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A TREATISE
ON
THE LAW OF DEFENSES

IN ACTIONS ON
COMMERCIAL PAPER

INCLUDING
THE DEFENSES AT COMMON LAW AND UNDER
THE NEGOTIABLE INSTRUMENTS ACTS

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PREFACE.

The purpose of the authors in this work has been to furnish a treatise on the defenses in actions upon commercial paper, including therein all of the common law defenses, and also those which are provided for by the Negotiable Instruments Laws.

The preparation of this manuscript has necessitated the examination of many thousands of decisions, all of which has been done personally by the authors.

The subjects have been arranged to present logically those defenses which originate with the inception of the paper, and extend down to the final action thereon, and to include those defenses which may arise subsequent to the commencement of the action.

The English Bills of Exchange Act is also added, as well as the Negotiable Instruments Laws, and these are considered with reference to the latest decisions.

It is believed that this book will prove a practical working tool, and a convenient handbook for the busy lawyer.

JOSEPH A. JOYCE,
HOWARD C. JOYCE.

New York, September, 1907.

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DEFENSES TO COMMERCIAL PAPER

CHAPTER I.

AVAILABILITY, GENERALLY AS TO PARTIES.

Sec.	Sec.
1. Rule as to makers.	7. In action on corporation note or indorsement.
2. Same Subject — That transfer from payee was procured by undue influence.	8. Clearing-house rules — When available.
3. Joint and several makers.	9. Guarantor—Rule as to.
4. Defense of maker not available to indorser.	10. Note indorsed in blank.
5. Where maker concluded by acts of agent.	11. On note purchased from bank.
6. Accommodation indorser—Rule as to.	12. Obligors on bond—Rule as to where given in consideration of extension of time.

§ 1. **Rule as to makers.**—In an action upon commercial paper it is a general rule that a defendant cannot avail himself of a defense that is peculiar to his co-defendant and goes only to the personal discharge of the latter,¹ as where the defense of coverture and suretyship is pleaded by one joint maker in which case, though such defense is established by him, it is held not to release his co-maker.² And though the indorser may, in an action against him and the maker, successfully defend the suit upon the ground of want of proof of due demand and notice the right of the holder to recover against the maker will not be affected thereby as the plea goes to the personal discharge of the party interposing it.³ And a maker cannot demur to a petition in an action on a note on the ground that it does not

¹ Slevin v. Reynolds, 1 Handy (Ohio) 37.

² Brant v. Barnett, 10 Ind. App. 653, 38 N. E. 421. See § 62, herein.

³ Nevill v. Hancock, 15 Ark. 511.

state a cause of action against an indorser.⁴ Nor is it any defense to an action against the maker by the indorsee that, in consequence of the insolvency of the maker, the plaintiff obtained the note from the payee for an amount much less than the amount due thereon, the plaintiff verbally agreeing with the indorser to exact from the maker about the same amount as he paid therefor, as such representation and promise were made to the indorser, were without any consideration moving from the defendant, and are to be regarded as of too loose and indefinite a character to discharge the defendant from his legal liability or to impair the legal obligation of his contract. A promisor may also withdraw a promised favor or gratuity and it cannot be demanded as a legal right since only such rights and liabilities are looked to by courts of law.⁵ And in such an action it is no defense that the note was obtained by the payee under an agreement with his creditors, to which the maker was not a privy, that it should be indorsed to them and that in violation of such agreement it was transferred to the indorser.⁶ So the drawer of a check is as between himself, the payee, and holder, the principal and it is immaterial that the check was for the accommodation of the payee and that the indorsee had knowledge that it was an accommodation check.⁷ But where a maker has a good defense to a note as between him and the payee, but is prevented from making it, in consequence of the note having passed into the hands of an indorsee, it may be proper to show the circumstances under which the indorsement was made, as that it was indorsed to him past due, or that he is not for other reasons, a *bona fide* holder of the note. This defense is proper in many instances for the purpose of subjecting the note in the hands of the indorsee to a defense existing between the original parties.⁸

§ 2. Same subject—That transfer from payee was procured by undue influence.—The maker cannot avail himself of the defense that the indorsement of a promissory note from the payee was procured by undue influence, where the act was disaffirmed neither by the payee nor his legal representatives. The indorsement in such case is a contract which is voidable and not void, and the right to avoid it is a

⁴ *Slevin v. Reynolds*, 1 Handy (Ohio) 37.

⁵ *Babson v. Webber*, 26 Mass. (9 Pick.) 163.

⁶ *Mack v. Clark*, 42 Mass. (1 Metc.) 423.

⁷ *Murray v. Judah*, 6 Cow. (N. Y.) 484.

⁸ *Tarbell v. Sturtevant*, 26 Vt. 512. Defenses available against a holder of a note may be set up against a receiver appointed to collect it. *Hutchins v. Langley*, 27 App. (D. C.) 234.

personal right which can only be exercised by the one upon whom the undue influence was exerted or by his guardian or representatives.⁹

§ 3. Joint and several makers.—If one of several joint makers of a note establishes a defense in an action against them all, which goes to the merits of the case and will defeat the rights of the plaintiff to recover, such defense will inure to the benefit of the other defendants,¹⁰ whether they individually made such defense or not.¹¹ So a defense by one of several makers sued jointly, which goes to the invalidity of the note as that the consideration therefor was illegal, is held to inure to the benefit of the others.¹² But the makers of a joint and several note, whatever may be their true relation as between themselves, stand as to the payee as principals and it cannot be shown by either of them that, as between him and the other joint makers, he was a surety, where the payee had no knowledge of such relation.¹³ The principle underlying this rule is, that a person executing a note as maker with another enters into an unconditional obligation to pay, and the contract so made must stand or fall by the legal rules which are controlling in such contracts. The language importing such an unconditional promise, the meaning thereof cannot be varied by parol, and the law affixes to the language used its obvious signification.¹⁴

⁹ *Carrier v. Sears*, 86 Mass. (4 Allen) 336, 81 Am. Dec. 707; distinguishing *Peasley v. Robbins*, 44 Mass. (3 Metc.) 164, which apparently holds to the contrary, on the ground that the defendant in such case had been notified by the guardian of the insane payee, not to pay the note to the plaintiff, and the defense being conducted by the guardian for the benefit of the ward.

¹⁰ *Moyer v. Brand*, 102 Ind. 301, 26 N. E. 125; *Brant v. Barnett*, 10 Ind. App. 653, 38 N. E. 421; *Miller v. Longacre*, 26 Ohio St. 291.

¹¹ *Brant v. Barnett*, 10 Ind. App. 653, 38 N. E. 421.

¹² *Miller v. Longacre*, 26 Ohio St. 291.

¹³ *Alabama*.—*Rice v. Brantley*, 5 Ala. 184.

California.—*Damon v. Pardow*, 34

Cal. 278; *Shriver v. Lovejoy*, 32 Cal. 574; *Auld v. Magruder*, 10 Cal. 282. *Connecticut*.—*Bull v. Allen*, 19 Conn. 101.

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Ohio.—*Cone v. Rees*, 11 Ohio Cr. Ct. 632, 1 Ohio Cr. Dec. 192.

Vermont.—*Benedict v. Cox*, 52 Vt. 247; *People's Bank v. Pearsons*, 30 Vt. 711; *Claremont Bank v. Wood*, 10 Vt. 582.

But examine *Texas*.—*Pridgen v. Buchannon*, 27 Tex. 589.

¹⁴ *Auld v. Magruder*, 10 Cal. 282, 290.

The note being a joint obligation the same construction must be put upon it as to all the defendants. The plaintiff's legal right in regard to one of the defendants cannot be looked upon in a different light from what they are in regard to the others without at once destroying their joint liability and changing a principal debtor into a mere surety.¹⁵ Makers in such a case cannot be permitted to require that the holder of the instrument should respect rights arising out of a relation of the parties to each other of which he is ignorant, and to impose such an obligation the character in which they occupy should appear on the face of the instrument, or he must be notified of it in some other way.¹⁶ It has, however, been decided that where a note does not *haec verba* describe the parties either as principals or sureties, but merely as joint promisors, the general rule that, where a party has stated the character in which he contracts, he shall not be allowed to prove the reverse by extrinsic evidence does not apply.¹⁷ And it has been determined that a person who signs a note jointly with another, may show that he in fact signed as surety with the knowledge of the payee or holder.¹⁸ So it has been decided that if one person buys property and makes a gift of a portion of it to another and both

¹⁵ Bull v. Allen, 19 Conn. 101.

¹⁶ Noel v. Harding, 2 Metc. (Ky.) 247. In this case it was said: "It is a just and reasonable doctrine that where the parties make an instrument which is assignable, and upon the contract itself hold themselves out as principals, they are to be regarded and treated both by the assignor and assignee as occupying the attitude in which they have represented themselves to stand, unless the holder has knowledge that some of them are the sureties of the others. Good faith requires that the holder of the paper should have a right to so regard and treat them. It would be manifestly unjust to subject them to the legal consequence of discharging the sureties to the note by an agreement with the principal, when he was ignorant of the relation in which the parties stood to each other and had a right to consider them all as prin-

cipals." Per Simpson, C. J. In Shriver v. Lovejoy, 32 Cal. 574, it is said that: "Whatever may be their true relation between themselves as to the payee they stood as principals. The promise of each is an absolute and primary promise, not a conditional or secondary one. The creditor is not interested in knowing the relation of the makers with each other. In a suit on the note he ought not to be delayed by an investigation into matters which do not concern him." Per Rhodes, J.

¹⁷ Branch Bank v. James, 9 Ala. 949, 953. See, also, Davis v. Barrington, 30 N. H. 517; Smith v. Bing, 3 Ohio 85.

¹⁸ Neel v. Harding, 2 Metc. (Ky.) 247; Cummings v. Little, 45 Me. 183; Grafton Bank v. Kent, 4 N. H. 221; Harmon v. Hale, 1 Wash. T. 422, 34 Am. Rep. 816. See Kennedy v. Gibbs, 2 Desauss. (S. C.) 380.

unite in giving a note therefor with the understanding that the latter signs as security, the gift to him does not constitute him a principal in the contract.¹⁹ And where a statute provides that "when judgment is rendered * * * on a joint contract or instrument, parties to the action who were not summoned * * * may be made parties thereto by action in the same court," the fact that at the commencement of the original action the days of grace allowed the maker had not expired, is no defense to an action to charge a joint maker.²⁰

§ 4. Defense of maker not available to indorser.—Where the makers and indorsers are sued upon a note, it has been decided that an answer by one of the makers will not inure as an answer of the indorsers.²¹

§ 5. Where maker concluded by acts of agent.—Where the obligee of a bond delivered the same to his creditor with authority to receive payment, and the latter accepted the note of the obligor with a surety and surrendered the bond, agreeing that the note should be delivered up to the maker in case the obligee should refuse to consider the note as payment, it was decided that he could not set up in defense to the note the agreement and the subsequent refusal of the obligee to consider the note as payment, as the giving of the note, and the taking possession of the bond under the authority given amounted in law to a payment and any subsequent dissent by the obligee was unavailing, he being concluded by the acts of his agent.²²

§ 6. Accommodation indorser—Rule as to.—Where a note is indorsed by one, merely for the accommodation of another, the former is to be regarded as surety and may avail himself of any defense, which the maker could make against a subsequent holder.²³ In an

¹⁹ *Fraser v. McConnell*, 23 Ga. 368.

²⁰ *Yohe v. McGovern*, 42 Ohio St. 11, decided under R. S. § 5366.

²¹ *Alfred v. Watkins*, Code R. N. S. (N. Y.) 343, 1 Edm. Sel. Cas. (N. Y.) 369.

²² *Parsons v. Gaylord*, 3 Johns. (N. Y.) 463.

²³ *Dunscumb v. Bunker*, 43 Mass. (2 Metc.) 8, may show that the indorsee received the note as security for the performance of a usurious

contract between him and the maker. *Weimer v. Shelton*, 7 Mo. 237: "An indorsee for accommodation is to be regarded in the light of a surety and as such is entitled to avail himself of any defense which would have availed the maker." Per Napton, J. *Sawyer v. Chambers*, 44 Barb. (N. Y.) 52: "Has a right to any defense the maker could avail himself of." Per Ingraham, J. *Sawyer v. Chambers*,

early case it was said: "As the act regulating interest stood at the institution of this suit, the excess of the usurious interest over the real sum of money advanced was adjudged against the lender, and it became a debt of record, upon which the party setting up usury, could on motion have judgment. This provision presents a serious difficulty in allowing the defense to be set up by a surety, as it would seem to be the intention of the legislature that the party whose necessities had been taken advantage of should alone be entitled to the benefit of this provision. But, however this may be, and whatever would be the proper course when a case of this kind arises, it is clear that to construe the act so as to preclude securities from setting up its provisions as a defense, would enable usurers, by a very simple and easy device, to evade the law completely."²⁴ So evidence has been held admissible in an action against an accommodation indorser by the indorsees to show that the whole consideration of the note, or the greater part of it, had failed; that the note was given on account of goods which the plaintiffs had agreed to sell to the maker; that only a small portion of such goods had been delivered and that the amounts so delivered had been actually paid for.²⁵ And a discharge in bankruptcy may be set up or waived by the bankrupt at his pleasure, and it is no defense to an action by the second indorser against the first that the former negligently omitted, in an action against him on the note, to avail himself of this defense in consequence of which he was obliged to pay a judgment recovered thereon.²⁶ In Louisiana this general rule is also affirmed, an exception, however, being apparently made in the case of pleas or defenses personal to the maker.²⁷

43 Barb. (N. Y.) 622; *Gunnis v. Weigley*, 114 Pa. St. 191, 6 Atl. 465; "As a general rule a surety is allowed to stand upon the rights of his principal." Per Mr. Justice Clark.

²⁴ *Weimer v. Shelton*, 7 Mo. 238, 240. Per Napton, J.

²⁵ *Sawyer v. Chambers*, 44 Barb. (N. Y.) 42, the court said. "I am at a loss to see any ground on which this evidence could be excluded. Surely an accommodation indorser is in no worse condition than the maker. He has a right to any defense which the maker could avail himself of. If the makers had been

sued upon the note, they could have shown that the note was given on account of goods to be delivered, and that such goods had never been received. The plaintiffs, under such proof, would have no proof against defendants, as the note would be with consideration. So long as the court permits the consideration of a note to be inquired into, under any circumstances, the facts presented in the defendants' offer come within the rule." Per *Ingraham*, P. J.

²⁶ *Bowman v. Pope*, 33 Miss. 94.

²⁷ *Johnson v. Marshall*, 4 Rob.

§ 7. **In action on corporation note or indorsement.**—Where a corporation authorized by resolution the raising of money on its assets to pay its debts and subsequently a party whose note it held gave two notes in place of the old one, one of which was then indorsed by the corporation to secure the loan, it was decided that it was no defense against the indorser that the transfer was unauthorized because the notes were not in existence at the time of the resolution, it being declared that the substituted notes would seem to be as much within the resolution as the original note, in whose place they were put.²⁸

§ 8. **Clearing-house rules—When available.**—Clearing-house rules are solely for the purpose of facilitating exchange between banks, and in an action against the indorser of a note he cannot avail himself, as a defense, of such rules to which he is not a party. Whatever effect is to be given such regulations as between the banks, a defendant in such a case is not in a situation to claim the benefit of them.²⁹

§ 9. **Guarantor—Rule as to.**—One who is a guarantor by virtue of his indorsement, may set up a defense of usury in the inception of the note in the same manner as if he had indorsed it in blank, he being regarded as a surety and entitled to avail himself of this defense to the same extent as the principal can.³⁰

§ 10. **Note indorsed in blank.**—Where one indorses a negotiable, promissory note in blank and delivers it to another for his accommodation, by whom it is delivered without indorsement to a third party in settlement of an indebtedness, the latter agreeing to pay the difference in cash, which he fails to do, but indorses the note and delivers it to a fourth party, who brings an action against the accommodation indorser for the amount of the note, it has been decided that an affidavit of defense, which sets forth the above facts and alleges that plaintiff is not a *bona fide* holder, is sufficient.³¹

§ 11. **On note purchased from bank.**—Where a note is purchased by a national bank at a discount, though the discount may be such

(La.) 157; Satterfield v. Compton, Rep. 376. Examine Overman v. Hoboken City Bank, 30 N. J. L. 61.
6 Rob. (La.) 120, may show usury. Sustains general rule.

²⁸ Crooke v. Mali, 11 Barb. (N. Y.) 205. ²⁹ Conger v. Babbet, 67 Iowa 13, 24 N. W. 569.

³⁰ Gunnis, Barrett & Co. v. Weigley, 114 Pa. St. 191, 6 Atl. 465.
³¹ Manufacturers' Nat. Bank v. Thompson, 129 Mass. 438, 37 Am.

that it amounts to usury and the bank forfeits the entire interest, yet the purchase, so far as the title of the note and its negotiability is concerned, is not affected by the usurious discount. The discount may, however, be so great as to be strong evidence, in connection with other circumstances tending to prove notice of the infirmity of the paper, and that the bank had notice at the time it bought the paper of its infirmity as to let in antecedent equities between the makers and payee as against the note in the hands of the bank.³² So where a person made and indorsed a note which the plaintiff purchased from the bank, it is no defense to an action by the latter to recover thereon, that the bank from which he purchased is by statute prohibited from discounting paper which has not at least two names thereon, such restriction being designed for the protection of the stock and bill holders and the depositors of the bank.³³

§ 12. Obligors on bond—Rule as to where note is given in consideration of extension of time.—Where, in consideration of an extension of the time for payment, the obligors upon a bond given to secure the debts of third parties, execute a note for the amount due thereon, it has been determined that they may avail themselves of any defense which would defeat a recovery upon the bond. Thus it was so held, where one who had the exclusive right to sell sewing machines manufactured by the plaintiff, and who was required to execute a bond with good and sufficient sureties for the payment of notes given in purchase of such machines, and who, being indebted to the plaintiff on notes so given and which had matured, made an arrangement with him, in consideration of the extension of the time of payment, to give a new note executed by himself and the sureties upon his bond, which note was given.³⁴

³² *Nicholson v. National Bank*, 92 Am. Rep. 242, construing R. S., Ky. 251, 17 S. W. 627, 16 L. R. A. Chap. 47, § 14.
223.

³⁴ *American Button-Hole &c. Mach. Co. v. Murray*, Fed. Cas. No. 292.

³³ *Roberts v. Lane*, 64 Me. 108, 18

CHAPTER II.

EXECUTION OR DELIVERY.

Sec.	Sec.
13. Execution or delivery procured by force or fraud.	22. Execution or indorsement in blank.
14. <i>Non est factum</i> —Where name signed by another.	23. Same subject—Application of rule.
15. Where payee signs note at foot with maker's name.	24. Instruments payable to fictitious person.
16. Signing after delivery.	25. Misrepresentations as to nature of instrument.
17. Mistake.	26. Same subject— <i>Bona fide</i> holder.
18. Reliance on recitals in note.	27. Same subject—Maker unable to read English.
19. As to revenue stamp.	28. Effect of negligence.
20. Want of delivery.	29. Instruments executed, accepted or delivered on Sunday.
21. Delivery by agent in violation of instructions.	

§ 13. **Execution or delivery procured by force or fraud.**—Where the execution or delivery of a note is procured by force or fraud without the maker's fault there can be no recovery thereon even by a *bona fide* holder.¹ So where the maker of a note, who was old, infirm and ignorant, was told by the payees that unless he signed the note they would do him violence, and one of them pretended to draw a weapon from his pocket, while the man with him stood guard at the door of the maker's house and demanded that he sign the note, and there was no one on the farm at the time except defendant's wife, who was also aged and infirm, and he signed the note through fear of violence, whereupon one of the payees snatched it up, and, against

¹ *Vanatta v. Lindley*, 98 Ill. App. Mich. 415, 4 Am. Rep. 497; *Denheim* 327, aff'd, 198 Ill. 40, 64 N. E. 735; *v. Wilmarding*, 55 Pa. St. 73. Compare *Dodd v. Dunne*, 71 Wis. 582, 37 Rep. 357; *Burson v. Huntington*, 21 N. W. 430.

the will of the defendant, carried it away, it was decided that the defendant was not liable thereon.² And where a note was torn by the payee from the maker's book and from an attached stub containing an express condition, written contemporaneous with the note and which, by agreement of the parties, was a substantive part thereof and restricted its negotiation, it was decided that the maker was not liable thereon, the severance in such a case of the condition being held to amount to a material alteration which would defeat recovery even by a *bona fide* purchaser for value and without notice.³ And there can be no recovery on municipal bonds fraudulently re-issued after redemption and cancellation as they have by such acts become extinguished.⁴ Where, however, a note was drawn as a matter of amusement, there being no intention to deliver it as a note, and it was taken by the payee by stealth and carried off without the knowledge of the maker and against his will, there was held to be no delivery, but in an action by a *bona fide* holder want of delivery was declared to be no defense.⁵

§ 14. *Non est factum*.—Where name signed by another.—Where a person's name is signed to a note by another, the defense of *non est factum* is not made out where it appears that the execution of the note in the former's name by the latter was authorized, that its execution was subsequently ratified and that an extension and renewal of the note was agreed to by him.⁶ Where a defendant has controverted the execution of a note sued upon by a varied plea of *non est factum* the burden of proving its execution is then held to rest on the plaintiff.⁷

§ 15. Where payee signs note at foot with maker's name.—Where a person who was the payee of a joint and several note upon its face also signed his name at its foot along with the other makers, whatever may be the rights, as against him, of a third party, if the note has come to such a one, *bona fide* and for value, in the due course of trade, his promise to pay himself is held to be a mere nugatory act which does not affect his right to recover against the makers, though there

² *Palmer v. Poor*, 121 Ind. 135, 22 130 U. S. 655, 9 Sup. Ct. 694.

N. E. 284, 8 L. R. A. 491. See Chap. V. ³ *Shiptley v. Carroll*, 45 Ill. 285.

⁴ *Stephen v. Davis*, 85 Tenn. 271. ⁵ *Bowman v. Rector*, (Tenn. Ch. App.) 59 S. W. 352.

⁶ 2 S. W. 181. See chapter VII, post, as to alteration of paper. ⁷ *Home Nat. Bank v. Hill*, (Ind.)

⁸ *Foster of Columbus v. Cornell*, 74 N. E. 1086.

is said to be authority for the proposition that if the note had simply been a joint one he could not sue upon it.⁸

§ 16. **Signing after delivery.**—Where a note joint and several in form, is signed by one person only, and delivered by him to the obligee, he cannot avoid liability thereon by the fact that another name is subsequently signed thereto, on the ground that it was unauthorized by him, unless he shows an actual dissent or circumstances equivalent thereto.⁹ And if a person signs a note after delivery for the purpose of enabling the payee to negotiate it, he will be concluded from the defense that there was no consideration for his signature in an action thereon by a *bona fide* purchaser.¹⁰ But it has been decided that, if the name of a person is signed as maker after a note is executed and delivered, the other makers may set this up in defense to an action thereon, but the one so signing will not be discharged from liability.¹¹

§ 17. **Mistake.**—A *bona fide* holder of a note is entitled to regard it as correctly written, and it is no defense to an action thereon by such a holder that by reason of a mistake the agreement of the parties is not correctly expressed therein.^{11*} It has, however, been determined that in an action by the payee of a note against the maker it may be shown by the latter that by mistake the amount expressed therein is too large.¹² So where a note is given on a settlement of accounts it

⁸ Fisher v. Diehl, 94 Md. 112, 50 Atl. 432.

⁹ Lilley v. Evans, 3 B. Mon. (Ky.) 417.

¹⁰ Rudolph v. Brewer, 96 Ala. 189, 11 So. 314.

¹¹ Browning v. Gosnell, 91 Iowa 448, 59 N. W. 340; Hamilton v. Hooper, 46 Iowa 515, 26 Am. Rep. 161; Dickerman v. Miner, 43 Iowa 508. One who signs a note after execution makes himself absolutely liable for the amount to an innocent holder. Ewing v. Clark, 8 Mo. App. 570.

^{11*} Steadwell v. Morris, 61 Ga. 67; Chase National Bank v. Faurot, 149 N. Y. 532, 44 N. E. 164; Miller v. Butler, Fed. Cas. No. 9565, 1 Cranch

C. 470. *The date of a note cannot be shown in such an action to be other than as expressed in the instrument.* Huston v. Young, 33 Me. 85.

¹² Claxon v. Demaree, 14 Bush (Ky.) 172; Kennedy v. Goodman, 14 Neb. 585, 16 N. W. 834. But see Cooch v. Money, 5 Houst. (Del.) 177; Mix v. White, 52 Vt. 284. *Where in an action on a due bill it is claimed by the defendant that there was a mutual mistake as to amount and the evidence is conflicting the question should be submitted to the jury.* Wheeler v. Seamens, 123 Wis. 573, 102 N. W. 28. *Equity will cancel a note executed by mistake for an amount not due.* Fitzmaurice

may be shown that the balance was produced by mistake when in fact nothing was due.^{12*} Again it has been decided that in such an action a maker may show that by mistake there was an omission of certain provisions, either from the note itself or the contract in connection with which it was executed.^{12**} The fact, however, that a note was executed under a mistake of law will not operate to defeat recovery in an action thereon.¹³ And it has also been decided that it cannot be shown in defense that a note was given under a mutual mistake and error of the parties, not in reference to any material fact but to some future, imaginary or speculative event, provided there was no fraud or misrepresentation.^{13*}

§ 18. Reliance on recitals in note.—A recital in a note as to the place of execution is a representation, upon which an innocent holder has a right to rely, that the note was executed at the place designated, and his right to recover cannot be defeated by showing that it was not so executed.¹⁴

§ 19. As to revenue stamp.—Where a revenue stamp is required upon a note it is no defense to an action by a *bona fide* holder that

v. Mosier, 116 Ind. 363, 16 N. E. 175, 19 N. E. 180, 9 Am. St. R. 854. Compare Capehart v. Moon, 5 Jones Eq. (N. C.) 178. *To the extent of what is actually due* a note given for an indebtedness will be sustained. Wilson v. Forder, 20 Ohio St. 89, 5 Am. Rep. 627. *In the case of negligence on the part of the maker* in omitting to use the means within his power of obtaining correct information a mistake has been held to be no defense. Capehart v. Moore, 5 Jones Eq. (N. C.) 178.

^{12*} Mercer v. Clark, 3 Bibb (Ky.) 224

^{12**} Byrd v. Campbell Printing-Press & Mfg. Co., 94 Ga. 41, 20 S. E. 253; Glisson v. Craig, 1 Tex. App. Civ. Cas. 42. But see Bradley v. Anderson, 5 Vt. 152.

¹³ Pool v. Alexander, 26 La. Ann. 669. A *director of a corporation* signing a note cannot set up that he

signed it in the belief that it was necessary to make it binding on the corporation and without any intention to bind himself. Maledon v. Leflor, 62 Ark. 387, 35 S. W. 1102. *Equity will grant relief* in the case of an honest mistake of law as to the effect of an instrument on the part of both contracting parties when such mistake operates as a gross injustice to one and gives an unconscionable advantage to the other. Thus it was so held where a note was given as a donation and there was no intention that it should bear interest and to effect this purpose the interest clause was left out. Loudermilk v. Loudermilk, 98 Ga. 780, 25 S. E. 927.

^{13*} Cartwright v. Gardner, 5 Cush. (Mass.) 273.

¹⁴ Watson v. Boston Woven Cordage Co., 75 Hun (N. Y.) 115, 58 N. Y. St. 194, 26 N. Y. Supp. 1101.

such stamp was not placed thereon at the time of execution, if it was properly stamped when negotiated, he having received it in ignorance of such facts.^{14*}

§ 20. **Want of delivery.**—The fact that a note was never delivered may be a good defense to an action thereon.¹⁵ So where a bill was indorsed without delivery and issued in fraud of the indorser, it was held that he might show in defense to an action on the instrument that the plaintiff was not a *bona fide* holder.¹⁶ And where a note left by the maker on the table, was carried off without his authority by the payee without any negligence on the part of the former it was decided that even as against a *bona fide* purchaser for value the want of delivery of the instrument was a good defense.¹⁷ And where a note was executed with the understanding that it should take effect upon the consummation of a certain contract for the sale of land, and the payee wrongfully and fraudulently took the note from a desk on which it was placed and left with the note in his possession, it was decided that, though the makers did not attempt to prevent his taking the note, they were not guilty of negligence thereby and were not liable to a *bona fide* holder.¹⁸ Again, where a note signed by certain persons was left with the agent of the payee for the purpose of procuring other signatures upon the performance of certain conditions, and was not to be delivered until those conditions were performed and the signatures obtained, it was decided that it might be shown against the payee, though not against a *bona fide* holder, that the note was delivered before the condition was performed or the signatures obtained.¹⁹ As was said by the court: "Such an unauthorized delivery to the payee and its subsequent transfer to the plaintiffs, the present holders, does not make the note subject to defenses by the makers, providing the plaintiffs are holders of the note in due course, without notice, and for value. It simply compels the plaintiffs to show that they are such holders. The possession of the note alone duly in-

^{14*} Robinson v. Lair, 31 Iowa 9; Wis. 52; Thomas v. Watkins, 16 Anderson v. Starkweather, 28 Iowa Wis. 549.

409; Gage v. Sharp, 24 Iowa 415; ¹⁶ Marston v. Allen, 8 Mees. & W. 494.

Blackwell v. Denie, 23 Iowa 63. ¹⁷ Benson v. Huntington, 21 Mich. 415.

Compare Green v. Davies, 4 B. & C. 233; Ebert v. Gitt, 95 Md. 186, 52 Atl. 900. ¹⁸ Dodd v. Dunn, 71 Wis. 578, 37

¹⁹ Gasquet v. Pechin, 143 Cal. 515, N. W. 430.

77 Pac. 481; Roberts v. McGrath, 38 ¹⁹ Porter v. Andrus, 10 N. D. 558, 88 N. W. 567.

dorsed to them, is not sufficient to protect them as against the showing of an unauthorized and fraudulent delivery and putting into circulation. Such a showing shifts the burden upon them to show that they are *bona fide* holders. If they succeed in showing that they are such *bona fide* holders, they are protected as against any defenses in favor of the makers. The makers having permitted the note regularly signed by them to remain in the agents' hands, and trusted him with its possession for the purpose of procuring the other signatures, cannot complain of his breach of trust, and they should be the sufferers, rather than those who innocently purchased the note without any notice of the manner in which it was put into circulation."^{19*} But in another case it has been decided, that as against a payee want of delivery of a note complete and perfect upon its face is no defense where the payee was ignorant of the fraud perpetrated by the maker's agent who obtained and delivered the instrument to him, it being declared to be necessary to show knowledge of such fact in the payee to render it a defense.²⁰ And where a note had been fully executed by the maker, though, as between the parties, it may be shown in defense that there was never a valid and legal execution of the same because not delivered, or fraudulently obtained possession of, yet, as between the maker and an innocent holder for value, such fact will be no defense.²¹ If, however, in an action upon a note proof is given showing a fraudulent and unauthorized delivery, it is decided that the burden of proof rests upon the plaintiff to show that he is a holder of the note in due course, without notice and for value.²² Again, where one accepted a bill and gave it to another who put his name thereto as drawer for the purpose of procuring it to be discounted and handing over the proceeds to the former, and, having failed to discount it, he returned it to the acceptor, who tore the bill in half and threw it aside and it was picked up by the one to whom it had been given, for the purpose of discount, in the presence of the acceptor, and was pasted together by him and put into circulation and transferred to a *bona fide* holder, the want of proper delivery was held to be no defense.²³ And, where a payee writes his name on the back of a note, his liability as an in-

^{19*} Porter v. Andrus, 10 N. D. 558, 88 N. W. 567. Per Morgan, J. yon v. Wohlford, 17 Minn. 239, 10 Am. Rep. 165.

²⁰ Jordan v. Jordan, 78 Tenn. (10 Lea) 124, 43 Am. Rep. 294. See ²² Porter v. Andrus, 10 N. D. 558, 88 N. W. 567.

Watson v. Russell, 3 Best & S. 34. ²³ Ingham v. Primrose, 7 C. B. N.

²¹ Clarke v. Johnson, 54 Ill. 296; S. 82.
Shipley v. Carroll, 45 Ill. 285; Kin-

dorser cannot be defeated as to an innocent holder by the claim that it had not been delivered by him.²⁴

§ 21. **Delivery by agent in violation of instructions.**—It is no defense to an action by a *bona fide* holder of a note that it was delivered by the agent of the maker in violation of his instructions, the possession by the agent being evidence of ownership.²⁵ So where a note was indorsed by the payee thereof and given to his agent with instructions to deliver it to a certain person upon the performance of certain conditions and was delivered to the latter before the conditions were performed, upon his promise that they would be performed on the same day, and he failed to perform them and delivered the note to a broker for sale and it was in fact sold, the indorser could not defend on the ground that his agent had violated his instructions.²⁶ And where the maker and payee of a note went to a hotel to leave it enclosed in an envelope with the landlord to hold, and he being out, the payee, with the knowledge of the maker, placed the envelope containing the note in the drawer of a table in the office of the hotel, the landlord's wife promising to give it to him upon his return, and this was the last the maker saw of the note, it was decided that he could not interpose the defense of want of delivery against a purchaser of the note in good faith before maturity.²⁷ This rule has likewise been applied in the case of a bill of exchange accepted by the principal where drawn by his agent, to whose order it was made payable, and who agreed to get it discounted for the principal's benefit, but pledged it to a *bona fide* holder for his own use;²⁸ and also in the case of school district bonds, which had been intrusted to a banker to sell for the benefit and account of the school district, where they are sold or pledged by the banker on his own account.²⁹

§ 22. **Execution or indorsement in blank.**—Where a bill or note as signed is incomplete by reason of unfilled blanks, the fact that it is

²⁴ Gould v. Segree, 5 Duer (N. Y.) 260.

²⁵ Giavanovich v. Blank, 26 La. Ann. 15; Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206; Murrell v. Jones, 40 Miss. 565; Bridenbecker v. Lowell, 32 Barb. (N. Y.) 9; St. Clairsville Bank v. Smith, 5 Ham. (Ohio) 222. See Collins v. Martin, 1 B. & P. 648; Bolton v. Puller, 1 B.

& P. 539; Ramsbotham v. Cator, 1 Starkie 238.

²⁶ Chase Nat. Bank v. Faurot, 149 N. Y. 532, 44 N. E. 164.

²⁷ McCormick v. Holmes, 41 Kan. 265, 21 Pac. 108.

²⁸ Clement v. Leverett, 12 N. H. 317.

²⁹ School District No. 16 v. State Bank, 8 Neb. 168.

subsequently filled fraudulently or in a manner not contemplated will be no defense to an action by a *bona fide* holder against the drawer, maker or indorser, for one who signs or indorses such an instrument furnishes the means of fraud and is estopped to deny his liability.³⁰ The proper rule in this class of cases has been declared by the United States Supreme Court in the following words: "Where a party to a negotiable instrument intrusts it to the custody of another with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face implied authority to fill up the blanks and perfect the instrument; and as between such party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instru-

³⁰ *Alabama*.—Prim v. Hammel, 134 Ala. 652, 32 So. 1006; Robertson v. Smith, 18 Ala. 220; Decatur Bank v. Spence, 9 Ala. 800; Roberts v. Adams, 8 Port. (Ala.) 297, 33 Am. Dec. 291; Herbert v. Hule, 1 Ala. 18, 34 Am. Dec. 755.

Georgia.—Moody v. Threlkeld, 13 Ga. 55.

Illinois.—Hudson v. Hanson, 75 Ill. 198.

Indiana.—Gothrump v. Williamson, 61 Ind. 599; Wilson v. Kinsey, 49 Ind. 35; Bowen v. Laird (Ind. App. 1906), 77 N. E. 295.

Iowa.—McDonald v. Muscatine Nat. Bank, 27 Iowa 319; Iowa College Trustees v. Hill, 12 Iowa 462.

Kansas.—Lowden v. National Bank, 38 Kan. 533, 16 Pac. 748.

Kentucky.—Bank of Commonwealth v. Curry, 2 Dana (Ky.) 142; Sowders v. Citizens' Nat. Bank, 12 Ky. L. Rep. 356.

Louisiana.—Battalora v. Erath, 25 La. Ann. 318.

Maine.—Breckenridge v. Lewis, 84 Me. 349, 24 Atl. 864, 30 Am. St. R. 353; Roberts v. Lane, 64 Me. 108, 18 Am. Rep. 242; Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427.

Massachusetts.—Ives v. Farmers' Bank, 84 Mass. (2 Allen) 236; An-

droscoggin Bank v. Kimball, 64 Mass. (10 Cush.) 373; Putnam v. Sullivan, 4 Mass. 45, 36 Am. Dec. 206.

Mississippi.—Goad v. Hart's Admr's, 8 Sm. & M. (Miss.) 787.

Missouri.—Clifford Banking Co. v. Donovan Commission Co., 195 Mo. 262, 94 S. W. 527; Iron Mountain Bank v. Murdock, 62 Mo. 70; Tumilty v. Bank of Missouri, 13 Mo. 276; Green v. Kennedy, 6 Mo. App. 577.

New York.—Van Duzer v. Howe, 21 N. Y. 531; Griggs v. Howe, 31 Barb. (N. Y.) 100.

North Carolina.—McArthur v. McLeod, 51 N. C. 475.

Ohio.—Ross v. Doland, 29 Ohio St. 473; Fullerton v. Sturges, 4 Ohio St. 529.

Pennsylvania.—Simpson v. Board, 74 Pa. St. 351.

Tennessee.—Frazier v. Gains, 61 Tenn. (2 Baxt.) 92.

Wisconsin.—Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

Federal.—National Exch. Bank v. White, 30 Fed. 412; Angle v. Northwestern Mut. &c. Co., 92 U. S. 330, 23 L. Ed. 556. Compare Riddell v. Stevens, 32 Conn. 378, 87 Am. Dec. 181. See also, Chaps. VII, VIII.

ment to his custody, or, in other words, it is the act of the principal and he is bound by it."³¹ And in a case in New York it is said: "It is settled law that when a person signs a note in blank, he impliedly confers upon the person to whom it is entrusted authority to fill up the usual and ordinary blanks, such as date, name of payee, amount and time of payment. * * * The note having found its way into the hands of an innocent holder, it is immaterial whether the defendant's express authority as to the filling in of the blanks was followed or not, for the defendant, by leaving the blanks unfilled, undertook to be answerable for the note when it was filled up in the shape of a binding obligation. In short, the sending into the world of printed notes, with the blanks unfilled, seems to be regarded as a letter of credit for an indefinite sum, and it will not do to allow a person who does this to escape the consequence of his act to the prejudice of the public."³² The fact, however, that a blank has been filled in a manner other than that contemplated is a defense against the one so filling it,³³ or against one taking the instrument with knowledge thereof.³⁴ And where a note payable to a person named or his order, is indorsed in blank it has been decided that the holder may sue either in his own name or in the payee's to his use, but in the latter case the maker may set up any defense which he could avail himself of if the payee had retained the ownership of the note.³⁵

§ 23. **Same subject—Application of rule.**—This rule has been applied where blanks have been left for the amount,³⁶ as in the case of

³¹ *Bank of Pittsburgh v. Neal*, 22 How. (U. S.) 97, 107. Per Mr. Justice Clifford.

³² *Harris v. Berger*, 15 N. Y. St. R. 389, 391. Per McAdam, J.

³³ *Luellen v. Hare*, 32 Ind. 211.

³⁴ *Snyder v. Van Dosen*, 46 Wis. 602, 1 N. W. 285, 32 Am. Rep. 739.

³⁵ *Temple v. Hays, Morris* (Iowa) 9.

³⁶ *Kentucky*.—*Griffith v. Collier*, 4 Ky. L. Rep. 260.

New York.—*Van Duzer v. Howe*, 21 N. Y. 531.

North Carolina.—*Humphrey v. Finch*, 97 N. C. 303, 1 S. E. 870, 2 Am. St. R. 293.

Tennessee.—*Grissom v. Fite*, 38

Tenn. (1 Head) 331. "Having executed the note in blank as to the amount, with the intention that the blank should be filled before being negotiated by the person in whose possession he placed it after signature, third persons dealing with the person in possession have the right to presume that the authority to fill the blank was a general and not a special authority, and they are not bound by any private instructions as to the amount which should be inserted in the note."

Wisconsin.—*Johnston Harvester Co. v. McLean*, 57 Wis. 258, 264, 46 Am. Rep. 39, 15 N. W. 177, per Taylor, J.

one who gives blank notes to another to secure the latter on his indorsement of notes executed by the former with the understanding that if the latter notes are paid the blank notes are to be returned, but if not paid they are to be filled out for the amount the indorser becomes liable for and are to be valid obligations for such amount, and the blank notes are filled up and negotiated in violation of the agreement and come into the hands of an innocent holder.³⁷ So where a bill of exchange is left blank as to the amount, and the person for whose benefit it is made fills it up for a larger amount than was agreed upon, an innocent holder who has discounted the bill for the amount called for upon its face may collect such amount.³⁸ And where a person, as accommodation maker with another, signed a note with the understanding that the space for the amount, which was left blank, should be filled so as to make a note for forty-five dollars, and the figures forty-five preceded by the dollar sign were put in the corner of the note, but the person intrusted with the note placed a cipher after such figures and filled the blank with the words "four hundred and fifty dollars," without the knowledge of the payee and before delivery to him, it was held that the maker was liable.³⁹ Again where a person signed three accommodation notes and delivered them to another to be filled out with an amount to be ascertained and which was due on a prior accommodation note given between the same parties and instead of making the notes for one-third each of the total amount due, the person to whom it had been intrusted filled one of them out for a considerably larger amount and indorsed it to the plaintiff bank before maturity in the usual course of business, the bank was allowed to recover thereon against the maker.⁴⁰ But where the note is complete in itself in every way, the amount being stated therein in the proper places, the fact that there is space left before the amount sufficient to enable the one to whom it is given to enlarge it by inserting words and figures before the proper amount, is held not to be such negligence as will enable a *bona fide* holder of a note which has been so changed to recover the enlarged amount.⁴¹ The general rule

³⁷ Harris v. Berger, 15 N. Y. St. R. 389.

⁴⁰ Market & Fulton National Bank v. Sargent, 85 Me. 349, 27 Atl. 192, 35 Am. St. R. 376.

³⁸ Smith v. Lockridge, 8 Bush (Ky.) 423.

⁴¹ Burrows v. Klank, 70 Md. 451, 17 Atl. 378, 14 Am. St. R. 371, 3 L.

³⁹ Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

R. A. 576.

has also been applied in the case of blanks as to the rate of interest,⁴² date,⁴³ name of payee,⁴⁴ term,⁴⁵ and the place at which the instrument is payable.⁴⁶ Again where there is a blank after the words "payable at" in a note, the payee is declared to have implied authority to fill such blank, and it is no defense to an action by a *bona fide* holder on such a note, which the payee subsequently filled by inserting a place of payment, that he had no authority to fill the blank.⁴⁷ And in the application of the general rule it has been decided that the owner of paper, who delivers it indorsed in blank to an agent for collection, cannot recover the proceeds from one purchasing it from such agent for value, without notice,⁴⁸ nor where it is delivered to an agent for safe keeping.⁴⁹ The blank indorsement of a bill or note to an agent is a power to transfer, and a *bona fide* purchaser from such agent will not be affected by any violation of duty or excess of authority on the part of such agent of which he has no knowledge,^{49*} and may hold the instrument against him, whether he purchased it before or after its maturity.⁵⁰ In the case, however, of a non-negotiable demand, indorsed in blank by the owner, the purchaser from any other party than the original owner is held to take only such rights as the latter has parted with, except where such owner is by his acts estopped from asserting his original claim thereto.⁵¹ Again, the fact that a note was fraudulently written over a signature placed on a blank piece of

⁴² Fisher v. Dennis, 6 Cal. 577, 65 Am. Dec. 534; Rainbolt v. Eddy, 34 Iowa 440, 11 Am. Dec. 152; Iron Mountain v. Murdock, 62 Mo. 70.

⁴³ Averton v. Matthews, 35 Ark. 146, 37 Am. Rep. 9.

⁴⁴ Jones v. Primm, 6 Tex. 170; Close v. Fields, 2 Tex. 232.

⁴⁵ Waldron v. Young, 56 Tenn. (9 Heisk.) 777.

⁴⁶ Winter v. Pool, 104 Ala. 580, 16 So. 543; Canon v. Grigsby, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769. Compare Cronkhite v. Nebeker, 81 Ind. 319, 42 Am. Rep. 127; McCoy v. Lockwood, 71 Ind. 319.

⁴⁷ Cason v. Grant County Deposit Bank, 97 Ky. 487, 31 S. W. 40, 53 Am. St. R. 418; Newell v. First Nat. Bank, 13 Ky. L. Rep. 775.

⁴⁸ Stutzman v. Payne, 23 Iowa 17.

In Bradford v. Williams, 91 N. C. 7, it is said: "The rule seems to be that the owner thus puts the note in the power of his indorsee to use and dispose, as his property, and is bound by his agents' acts and transactions within the scope of his apparent authority, in his dealing with a *bona fide* assignee who pays full value therefor." Per Smith, C. J.

⁴⁹ Ringling v. Kohn, 4 Mo. App. 59.

^{49*} Palmer v. Marshall, 60 Ill. 289; Murrell v. Jones, 40 Miss. 565. Compare People v. Bank of North America, 75 N. Y. 547.

⁵⁰ Cornell v. Bliss, 52 Me. 476.

⁵¹ Cowdry v. Vandenburg, 101 U. S. 572, 25 L. Ed. 923. Compare Caulkins v. Whistler, 29 Iowa 495, 4 Am. Rep. 236.

paper has been held a good defense against all persons.⁵² But in a case in Maine it has been decided that, where names are signed on a blank piece of paper for commercial use, such as to write an order over the signature, and a promissory note is subsequently written over such signatures the persons whose names are so signed are liable to a *bona fide* holder.⁵³ Again the blank indorsement of a bill of exchange is held to pass all the interest in the bill to every indorsee in succession, discharged from any obligation which might subsist between the original parties, but which does not appear upon the face of the instrument itself.⁵⁴

§ 24. **Instruments payable to fictitious person.**—That a bill or note is made payable to a fictitious person is no defense to an action by a *bona fide* holder, where such a designation is not forbidden by statute, as the maker by making the instrument payable to such a person is estopped to deny that the payee named exists and it may be regarded as one payable to bearer.⁵⁵ So the acceptor of a bill of exchange cannot set up that the payee named is a fictitious person, as by accepting the bill he is estopped to assert such fact.⁵⁶ And this rule has been applied in the case of a note made payable to a fictitious firm and indorsed by the holder in the name of the payee to a *bona fide* purchaser, though the maker had no knowledge at the time he executed the note that the name of the payee was fictitious.⁵⁷ And where a bank check is payable to "bill payable" it is held to stand upon the same ground as one payable to a fictitious person and not to be subject in the hands of an assignee to every defense to which it was liable when transferred.⁵⁸ And a similar rule has been held to prevail in the case of a note payable "to order."⁵⁹ Again, where the holder treats as fictitious the name of the payee to whom the instrument was drawn by the maker and whose indorsement was forged by

⁵² First Nat. Bank v. Zeims, 93 Iowa 140, 61 N. W. 483.

⁵³ Breckenridge v. Lewis, 84 Me. 349, 24 Atl. 864, 30 Am. St. R. 353.

⁵⁴ Wilkinson v. Micklin, Fed. Cas. No. 17673.

⁵⁵ Farnsworth v. Drake, 11 Ind. 101; Lane v. Krekle, 22 Iowa 399; Ort v. Fowler, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501; Nevada v. Cleveland, 6 Nev. 181; Hunter v.

Blodgett, 2 Yeates (Pa.) 480; Vacitt v. James, 39 Tex. 189. See Foster v. Shattuck, 2 N. H. 446.

⁵⁶ Phillips v. Im Thurn, 18 C. B. N. S. 694.

⁵⁷ Ort v. Fowler, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501.

⁵⁸ Willets v. Bank, 2 Duer (N. Y.) 121.

⁵⁹ Davega v. Moore, 3 McCord (S. C.) 482.

him, the latter is held to be estopped from any contest on the ground of the genuineness of the signature.⁶⁰

§ 25. **Misrepresentations as to nature of instrument.**—It is a good defense to an action upon a note against the maker that he was induced to sign the same by reason of fraud, artifice or deception practiced upon him by another as to the nature of the instrument, and that he signed the same innocently and under the belief that it was a contract of a different character, unless it appear that he was guilty of laches or carelessness in affixing his signature thereto.⁶¹ So it is said in a recent case: "While the legal presumption obtains that the party attaching his signature to the written embodiment of the contract has read it, as he is obligated to do, and is acquainted with its contents, yet, between the original parties to the instrument, defendant may plead and establish by proper proof that through his illiteracy, by the misreading of the paper to him or other fraudulent device, an instrument other than the one understood and intended by him to be executed was fraudulently substituted, and his signature thereto wrongfully obtained."⁶² Such evidence is not addressed in variation of a written instrument, but assails its actual execution, and is ad-

⁶⁰ *Meacher v. Fort*, 3 Hill (S. C.) 227, 30 Am. Dec. 364.

⁶¹ *Alabama*.—*Burroughs v. Pacific Guano Co.*, 81 Ala. 255, 1 So. 212.

California.—*Wenzel v. Shulz*, 78 Cal. 221, 20 Pac. 404.

Georgia.—*Brooks v. Matthews*, 78 Ga. 739, 3 S. E. 627.

Illinois.—*Auten v. Gauner*, 90 Ill. 300; *Hewitt v. Johnson*, 72 Ill. 513; *Hewitt v. Jones*, 72 Ill. 218; *Hubbard v. Rankin*, 71 Ill. 129; *Richardson v. Schirtz*, 59 Ill. 313; *Puffer v. Smith*, 57 Ill. 527.

Indiana.—*Yeagley v. Webb*, 86 Ind. 424; *Baldwin v. Bricker*, 86 Ind. 221; *Webb v. Corbin*, 78 Ind. 403; *Detwiler v. Bish*, 44 Ind. 70; *Ryers v. Dougherty*, 40 Ind. 198.

Maryland.—*Kagel v. Totten*, 59 Md. 447.

Michigan.—*Soper v. Peck*, 51 Mich. 563, 17 N. W. 57; *Gibbs v. Linabury*, 22 Mich. 478, 7 Am. Rep. 675.

Minnesota.—*Yellow Medicine Co. v. Tagley*, 57 Minn. 391, 59 N. W.

486; *Aultman v. Olson*, 34 Minn. 450, 26 N. W. 451.

Missouri.—*Martin v. Smylee*, 55 Mo. 577; *Briggs v. Ewart*, 51 Mo. 245, 11 Am. Rep. 445; *Kalamazoo Nat. Bank v. Clark*, 52 Mo. App. 593.

New York.—*Chapman v. Rose*, 44 How. Pr. (N. Y.) 364; *Whitney v. Snyder*, 2 Lans. (N. Y.) 477.

Ohio.—*De Camp v. Hanna*, 29 Ohio St. 467.

Wisconsin.—*Griffiths v. Kellogg*, 39 Wis. 290, 20 Am. Rep. 48; *Butler v. Cairns*, 37 Wis. 61; *Kellogg v. Steiner*, 29 Wis. 626; *Walker v. Ebert*, 29 Wis. 194, 9 Am. Rep. 548. But see *Rowland v. Fowler*, 47 Conn. 347.

That printed matter was obscured is no defense. *Palo Alto Stock Farm v. Brooker* (Iowa 1906), 108 N. W. 307.

⁶² Citing *Corby v. White*, 57 Mo. 452; *Law v. Crawford*, 67 Mo. App. 150; *Kingman v. Shawley*, 61 Mo. App. 54.

missible under a plea of *non est factum*.⁶³ So in an action by an insurance company on a note given to them, it is a good defense thereto that the maker signed the same under the belief that he was signing an application for insurance instead of a note.⁶⁴ And where one was induced to sign a promissory note by a fraudulent representation that he was witnessing a deed and he so believed at the time, and had no knowledge of the existence of the promissory note, and the jury negatived negligence on his part in so signing a document, such facts afford a defense to the action.⁶⁵ So where a note is obtained through the usual device of men who go about the country as dealers in patent rights or new inventions, with papers so prepared as to obtain the signatures of their victims to promissory notes, when the latter have no expectation or intention of executing a promissory note, the fraud and circumvention of such parties is a defense thereto.⁶⁶ Again, where one paper is read to the maker and another is fraudulently substituted for his signature, in the absence of negligence on his part, this will be a good defense.⁶⁷ And where a maker objects to a clause which the other party agrees to strike out, but instead of striking out the clause objected to, erases another, thereby defrauding plaintiff, a plea setting up such facts has been held good.⁶⁸ A misrepresentation, however, as to the legal effect of an instrument has been held not to be such a fraud as will constitute a defense against a *bona fide* holder.⁶⁹

§ 26. **Same subject—Bona fide holder.**—This defense of fraud, artifice, or deception has also been held available even against a purchaser before maturity, for value and without notice.⁷⁰ So where a

⁶³ *Broyles v. Absher*, 107 Mo. App. 168, 80 S. W. 703, 705. Per *Reyburn, J.*

⁶⁴ *Dwelling House Ins. Co. v. Downey*, 39 Ill. App. 524.

⁶⁵ *Lewis v. Clay*, 67 L. J. Q. B. 224, 77 Law T. 653.

⁶⁶ *Champion v. Ulmer*, 70 Ill. 322.

⁶⁷ *Butler v. Carus*, 37 Wis. 61.

⁶⁸ *Angier v. Brewster*, 69 Ga. 362.

⁶⁹ *Latham v. Smith*, 45 Ill. 25.

⁷⁰ *Illinois*.—*Sims v. Rice*, 67 Ill. 88.

Indiana.—*Home National Bank v. Hill*, 165 Ind. 226, 74 N. E. 1086; *Lindley v. Hofman*, 22 Ind. App. 237, 53 N. E. 471.

Iowa.—*First Nat. Bank v. Zeims*, 93 Iowa 140, 61 N. W. 483.

Missouri.—*Martin v. Smylee*, 55 Mo. 577.

New York.—*National Exch. Bank v. Venemans*, 4 N. Y. St. R. 363; *Whitney v. Snyder*, 2 Lans. (N. Y.) 477.

Ohio.—*De Camp v. Hanna*, 29 Ohio St. 467.

Wisconsin.—*Butler v. Carns*, 37 Wis. 61; *Kellogg v. Steiner*, 29 Wis. 626. But see *Woolen v. Whitacre*, 73 Ind. 198; *First Nat. Bank v. Johns*, 22 W. Va. 520, 46 Am. Rep. 506.

person was induced by another to sign a paper believing it to be merely to furnish means of identification and not intending it to be a note or contract in any form, and the latter then filled in certain blanks in the paper so as to make it a note, it was held that plaintiff, though an innocent holder for value, could not recover.⁷¹ And where a person signs a note under the belief induced by representations of another, that he is signing an agreement appointing him agent for the sale of a certain article and a statement of his ownership of property, and it appeared from the evidence that he could read printed matter and writing with difficulty, the fraud and circumvention in obtaining his signature will be a good defense even as against a *bona fide* holder.⁷² In an action, however, against the maker of a note by a *bona fide* holder the fact that the maker was induced by fraud to execute the note in the belief that he was signing a paper of an entirely different character is not of itself a good defense, as it is essential to the perfection of such a defense that it should appear that there was no negligence on the part of the maker.⁷³

§ 27. **Same subject—Maker unable to read English.**—That the maker of a note was unable to read English and that his signature was obtained by false representations as to the character of the instrument, without any negligence on his part, will be a good defense even as against a *bona fide* holder.⁷⁴ In such a case the note has never existed in the sense of the minds of the parties meeting to give it validity.⁷⁵ So where a person unable to read and write executes a note, after it has been misread to him, and under the belief that the time of payment is different from that actually stated in the note, evidence of such fraud is admissible to defeat an action on the instrument.⁷⁶ And where such a person signs a note for a larger sum than

⁷¹ First Nat. Bank v. Zeims, 93 Iowa 140, 61 N. W. 483.

⁷² Sims v. Rice, 67 Ill. 88.

⁷³ Brown v. Feldwert, (Ore.) 80 Pac. 414.

⁷⁴ Illinois.—Davis v. Snider, 70 Ala. 315; Taylor v. Atchison, 54 Ill. 196, 5 Am. Rep. 118; Vanbrunt v. Singley, 85 Ill. 281; Puffer v. Smith, 57 Ill. 527.

Indiana.—Webb v. Corbin, 78 Ind. 403; Lindley v. Hofman, 22 Ind. App. 237, 53 N. E. 471.

Minnesota.—Cummings v. Thompson, 18 Minn. 246.

Nebraska.—First Nat. Bank v. Lierman, 5 Neb. 247.

Texas.—Stacy v. Ross, 27 Tex. 3. Wisconsin.—Walker v. Ebert, 29 Wis. 194, 9 Am. Rep. 548.

⁷⁵ Green v. Wilkie, 98 Iowa 74, 66 N. W. 1046.

⁷⁶ Nielson v. Schuckman, 53 Wis. 638, 11 N. W. 44.

he intends, being ignorant of the fact that it is drawn for the larger amount and is guilty of no negligence in not knowing the exact amount of the note in question, he is not bound thereby.⁷⁷ And where an action was brought on a note signed by defendant, and it appeared that the defendant was an illiterate person and had signed the note in question, not knowing it to be such, but under the belief that he was signing duplicate contracts by which he was to be appointed agent for a certain company and no other parties were present and he was compelled to trust to the reading of the paper by the one to whom it was given, it was decided that there could be no recovery.⁷⁸ But if the maker was guilty of negligence in signing the instrument without having the same read to him or taking steps to learn its contents, or exercising the ordinary care which a prudent business man would exercise, the fact that he was fraudulently induced to sign it, will be no defense to an action by a *bona fide* holder, as in such case the rule of law applies, that where one of two persons must suffer loss, he who by his negligent conduct has made it possible must bear the same.⁷⁹ So where an answer alleged the inability of the maker to read, and the misreading of the note by the payee, on which the maker had relied in affixing his signature, it was decided that the facts pleaded were not sufficient to constitute a good answer there being no averment that he was alone or had no other means of having the paper read to him except by the payee.⁸⁰ It has also been said: "Where a party, through neglect of precautions within his power, affixes his name to that kind of paper without knowing its character, the consequent loss ought not to be shifted from him to a *bona fide* purchaser of the paper. Tested by this rule, the facts which defendant offered to prove would have been no defense. He signed the paper voluntarily. He was under no controlling necessity to sign without taking such time as might be needed to inform himself of its character. If he could not read it himself, there was no reason, except, perhaps, his own convenience or haste, why he should not postpone signing until he could have it read by some person upon whom

⁷⁷ Bowers v. Thomas, 62 Wis. 480, 22 N. W. 710.

⁷⁸ Willard v. Nelson, 35 Neb. 651, 53 N. W. 572, 37 Am. St. R. 455.

⁷⁹ Bedell v. Hering, 77 Cal. 572, 20 Pac. 129, 11 Am. St. R. 307; Swanell v. Watson, 71 Ill. 456; Anderson v. Warne, 71 Ill. 20, 22 Am. Rep. 83;

Muhlke v. Hegerness, 56 Ill. App. 322; Yeagley v. Webb, 86 Ind. 424; Williams v. Stoll, 79 Ind. 80, 41 Am. Rep. 604; Ruddell v. Dillman, 73 Ind. 518, 37 Am. Rep. 152; Fisher v. Von Behren, 70 Ind. 19, 36 Am. Rep. 162.

⁸⁰ Lindley v. Hofman, 22 Ind. App. 237, 53 N. E. 471.

he had a right to rely. Instead of doing this he chose to rely upon an entire stranger, that stranger the party opposed to him in interest, and the only person under any temptation to deceive him as to the character of the paper he was asked to sign. One who, without any necessity, so misplaces his confidence ought not to be heard to claim that the paper he is in consequence misled to sign should be taken out of the rule protecting commercial paper."⁸¹ In the absence of fraud, illiteracy has been held no defense.⁸² In this connection it is decided in a recent case that the mere fact that the maker of a note is an Indian and that he could not, at the time he made the note, read or write the English language and understood the language imperfectly, is not of itself sufficient to overcome the presumption that he understood the plain terms of the note when he signed it.⁸³

§ 28. **Effect of negligence.**—The fact that fraud was practiced upon the maker of a note will be of no avail as a defense if it appears that he was guilty of negligence, as in such a case where one of two innocent parties must suffer, the one whose negligence contributed to the loss must bear it.⁸⁴ It is incumbent upon a party executing an

⁸¹ *Mackey v. Peterson*, 29 Minn. Bank, 21 Ky. L. Rep. 1416, 55 S. W. 298, 13 N. W. 132, 43 Am. Rep. 211. 552.
Per. Gilfillan, C. J.

⁸² *Weller's Appeal*, 103 Pa. St. 594. 59.

⁸³ *Warnock v. Itawis*, 38 Wash. 144, 80 Pac. 297. *Minnesota.*—*Ward v. Johnson*, 51 Minn. 480, 53 N. W. 766.

⁸⁴ *Alabama.*—*Orr v. Sparkman*, 120 Ala. 9, 23 So. 829; *Goetter v. Pickett*, 61 Ala. 387. *Missouri.*—*Frederick v. Clemens*, 60 Mo. 313; *Shirts v. Overjohn*, 60 Mo. 305.

Illinois.—*Homes v. Hale*, 71 Ill. 552; *Fulford v. Block*, 8 Ill. App. 284. *Nebraska.*—*Cole v. Williams*, 12 Neb. 440, 11 N. W. 875.

Indiana.—*Home National Bank v. Hill*, 165 Ind. 226, 74 N. E. 1086; *New Hampshire.*—*Citizens' Nat. Bank v. Smith*, 55 N. H. 593.

Baldwin v. Barrows, 86 Ind. 351; *New York.*—*Chapman v. Rose*, 56 N. Y. 137; 15 Am. Rep. 401; *Carey v. Baldwin v. Bricker*, 86 Ind. 221; *Miller*, 25 Hun. (N. Y.) 28; *Mosher v. Williams v. Stoll*, 79 Ind. 80, 41 Am. Rep. 604; *Ruddell v. Phalor*, 72 Ind. 533, 37 Am. Rep. 177; *Fisher v. Von Behren*, 70 Ind. 19, 36 Am. Rep. 162; *West Virginia.*—*Parkersburg First Nat. Bank v. Johns*, 22 W. Va. 520, 46 Am. Rep. 506.

Dutton v. Claffer, 53 Ind. 276. *See Roe v. Jerome*, 18 Conn. 138; *Carpenter v. Bank*, 119 Ill. 352, 10 N. E. 18.

Iowa.—*Hopkins v. Hawkeye Ins. Co.*, 57 Iowa 203, 42 Am. Rep. 41; *Wright v. Flinn*, 33 Iowa 259; *McDonald v. Bank*, 27 Iowa 319. *Kentucky.*—*Wheeler v. Traders'*

instrument to exercise reasonable care and diligence to ascertain its contents.⁸⁵ He is not required, however, to exercise every possible precaution, but only that caution which would be expected from a man of ordinary prudence.⁸⁶ But though a maker may be estopped by his carelessness from setting up the defense of fraud as against a *bona fide* holder yet it may be available against the payee.⁸⁷ So the general rule has been applied in the case of one who intends to bind himself by some obligation in writing and signs the instrument voluntarily with full means of ascertaining its true character, but negligently signs and delivers a note in lieu of the instrument he intended to sign, that he will be estopped to impeach its validity in the hands of a *bona fide* holder.⁸⁸ So one who has signed a note as surety cannot, in an action by the payee, who is an innocent holder, defeat recovery on the note by setting up that one of the signatures which was upon the note when he signed it was a forgery, he having trusted and relied upon the one who procured him to sign it, the fraud being practiced upon him by such person and not by the payee.⁸⁹ And where one signed a note under the belief that it was a receipt for a plow, the one presenting the instrument to him for his signature having so represented it, both by his statements and in his reading of it, and there was no one within half a mile who could read English, the person so

⁸⁵ *Hopkins v. Hawkeye Ins. Co.*, 57 Iowa 203, 10 N. W. 605, 42 Am. Rep. 41. *Mo. App.* 264; *First Nat. Bank v. Stanley*, 46 Mo. App. 440.

⁸⁶ *Sims v. Rice*, 67 Ill. 88.

⁸⁷ *Dwelling House Ins. Co. v. Bailey*, 39 Ill. App. 488.

⁸⁸ *Illinois*.—*Hubbard v. Rankin*, 71 Ill. 129; *Sims v. Rice*, 67 Ill. 88; *Smith v. Culton*, 5 Ill. App. 422.

Indiana.—*Ind. Nat. Bank v. Wech-erly*, 67 Ind. 345; *Kimble v. Christie*, 55 Ind. 140; *Glenn v. Porter*, 49 Ind. 500.

Iowa.—*Douglass v. Matting*, 29 Iowa 498.

Michigan.—*Anderson v. Walter*, 34 Mich. 113.

Minnesota.—*Yellow Medicine County Bank v. Tagley*, 57 Minn. 391, 59 N. W. 486.

Missouri.—*Cogwill v. Petifish*, 51

Nebraska.—*Dinsmore v. Stimbert*, 12 Neb. 433, 11 N. W. 872.

New Hampshire.—*Citizens' Nat. Bank v. Smith*, 55 N. H. 593.

New York.—*Chapman v. Rose*, 56 N. Y. 137; *Hutkoff v. Moje*, 20 Misc. (N. Y.) 632, 46 N. Y. Supp. 905; *Auburn Nat. Exch. Bank v. Beneman*, 43 Hun (N. Y.) 241; *Fenton v. Robinson*, 4 Hun (N. Y.) 252, 6 Thomp. & C. 427.

English.—*Broadbelt v. Huddleson*, 2 Wkly. Notes Cas. 293; *Foster v. Mackinnon*, L. R. 4 C. P. 704.

See *De Camp v. Hanna*, 29 Ohio St. 467. But see *Corby v. Weddle*, 57 Mo. 452.

⁸⁹ *Wheeler v. Traders' Deposit Bank*, 21 Ky. L. Rep. 1416, 55 S. W. 552.

affixing his signature in reliance merely upon the statement of such party, was held guilty of such negligence as to estop him from defeating recovery by a *bona fide* holder.⁹⁰ In another case, however, where it appeared that one had signed a note, relying upon the representation of a stranger, who had come to his farm, that the instrument was an application for insurance and it was read to him as such by the stranger, he being unable to read, it was decided that a purchaser of such note could not recover thereon against the maker.⁹¹ Again, failure to read the instrument has been held to be such negligence as will estop a maker from setting up fraudulent representations,⁹² the note not having been signed under any emergency and there being nothing to prevent him from doing so and no allegation of any sufficient excuse.⁹³ And such failure will not be excused by the fact that the maker was unable to read without glasses where they could easily have been obtained.⁹⁴ In this case it appeared that the defendant, who was president of the school board, had been given several papers to sign in reference to school matters, among which papers the note in question had been surreptitiously placed in such a manner that the defendant could not distinguish it from the other papers, that he had affixed his signature thereto, in the belief that it was an order in regard to school matters, and that at the time he was unable to read or distinguish papers without his glasses, but neglected to use them, and he was held estopped, in an action by an innocent holder, to deny he executed the paper. Nor is it any excuse that the maker was not ac-

⁹⁰ *Mackey v. Perterson*, 29 Minn. 298, 13 N. W. 132, 43 Am. Rep. 211.

⁹¹ *First Nat. Bank v. Deal*, 55 Mich. 592, 22 N. W. 53.

⁹² *Alabama*.—*Martin v. Smith*, 116 Ala. 639, 22 So. 917; *Cannon v. Lindsey*, 85 Ala. 198, 3 So. 676, 7 Am. St. R. 38.

Georgia.—*Walton Guano Co. v. Copelan*, 112 Ga. 319, 37 S. E. 411.

Illinois.—*Carpenter v. First Nat. Bank*, 119 Ill. 352, 10 N. E. 18; *Mead v. Munson*, 60 Ill. 49.

Indiana.—*Baldwin v. Barrows*, 86 Ind. 351; *American Ins. Co. v. McWhorter*, 78 Ind. 136; *Nebeker v. Cutsinger*, 48 Ind. 436.

Iowa.—*Sheneberger v. Union Ins. Co.* 114 Iowa 678, 87 N. W. 493.

Kansas.—*Ort v. Fowler*, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501.

Minnesota.—*Ward v. Johnson*, 51 Minn. 480, 53 N. W. 766, 38 Am. St. R. 515.

New York.—*Chapman v. Rose*, 56 N. Y. 137.

Compare *Radcliffe v. Biles*, 94 Ga. 480, 20 S. E. 359; *Downey v. Beach*, 78 Ill. 53; *Hopkins v. Hawkeye Ins. Co.*, 57 Iowa 203, 10 N. W. 505, 42 Am. Rep. 41.

⁹³ *Boynton v. McDaniel*, 97 Ga. 400, 23 S. E. 824.

⁹⁴ *McCoy v. Gouvion*, 19 Ky. L. Rep. 1441, 43 S. W. 699.

quainted with the language,⁹⁵ where the instrument could have been read to him by others who were present when he signed it,⁹⁶ or where no effort was made by him to ascertain the contents.⁹⁷ So it has been determined that as a matter of law one who, possessed of all his faculties, and able to read, signs a bill or note relying upon the assurance or the reading of a stranger that it is a different instrument, is guilty of such negligence as will render him liable thereon.⁹⁸ The rule is said to be founded upon the principle, that a party who is in possession of his faculties and able to read can know the character of the instrument which he is signing, and owes the duty to know this to every party who may be subsequently affected by his act. By affixing his signature to the instrument, the credence of the world to every statement and promise therein is invited and an omission on his part to ascertain what the provisions and statements are, constitutes negligence.⁹⁹ Ordinarily, however, the question of what constitutes negligence on the part of the maker is held to be one of fact for the jury.¹⁰⁰ And mere failure of an illiterate person to procure some one to read a note for him before signing it cannot be held, as a matter of law, to constitute such negligent signing thereof as would prevent him from controverting its execution even against a *bona fide* holder.¹⁰¹ So where two persons called on the person whose name was signed to a note, several days before it was executed, and as a result of their negotiations with him he was appointed agent for a certain territory for the sale of cornshellers, which were to be forwarded to him, but before they were received another party called and procured his signature to what was represented to be a paper in the nature of a receipt

⁹⁵ *Fisher v. Van Behren*, 70 Ind. 19, 36 Am. Rep. 162; *Boagin v. Fouchy*, 26 La. Ann. 594.

⁹⁶ *Baldwin v. Barrows*, 86 Ind. 351.

⁹⁷ *Ruddell v. Dillman*, 73 Ind. 518, 38 Am. Rep. 152.

⁹⁸ *Ort v. Fowler*, 31 Kan. 478, 2 Pac. 580, wherein it is said: "If he has eyes and can see he ought to examine; if he can read he ought to read; and he has no right to send his signature out into the world affixed to an instrument of whose contents he is ignorant. If he relies upon the word of a stranger he makes that stranger his agent. He adopts

his reading as his own knowledge, what his agent knows he knows, and he cannot disaffirm the acts of that agent done within the scope of the authority he has intrusted to him." Per Brewer, J.

⁹⁹ *Ort v. Fowler*, 31 Kan. 478, 2 Pac. 580.

¹⁰⁰ *Ray v. Baker*, (Ind.) 74 N. E. 619; *Hopkins v. Hawkeye Ins. Co.*, 57 Iowa 203, 10 N. W. 605; *National Exch. Bank v. Venemans*, 4 N. Y. St. R. 363; *Bowers v. Thomas*, 62 Wis. 480, 22 N. W. 710.

¹⁰¹ *Ray v. Baker*, (Ind.) 74 N. E. 619.

of a certain number of cornshellers, claimed to be at a certain depot consigned to him, and in response to the signer's statement that he feared the paper might be a note, he was assured that it was not, and he was unable to read English, and had no neighbor within a mile. it was held in an action by a *bona fide* holder of the instrument, which was in fact a note, that the question whether he was negligent in signing the same was for the jury and in this case it was held there could be no recovery.¹⁰² In determining the question of negligence the age, mental power, and physical infirmities of the one signing the note are among the elements to be considered.¹⁰³

§ 29. Instruments executed, accepted or delivered on Sunday. Though it may be shown as a defense to an action between the parties, that a note or bill of exchange was executed or accepted and delivered on Sunday, yet if such an instrument bears the date of a secular day, the maker or acceptor will be estopped to set up such defense as against a *bona fide* holder taking the same before it became due for a valuable consideration and without notice.¹⁰⁴ So this rule has been applied in a case of drafts delivered and accepted on Sunday, but falsely dated as of another date. And in reference to this the court said: "The drafts were negotiable paper and bore date upon a day of the month corresponding to Saturday. If they were in fact executed on Sunday, they were void as between the original parties; and that they were thus void might be shown also against any holder affected with notice. But if Ball purchased them before maturity, and took them for a valuable consideration, in the due course of trade, and without notice of their immoral taint, the acceptor, having accepted upon Sunday, with no correction of the false date, and no indication of the true time of the acceptance, is estopped from urging in defense of a suit against him by Ball that the drafts were drawn and accepted on Sunday. * * * This does not trench upon the rule that a Sunday

¹⁰² National Exch. Bank v. Vene-
mans, 4 N. Y. St. R. 363.

¹⁰³ Kalamazoo Nat. Bank v. Clark,
52 Mo. App. 593.

¹⁰⁴ Arkansas.—Trieber v. Commer-
cial Bank of St. Louis, 31 Ark. 128.

Georgia.—Harrison v. Powers, 76
Ga. 218.

Iowa.—Clinton Nat. Bank v.
Graves, 48 Iowa 228.

Kentucky.—Hofer v. Cowan Co.,
(Ky.) 68 S. W. 438.

Maine.—Bank v. Mayberry, 48 Me.
198.

Massachusetts.—Cranston v. Goss,
107 Mass. 439, 9 Am. Rep. 45.

Michigan.—Bernau v. Wessels, 53
Mich. 549, 19 N. W. 179; Vinton v.
Peck, 14 Mich. 287.

New Hampshire.—State Capital
Bank v. Thompson, 42 N. H. 369.

contract is void; it only excludes the acceptor from treating those drafts as Sunday contracts, after he has given currency to them as Saturday contracts and with no timely disclosure that they were other than what they purported to be. It makes their date conclusive that they were Saturday contracts, and not Sunday contracts. The defense that a party's own act is void may be outlawed by the doctrine of estoppel, to protect innocent purchasers and prevent fraud."¹⁰⁵ And where a note is delivered on a secular day, it is held that it is no defense to an action thereon, that it was signed on a Sunday, it being declared that a note becomes a contract at the time of delivery.¹⁰⁶ And it has been decided that in an action by a transferee after maturity, the fact that the note, though purporting to have been executed on a week day, was executed on a Sunday, cannot be set up in defense thereto by the surety where it is not shown that such defense could have been set up by him against the payee.¹⁰⁷ But where the contract, which was the consideration of the note, was made on Sunday, and the note was made and delivered on that day to the original payee, such facts were declared to be a good defense to an action by him on the note.¹⁰⁸ And where a note is given on Sunday the fact that the consideration was goods purchased on a week day is held not to alter the rule, in an action by the payee.¹⁰⁹ And it has also been decided that there can be no recovery on a note given on a week day for a contract completed on a Sunday,¹¹⁰ or on a note executed on such a day where the consideration was a tort growing out of an unlawful Sunday contract, as where the consideration for a note was an injury done to a horse and wagon by careless or negligent driving on a Sunday.¹¹¹ Again, where a note executed on Sunday is void as in violation of a penal statute, there can be no recovery on a renewal note made on Sunday and delivered by the maker to another to be delivered to the payee on the following day.¹¹² And under

¹⁰⁵ *Ball v. Powers*, 62 Ga. 757. Per Bleckley, J.

¹⁰⁶ *Bell v. Mahin*, 69 Iowa 408, 29 N. W. 331; *Bank of Cumberland v. Mayberry*, 48 Me. 198. See *Hall v. Parker*, 37 Mich. 590, 27 Am. Rep. 540.

¹⁰⁷ *Leightman v. Kadetska*, 58 Iowa 676, 12 N. W. 736, 43 Am. Rep. 129.

¹⁰⁸ *Cranson v. Goff*, 107 Mass. 439,

9 Am. Rep. 45; *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179.

¹⁰⁹ *Morgan v. Bailey*, 59 Ga. 683; *McAuley v. Reynolds*, 64 Me. 136; *Miller v. Lynch*, 38 Miss. 344. See *Foreman v. Ahl*, 55 Pa. St. 325.

¹¹⁰ *Kountz v. Price*, 40 Miss. 341.

¹¹¹ *Tillock v. Webb*, 56 Me. 100.

¹¹² *Davis v. Bengier*, 57 Ind. 54. See *Stevens v. Wood*, 127 Mass. 123.

such a statute there can be no recovery against a surety on a note so executed by him, in an action by the payee to whom it was delivered by the principal, the payee taking the same in good faith and with no knowledge as to the date of the execution.¹¹³ So a Sunday note, void under the laws of a state, cannot, as between the parties, be ratified by a subsequent promise to pay the same made on a week day, as the transaction, being illegal in its inception, will not be purged of its illegality by a subsequent promise, it not being in the power of parties to render a contract legal which the law declares to be illegal.¹¹⁴

¹¹³ *Parker v. Pitts*, 73 Ind. 597, 38 Am. Rep. 155. *amine Tucker v. West*, 29 Ark. 386; *Reeves v. Butcher*, 31 N. J. L. 224.

¹¹⁴ *Pope v. Linn*, 50 Me. 83. Ex-

CHAPTER III.

INCAPACITY AND WANT OF AUTHORITY.

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Subdivision I.

COVERTURE.

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§ 30. Coverture—Rule at common law.—At common law a married woman had no separate legal existence.¹ She could not make a binding contract, and a promissory note made by her was regarded as

¹ *Dollner, Potter & Co. v. Snow*, 16 Fla. 86; *Scudder v. Gori*, 3 Rob. (N. Y.) 661.

void.² Coverture, therefore, was and is a good defense to an action on a note or bill made or indorsed by her, in the absence of some enabling statute,⁴ even as against a *bona fide* holder.⁵ So where money was loaned

² *Florida*.—First Nat. Bank v. Hirschkowitz (Fla. 1903), 35 So. 22, 24; Dollner, Potter & Co. v. Snow, 16 Fla. 86.

Iowa.—Jones v. Crosthwaite, 17 Iowa 393.

Maine.—Bryant v. Merrill, 55 Me. 515; Howe v. Wildes, 34 Me. 566.

Mississippi.—Robertson v. Bruner, 24 Miss. 242.

Missouri.—Cummings v. Leedy, 114 Mo. 454, 21 S. W. 804.

New York.—Kinne v. Kinne, 45 How. Pr. (N. Y.) 61; Vansteenburgh v. Hoffman, 15 Barb. (N. Y.) 28.

South Carolina.—Goodhue v. Barnwell, Rice's Eq. (S. C.) 198.

California.—So it was declared in an early California case, that a *feme covert* has no power to make a contract, such as to sign her name to a note, is a doctrine which this court has no power to disturb. Simpson v. Sloan, 5 Cal. 457. See Rowe v. Kohle, 4 Cal. 285.

Indiana.—And in an Indiana case that: "It is the settled law of this state that a married woman, during her coverture, cannot make a promissory note which will be valid and binding on her." American Ins. Co. v. Avery, 60 Ind. 566.

⁴ *Alabama*.—Fry v. Hammer, 50 Ala. 52.

California.—Simpers v. Sloan, 5 Cal. 457.

Colorado.—Fernando v. Beshoar, 9 Colo. 291, 12 Pac. 196.

District of Columbia.—Jackson v. Hulse, 6 Mackey (D. C.) 548.

Florida.—First Nat. Bank v. Hirschkowitz (Fla. 1903), 35 So. 22, 24; Hodges v. Price, 18 Fla. 342; Dollner, Potter & Co. v. Snow, 16 Fla. 86.

Georgia.—Perkins v. Rowland, 69 Ga. 661.

Illinois.—Taylor v. Boardman, 92 Ill. 566; Mudge v. Bullock, 83 Ill. 22.

Indiana.—Lackey v. Boruff, 152 Ind. 371, 53 N. E. 412; American Ins. Co. v. Avery, 60 Ind. 566; Brick v. Scott, 47 Ind. 299; Hodson v. Davis, 43 Ind. 258; O'Daily v. Morris, 31 Ind. 111.

Iowa.—Jones v. Crosthwaite, 17 Iowa 393.

Louisiana.—Conrad v. LeBlanc, 29 La. Ann. 123.

Maine.—Wyman v. Whitehouse, 80 Me. 257, 14 Atl. 68; Bryant v. Merrill, 55 Me. 515; Howe v. Wildes, 34 Me. 566.

Maryland.—Griffith v. Clarke. 18 Md. 457.

Michigan.—Waterbury v. Andrews, 67 Mich. 281, 34 N. W. 575; Kenton Ins. Co. v. McClellan, 43 Mich. 564, 6 N. W. 88; Johnson v. Sutherland, 39 Mich. 579.

Mississippi.—Robertson v. Bruner, 24 Miss. 242; Davis v. Foy, 7 Sm. & M. (Miss.) 64.

New Jersey.—National Bank v. Brewster, 49 N. J. L. 231, 12 Atl. 769.

New York.—Linderman v. Farquharson, 101 N. Y. 434, 5 N. E. 67; Scudder v. Gori, 3 Rob. (N. Y.) 661; Kinne v. Kinne, 45 How. Pr. (N. Y.) 61; Bogert v. Gulick, 65 Barb. (N. Y.) 322; Vansteenburgh v. Hoffman, 15 Barb. (N. Y.) 28; Lee Bank v. Satterlee, 24 N. Y. Super. Ct. 1.

Rhode Island.—Radican v. Radican, 22 R. I. 405, 48 Atl. 143.

South Carolina.—Goodhue v. Barnwell, Rice's Eq. (S. C.) 198.

Tennessee.—Yeatman, Shields & Co. v. Bellman, 1 Tenn. Ch. 589.

Texas.—Kavanaugh v. Brown, 1 Tex. 481.

⁵ *Louisiana*.—Conrad v. LeBlanc, 29 La. Ann. 123.

to a wife, and she and her husband executed a note therefor, prior to the Indiana Act of 1881, conferring certain rights upon married women, it was decided that the note was void.⁶ And a married woman is not estopped from showing her coverture in defense to a note by the fact that the word "widow" followed her signature thereto.⁷ And where a married woman cannot make a valid promissory note, coverture will be a defense to an action against her on a mortgage note given by her, though she made a payment thereon subsequent to her husband's death,⁸ or made a promise after his death to pay, the promise being void and not binding on her.⁹ So though a note was given by a husband and wife for money and supplies furnished to be used, and which were used for the support of the husband and his family, such support and maintenance being a legal charge against the husband alone, and for which his wife could not bind herself to pay unless she had a separate estate and business, and there was no proof or claim that she had either, she was held to be under the common law disability of coverture.¹⁰ And it has been decided, that a married woman is not liable on a note given by her for false representations in the nature of a warranty of her capacity.¹¹

§ 31. **Effect of new promise after husband's death.**—Where a married woman pleads her coverture in bar to an action on a note it is not a good replication thereto that she promised to pay the note after her husband's death, where there is no moral obligation to pay shown, nor any new consideration to support the subsequent promise.¹²

§ 32. **Rule in equity—English decisions.**—Although the note of

Michigan.—Johnson v. Sutherland, 39 Mich. 579.

Missouri.—Comings v. Leedy, 114 Mo. 454, 21 S. W. 804.

New Jersey.—National Bank v. Brewster, 49 N. J. L. 231, 12 Atl. 769.

New York.—Linderman v. Farquharson, 101 N. Y. 434, 5 N. E. 67; Scudder v. Gori, 3 Rob. (N. Y.) 661; Lee Bank v. Satterlee, 24 N. Y. Super. Ct. 1. "Inasmuch as a married woman cannot contract generally, her contracts, whether negotiable or non-negotiable in form, can never be any better in the hands of a *bona fide* holder than in those of the first

holder." Johnson v. Sutherland, 39 Mich. 579, per Campbell, C. J.

⁶ Lackey v. Boruff, 152 Ind. 371, 53 N. E. 412.

⁷ Cannam v. Farmer, 3 Exch. 698.

⁸ Radican v. Radican, 22 R. I. 405, 48 Atl. 143.

⁹ Wilcox v. Arnold, 116 N. C. 708, 21 S. E. 434.

¹⁰ O'Malley v. Ruddy, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702.

¹¹ Wright v. Leonard, 11 C. B. N. S. 258.

¹² Vance v. Wells & Co., 6 Ala. 737.

a married woman was void at common law, and her coverture was a defense to an action thereon, yet a different doctrine prevailed in courts of equity. So in an early English case, where by deed a father directed rents and profits of a real estate to be paid to his daughters, whether sole or covert, for their separate use, and they joined in bonds for money lent to their husbands, the trustee was ordered by the court to pay the rents and profits accordingly.¹³ And in a case, where it appeared that a married woman had borrowed money, which she had promised should be repaid with interest out of her separate property, and had given her promissory note therefor, it was decreed that the debt should be paid out of the rents and profits of estates, settled to her separate use for life.¹⁴ In a later case the court said: "At law there can be no separate enjoyment of property by a *feme covert*; in equity there may; and as incident to the power of enjoyment, she has a power of charging her separate property. Where a wife joins with her husband in a security, it is implied to be an execution of her power to charge her separate property."¹⁵ And in the same year it was again said by the court: "I am of opinion that a *feme covert* being incapable of contract this court cannot subject her separate property to general demands, but that, as incident to the power of enjoyment of separate property, she has a power to appoint it, and that this court will consider a security executed by her, as an appointment *pro tanto* of her separate estate."¹⁶ It was subsequently decided that where a *feme covert*, having a separate property, joined her husband in a promissory note for money advanced to the husband, her signature was *prima facie* evidence to charge her and that the court acted upon the security of the wife, not as an agreement to charge her separate estate, but as an equitable appointment under the settlement. Without the consent of the defendant, the court said, it could not order the property to be either sold or mortgaged, and the decree must be for satisfaction out of the rents and profits.¹⁷ Again, in another case, it was declared that when a woman has property settled to her separate use, she may bind that property, without definitely stating that she intends to do so, and that she may enter into a bond, bill, promissory note, or other obligation which, considering her state as a

¹³ *Standford v. Marshall*, 2 Atk. 69.

¹⁴ *Bullpin v. Clarke*, 17 Ves. Jr. 365.

¹⁵ *Greatly v. Noble*, 3 Madd. 79, 94,

¹⁶ *Stuart v. Kirkwall*, 3 Madd. 387,

388, per vice-chancellor.

¹⁷ *Field v. Sowle*, 4 Russ. 112.

per the vice-chancellor.

married woman, could only be satisfied by means of her separate estate.¹⁸

§ 33. **Same subject—United States decisions.**—In the United States it has been determined, that the power of a married woman to bind her separate estate in equity, for the payment of a promissory note is recognized,¹⁹ and the power is declared to be sustained by a great weight of authority.²⁰ And in a New York case it is said, that the rule may be regarded as settled, that in equity, the written engagements of a married woman, entered into on her own account, to pay money, with the intention to charge her separate estate, are to be satisfied out of her separate estate and her coverture therefore is no defense.²¹ The following extract from a decision in New Jersey is of value in this connection as showing the origin and growth of this doctrine: “My examination has satisfied me that this entire subject, with respect to the power of the *feme covert* over her separate estate, has been the creation of the court of equity, and that the system had been from time to time, circumscribed or extended, not under the coercion of any inflexible rules or established principle, but in accordance with judicial opinion founded on very general considerations as to the propriety or policy of the particular circumscription or expansion. No one who has the least acquaintance with the topic, can doubt that the rule, that a *feme* can bind her separate estate by a contract of suretyship and this, too, in the absence of any expressed intent so to do, is, and has been for a long time past, entirely settled in the English courts. But still the doctrine in its established form, is not sufficiently ancient to have in this court an imperative force and the consequence is, as I have already remarked, the way is open for us to adopt a rule which will embrace, or one which will exclude, the power which has been exercised in the present instance. * * * Looking back to the beginning of this system, we find that the separate estate itself of the *feme covert* is a pure creature of equity. It bears no

¹⁸ *Tullett v. Armstrong*, 4 Beav. 319, 323.

¹⁹ *Maclay v. Love*, 25 Cal. 367, 379, 85 Am. Dec. 133; *Davis v. Smith*, 75 Mo. 219; *Whitesides v. Cannon*, 23 Mo. 457; *Harvey v. Johnson*, 133 N. C. 352, 357.

²⁰ *Williams v. Urmiston*, 35 Ohio St. 296, 35 Am. Rep. 611.

²¹ *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503n, citing *North American Coal Co. v. Dyett*, 7 Paige (N. Y.) 9; *Bullpin v. Clarke*, 17 Ves. Jr. 365; *Heatley v. Thomas*, 15 Ves. 596; *Stuart v. Kirkwall*, 3 Madd. 387; 2 Story's Eq., § 1400.

analogy to anything existing at the common law. According to the general legal doctrine, the effect of marriage was to merge the existence of the wife into the legal life of the husband, so that with respect to property and civil rights she, as a separate person, had no recognition. In open derogation of this cardinal principle, equity chose to clothe her with a capacity to hold property in her individual right. It is certainly not to be wondered at that an estate thus originating in this clear violation of the laws of property as between husband and wife, should have been afterward modified to suit the supposed convenience or exigency of the case. Nor did equity scruple to introduce another anomaly when the occasion seemed to require it. It having been settled that the wife might enjoy a separate estate, the result was, as the laws of property attached to it, that she could alienate it, and this power in its application to settlements, proving disadvantageous, the defect was cured by another violation of legal rules, and a restraint against alienation inconsistent with the nature of the estate granted was supported. The structure raised on a foundation thus arbitrarily laid, could of necessity have no other form than that which would proceed from the will of the builders. And such in truth was the result. The married woman being thus recognized as the owner of the estate, the question arose as to the nature and extent of her authority over it. It became obvious at once, that in order to enjoy the privileges thus granted, she must be allowed to make contracts with respect to her separate interests and it was accordingly soon intimated,²³ that to this extent she would be regarded in equity as a *feme sole*. The result was that those contracts which a woman under coverture made touching her separate property, although void at law, were universally enforced in equity, the principle at first being, that such contracts, operating on the property, were in the nature of an execution of a power of appointment. But it was soon supposed that this principle was not broad enough to satisfy the purposes to be subserved and accordingly in the great case of *Hulme v. Tenant*,²⁴ Lord Thurlow decided that a bond of a *feme covert*, jointly with her husband, would bind her separate property. His language is: 'I have no doubt about this principle, that if a court of equity says a *feme covert* may have a separate estate, the court will bind her to the whole extent, as to making that estate liable to her own engagements, as, for

²³ In *Grigby v. Cox*, 1 Ves. Sr. 517, and in *Peacock v. Monk*, 2 Ves. Sr. 16.
190.

²⁴ *Hulme v. Tenant*, 1 Bro. C. C.

instance, for the payments of debts,' etc. This case does not appear to have been entirely satisfactory to Lord Eldon, but he never judicially departed from it, and it has been followed in many subsequent cases, and according to Lord Coltenham, it contains the correct view of the principle upon which equity acts in giving effect to the agreements of married women.²⁵ This principle, that the general engagements of a *feme covert* will be effectuated by the method of the court acting on her separate property, has, in a long series of cases, been applied and put in force. Thus it has been held, that she can render her estate liable in the form of the acceptance of a promissory note, or her own note, or on an engagement to pay the costs and proceedings of a suit in chancery. * * * Although the theory of the English courts on this subject has, after an agitation of a century, settled into form and coherence, the process by which this result has been produced has not escaped the criticism of some of the most distinguished of American lawyers."²⁶ In the application of this doctrine it has been decided that a wife only charges so much of her property as she had at the time of signing the note and not after-acquired property.²⁷

§ 34. **Defense of coverture as affected by statute.**—The strict doctrine of common law in regard to married women, has been greatly modified by legislation. Coverture is not at the present date a defense to such an extent as it formerly was, as in most of the states laws have been passed removing most of their disabilities and enlarging their power to contract.²⁸ So it was determined in Indiana that, prior

²⁵ *Owens v. Dickenson*, 1 Cr. & Ph. 54.

²⁶ *Perkins v. Elliot*, 23 N. J. Eq. 526, per Beasley, C. J.

²⁷ *Manahan v. Hart*, 24 Ohio Cir. Ct. 526.

²⁸ The following citations show how various statutes have been construed in different states:

California.—*Goad v. Moulton*, 67 Cal. 536, 8 Pac. 63, holding that under Cal. Civ. Code, § 158, providing that a married woman may enter into any engagement or transaction respecting property which she might if unmarried; a promissory note is an engagement respecting property,

which she may make, though it can be enforced only as against her separate property. See also, *Alexander v. Bouton*, 55 Cal. 14; *Marlow v. Barlew*, 53 Cal. 456; *Belloc v. Davis*, 38 Cal. 242, holding that a married woman was incapable of binding her estate except by an instrument in writing acknowledged and certified as required by statute. See *Smith v. Greer*, 31 Cal. 476; *Maclay v. Love*, 25 Cal. 367.

Connecticut.—*Williams v. King*, 43 Conn. 569, holding that the Connecticut act of 1872, providing that an action at law might be sustained against any married woman upon

to the passage of the Act of March 25, 1879, it was the settled law of that state that the contract of a married woman was void and could

any contract made by her, upon her personal credit, for the benefit of herself, her family, or her estate in the same manner as if she were sole, single, and unmarried, simply changed the form of the remedy for liabilities which had been or should be incurred by married women, and did not create any new liability. It authorized an action at law against a married woman for the same cause of action upon which she would have previously been liable in equity.

Iowa.—Rodenmeyer v. Rodman, 5 Iowa 426, holding that if a married woman by her contract, as upon a promissory note, becomes liable, she may be sued at law in the same manner as any other person, but her liability is not a personal one and only extends to and can affect her separate property or estate under code.

Louisiana.—Barrow v. Mittenberger, 21 La. Ann. 396, construing Louisiana Act of 1855, which declared in its title that it was "an act to enable married women to contract debts and bind their paraphernal or dotal property."

Maine.—Howes v. Bennett (Me. 1886), 3 Atl. 661, holding that under the laws of Maine a married woman might bind herself by note as if sole.

Massachusetts.—Major v. Holmes, 124 Mass. 108, holding that the Massachusetts statute of 1874, c. 184, authorizing her to contract, except with her husband, was in this latter respect not intended to impose any new restriction on her capacity, but merely to affirm the rule of common law, so far as her husband is the

other party to her grant or contract, and did not prevent her executing a note jointly with her husband to a third party, though the consideration is no other than a debt of his to the payee.

Michigan.—Kenton Ins. Co. v. McClellan, 63 Mich. 564, 6 N. W. 88; Russel v. People's Sav. Bank, 39 Mich. 671, 33 Am. Rep. 671; Johnson v. Sutherland, 39 Mich. 579; Ross v. Walker, 31 Mich. 120; West v. Laraway, 28 Mich. 464. In these cases it is decided that under the statutes of Michigan a married woman cannot become personally liable on an executory promise except concerning her separate estate, and that a note given for any other consideration is void. See Mich. Comp. L., § 4803.

New York.—McVey v. Cantrell, 70 N. Y. 295, 26 Am. Rep. 605, holding that by § 3 of the Act of 1860, ch. 90, as amended by the Act of 1862, ch. 172, a married woman may enter into any contract having reference to her real estate, and by § 7 of the Act of 1860 she may sue and be sued in all matters having relation to her separate property. The test of her liability is not whether her separate estate is actually benefited or not, but whether the contract has reference to it or relation to it. Barton v. Beer, 35 Barb. (N. Y.) 78, holding that the law of 1860 in New York, sess. laws 157, § 2, relieved a married woman from her disabilities to a certain extent and enabled her to carry on her trade or business and perform any labor or services on her sole and separate account, and to make all contracts incident to such trade or business,

and to give a note in payment of goods purchased for use in such business.

Pennsylvania.—*Mahon v. Gormley*, 24 Pa. St. 80, holding that the Pa. Act of April 11, 1848, to secure the rights of married women "was intended for their protection, not for their injury, and must receive such a construction as shall promote that object. * * * The statute is in derogation of the common law and must therefore be strictly confined to the objects plainly expressed or necessarily implied. * * * Where the declaration is on a promissory note, and contains no averment respecting the origin of the debt, the plea of coverture, without any such averment, is a good answer to it on demurrer. If the plaintiff wishes to avoid its effect he must set forth in a replication the special circumstances which make the defendant liable, notwithstanding her coverture, or amend his declaration so as to set forth these circumstances. So if the plaintiff, in his affidavit of claim, sets forth a promissory note, without stating any of the special circumstances which make a married woman liable on such a contract, an affidavit of defense, setting forth the coverture of the defendant, without negating these special circumstances, is sufficient."

South Carolina.—*Singluff v. Tindal*, 40 S. C. 504, 19 S. E. 137; *Martin v. Suber*, 39 S. C. 525, 18 S. E. 125, holding that a promissory note is not a conveyance, mortgage, or a like formal instrument affecting her separate estate within the meaning of the S. C. Act of 1887.

Vermont.—*Spencer v. Stockwell*, 76 Vt. 176, 56 Atl. 661, holding that the doctrine of the common law by

which all the personal property of the wife's became her husband's upon marriage has been abrogated by statutes. *Reed v. Newcomb*, 59 Vt. 630, 10 Atl. 593, holding that under Vermont laws of 1884, Act No. 140, a married woman has power to make contracts with any person other than her husband, and to bind herself and her separate estate in the same manner as if she was unmarried, and she may sue and be sued as to all such contracts made by her estate, either before or during coverture. This law removes the incapacity of a married woman to contract, and permits her to make contracts in the same manner and to the same extent as a *feme sole*, excepting with her husband, and enforces them.

West Virginia.—*Williamson v. Cline*, 40 W. Va. 194, 197, 20 S. E. 917, declaring, per Brannon, J., that "What is commonly called the 'Married Woman's Act' has undergone material legislative amendment since the first enactment in chapter 66 of the Code of 1868. Up to the enactment of chapter 3, Acts 1893, a court of law had no jurisdiction to render judgment upon the contract of a married woman, and the plea of coverture filed in this action would have at once ousted the law court of the case. Only a court of equity had jurisdiction to enforce against her separate estate such contracts as bound it. * * * So far as concerns the jurisdiction of courts of law to enforce her contracts against her separate estate, § 15, of chapter 66, of the Code, as found in chapter 3, Acts 1893, makes a radical revolution. By it a married woman may sue and be sued in any court of law or chancery in this state, which may have jurisdiction of the subject-

not be enforced against her;²⁹ but ability has since been declared to be the rule in this state and disability the exception.³⁰

§ 35. Statute does not have retroactive effect.—Where coverture is a defense to a note at the time of its execution, the right to interpose such a defense will not be affected by a statute subsequently passed, as a retroactive effect will not be given to an enabling statute so as to render a note executed by a married woman valid unless it clearly appears that such was the intention of the legislature.³¹

§ 36. Coverture a defense when transaction not within statutory exception.—The rule of the common law that coverture is a defense, is not changed except in the particular cases provided by statute,³² for where the legislation has created some specific status for a woman, she cannot act otherwise than the law specifically directs and permits.³³ So a married woman cannot bind herself by a promissory note, unless the transaction comes within the exceptions of the statute which authorizes her to contract, and the fact that the transaction is not of such a character will defeat a recovery thereon.³⁴

§ 37. Same subject—Burden of proof—Pleading.—The general rule being that a married woman cannot make a contract, or be sued, the burden of proof is on the plaintiff to show that she is within the

matter, the same in all cases as if she were a *feme sole*; and any judgment rendered against her in any such suit shall be a lien against the corpus of her real estate, and an execution may issue thereon and be collected against the separate personal property of a married woman as though she were a *feme sole*. Under this section her status or condition of coverture has no influence upon jurisdiction. It depends on the subject-matter."

²⁹ Wooden v. Wampler, 69 Ind. 88, per Scott, J.

³⁰ Arnold v. Engleman, 103 Ind. 512, 3 N. E. 238.

³¹ Bryant v. Merrill, 55 Me. 515, so construing ch. 52 of P. L. of 1866, providing that the "contracts of any married woman, made for any lawful purpose, shall be valid and binding."

³² Rowe v. Kohle, 4 Cal. 285. See Wilcox v. Arnold, 116 N. C. 708, 21 S. E. 434, holding that except in the cases mentioned in the Code, §§ 1828, 1831, 1832, 1836, a *feme covert* is at law incapable of making an executory contract and that no recovery could be had on a note which neither purported to charge her separate estate or to be for her benefit.

³³ Scudder v. Gori, 3 Rob. (N. Y.) 661; see Robertson v. Bruner, 24 Miss. 242.

³⁴ Miss. 242. As to purchasing a married woman's note see Haas v. American Nat. Bank (Tex. Civ. App.), 94 S. W. 439.

³⁵ Noel v. Clark, 25 Tex. Civ. App. 136, 60 S. W. 356. See Kavanaugh v. Brown, 1 Tex. 483, 484. Where an original note of a married woman is void. Gilbert v. Brown (Ky.), 97 S. W. 40.

exception.³⁵ And where coverture is pleaded as a defense to an action on promissory notes, it is proper and necessary for plaintiff to supply the facts which show that the contract declared on is one which the married woman had power to execute.³⁶ So an answer which sufficiently avers coverture, is a sufficient *prima facie* defense, and if plaintiff would show or rely upon her ability as a *feme covert*, he should confess the coverture and avoid its effects, by setting up or showing such a state of case, as is contemplated by the provisions of the code. The rule is that she is not liable and if he seeks to bring her within some of the exceptions to the rule, he should plead the exception.³⁷

§ 38. **Assent of husband.**—In some states the assent of the husband is required by law to render a note executed by her valid. So under the code of Alabama, a married woman might, with the assent or concurrence of her husband expressed in writing, execute a note payable in bank, or a bill of exchange, as well as any other contract into which she was authorized to enter by the statute.³⁸ And in an early case in New York, it was decided that a note made by a *feme covert* to bind a submission by her was void when made without the assent of her husband.³⁹ Where the written assent of the husband to a contract of the wife is required in order to render such a contract enforceable against her, his assent need not be signified by a separate clause, but his execution of a note jointly with her, is a sufficient compliance with the law in this respect.⁴⁰

§ 39. **Note given for insurance premiums.**—A wife is liable on a note executed by her and her husband for the purpose of securing the

³⁵ Gregory v. Preice, 4 Metc. (Mass.) 478; Robertson v. Bruner, 24 Miss. 242. Where a married woman can make no obligation except on account of her own property any one seeking to hold her, must make out an affirmative case. Feckheimer v. Peirce, 70 Mich. 440, 38 N. W. 325. "In a suit against a married woman, when her coverture is pleaded and proven, it devolves upon the plaintiff to show that the contract was made with reference to and upon the credit of her separate estate." Grand Island

Bkg. Co. v. Wright, 53 Neb. 574, 74 N. W. 82, per Norval, J.

³⁶ Arnold v. Engleman, 103 Ind. 512, 3 N. E. 238.

³⁷ Rodemeyer v. Rodman, 5 Iowa 426.

³⁸ Scott v. Taul, 115 Ala. 529, 533, 22 So. 447, under Code of 1886, § 2346.

³⁹ Rumsey v. Leek, 5 Wend. (N. Y.) 20.

⁴⁰ Freeman, In re, 116 N. C. 199, 21 S. E. 110; Jones v. Craigmiles, 114 N. C. 613, 19 S. E. 638.

payment of the dues and premiums of an insurance policy on her husband's life in favor of her and her child.⁴¹ So she has been held liable on a note so given for the premiums on such a policy issued at her request and in his absence, the note being declared to be primary obligation against her and not to be a guaranty of the husband's debt.⁴² But where a married woman gives a note for moneys lent to her husband to pay an insurance premium, it has been held that the note, being for a debt due by her husband, and it not appearing what interest she had, if any, in the policy, or what it was worth, or its value, she is not liable.⁴³

§ 40. **Where note made by wife to husband.**—Where a note is made by a wife to her husband and indorsed by him, it has been decided in Massachusetts, that under the rule of the common law the note cannot be enforced against her, and that such rule is in force in this state.⁴⁴ So it has been decided that where notes were made by a married woman payable to the order of her husband and indorsed by him, no action could be maintained thereon against her or her administrator and that plaintiff could not be relieved in equity against the defense that the notes were void as a contract between husband and wife, since this would enable parties, with the aid of a court of equity, to set aside at their pleasure this rule of the common law which had been declared and recognized by the legislature and the court.⁴⁵ In New Jersey, it has been determined, that a contract made by a note executed by a wife to her husband and indorsed to the plaintiff, who advanced money to the wife on her credit and for her sole and separate use, being one which in its inception is a contract made between husband and wife, no legal cause for action upon the contract can arise in favor of the indorsee, and the remedy against the wife must be in equity.⁴⁶ And under a statute which provides that a married woman may be sued jointly with her husband on any note which

⁴¹ *Crenshaw v. Collier*, 70 Ark. 5, 65 S. W. 709.

⁴² *Mitchell v. Richmond*, 164 Pa. St. 566, 30 Atl. 486.

⁴³ *Jones v. Bradwell*, 84 Ga. 309, 10 S. E. 745.

⁴⁴ *National Bank of Republic v. Delano*, 185 Mass. 425, 70 N. E. 444; *Massachusetts Nat. Granite Bank v. Whicher*, 173 Mass. 517, 53 N. E. 1004; *Roby v. Phelon*, 118 Mass. 541.

⁴⁵ *National Granite Bank v. Tynedale*, 176 Mass. 547, 57 N. E. 1022. See, also, *Caldwell v. Nash*, 190 Mass. 507, 77 N. E. 515.

⁴⁶ *First National Bank v. Albertson* (N. J. Ch. 1900), 47 Atl. 818, decided under Act June 13, 1895 (P. L. 821, 2 Gen. St., p. 2017), Act of 1874, §§ 5, 14. Compare *National Bank v. Brewster*, 49 N. J. L. 231, 12 Atl. 769.

she has executed jointly with him,⁴⁷ she is not liable on a note executed by her to her husband and indorsed by him to a third person as her common law disability still extends to all undertakings other than those which she is empowered by statute to enter into.⁴⁸ Under the New York laws, however, authorizing a married woman to contract but providing that the act does not apply to any contract that shall be made between the husband and wife,⁴⁹ it has been decided that it is not a contract between her and her husband where she executes a note payable to his order which he indorsed before maturity, where it is given as a loan of her credit to her husband. In such a case the contract is held not to spring into existence until the note has been discounted and the proceeds given to the husband of the defendant who is liable thereon.⁵⁰

§ 41. **Where wife a joint maker.**—In an action against a wife on a note on which her name appears as a joint maker, coverture is a good defense thereto either at common law or where her contract is not one within the statutory exception.⁵¹ So where a husband and wife give a joint note for the purchase price of a horse purchased jointly, she was held not liable on the note, as its effect was to make her liable as a surety for her husband, which she cannot become in Michigan, and it is also the established doctrine in this state that the wife is not liable generally for her engagements, nor can she make herself liable, except by contract relating to her separate estate or by contract by which she acquires separate property.⁵² And coverture is a defense to an action against a wife on a note executed by her and her husband jointly for money and supplies furnished to be used for support and maintenance of the husband and his family and which was a legal charge against him alone where there is no proof or claim that she

⁴⁷ Md. Code, Art. 45, § 2.

⁴⁸ Harvard Pub. Co. v. Benjamin, 84 Md. 333, 35 Atl. 930.

⁴⁹ N. Y. Laws 1884, chap. 381, § 2.

⁵⁰ Bowery Nat. Bank v. Sniffen, 54 Hun (N. Y.) 394, 27 N. Y. St. R. 10, 7 N. Y. Supp. 520, 2 Bkg. Law J. 173.
⁵¹ California.—Brown v. Orr, 29 Cal. 120; Luning v. Brady, 10 Cal. 265.

Indiana.—Thacker v. Thacker, 125 Ind. 489, 25 N. E. 595.

Louisiana.—Sprigg v. Boissier, 5 Mart. (La. O. S.) 54.

Maryland.—Mitchell v. Farrish, 69 Md. 235, 14 Atl. 712.

Michigan.—Caldwell v. Jones, 115 Mich. 129, 73 N. W. 129, 4 Det. L. N. 795.

Tennessee.—Jordan v. Keeble, 85 Tenn. 412, 3 S. W. 511. If within her power under statute it is immaterial that the purpose was not carried out. Italo-French Produce Co. v. Thomas, 31 Pa. Super. Ct. 503.

⁵² Caldwell v. Jones, 115 Mich. 129, 73 N. W. 129.

had a separate estate or business.⁵³ And where the real consideration of such a note was a loan to the husband by the payee, it was held that she was not estopped by a recital in the note that the said sum was procured for her benefit and that for the payment of this claim when called for she pledged her own individual estate.⁵⁴ In some jurisdictions, however, she is liable where the consideration for the note passed to her,⁵⁵ or is liable to a *bona fide* purchaser without notice of her suretyship,⁵⁶ or to an indorsee in good faith before maturity, if it be shown that she executed the note as principal, or that she is estopped from denying that she so executed it,⁵⁷ or where the note was for the benefit of her separate estate,⁵⁸ or where its effect was to extinguish a mortgage held by the payee and which in turn freed the wife's inchoate right of dower.⁵⁹ And, though a note may be so given for the individual indebtedness of the husband, she is liable thereon under a statute which provides that "either husband or wife may enter into any engagement or transaction with the other or with any other person respecting property, which either might if unmarried."⁶⁰ So in England, where a woman, married since the passage of the Married Women's Property Act of 1870, joined her husband in signing a joint and several promissory note for money lent to him and he became bankrupt, it was held that her separate estate was liable for the amount due on the note.⁶¹ And in Canada, under the act of 1872,⁶² giving a married woman power to contract under certain conditions and to be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried; the power to contract within the conditions specified is just as absolute as the power of a man, and she is liable on a promissory note signed by her and her husband, for money due by him which was accepted on the representation, which was true, that she

⁵³ O'Malley v. Ruddy, 79 Wis. 147, 149, 48 N. W. 116, 24 Am. St. 702.

⁵⁴ Kilbourn v. Brown, 56 Conn. 149, 14 Atl. 784, decided under Conn. Gen. St. 1888, § 984.

⁵⁵ Shaw v. Fortine, 98 Mich. 254, 57 N. W. 128. She is liable for only so much of the consideration as she receives. Dobbins v. Blanchard, 94 Ga. 500, 21 S. E. 215.

⁵⁶ Venable v. Lippold, 102 Ga. 208, 29 S. E. 181.

⁵⁷ Potter v. Sheets, 5 Ind. App. 506, 32 N. E. 811.

⁵⁸ Noel v. Kinney, 106 N. Y. 74, 12 N. E. 351.

⁵⁹ Beberdick v. Crevier, 60 N. J. L. 339, 37 Atl. 959.

⁶⁰ Miller v. Purchase, 5 S. D. 232, 58 N. W. 556, decided under Dak. Comp. Laws, § 2590. See Granger v. Roll, 6 S. D. 611, 62 N. W. 970.

⁶¹ Davis v. Jenkins, 6 L. R. Ch. Div. 728.

⁶² 35 Vict. Ch. 160.

had a separate estate, the only consideration being a forbearance of the husband's debt.⁶³ Again, in West Virginia, in an action on a note given by a husband and wife jointly and severally, in consideration of a discharge of a partnership debt the husband being a member of a partnership, it was decided that, "the separate estate of a married woman is liable for any simple contract debt, which she would be liable for if she were a *feme sole*; and the consideration for such debt need not inure to her own benefit, or that of her separate estate; but it may inure to the benefit of her husband, or any third party, or may be a mere prejudice to the other contracting party."⁶⁴ In an action upon a note executed by a husband and wife jointly and severally, to entitle the plaintiff to recover, the facts appearing of record must bring the case within the provisions of the statute which makes a married woman liable "upon any contract made by her since her marriage, upon her personal credit, for the benefit of herself, her family or her separate joint estate."⁶⁵ So no recovery can be had on a note signed by husband and wife jointly against her succession where the authorization of the husband is not shown.⁶⁶ And a wife is not bound on a note given by her and her husband jointly, unless it be shown that the contract turned to her advantage and was for something which the husband was not bound to furnish.⁶⁷ And in Ohio it has been decided that a married woman is not liable on such a note unless it appear that she has separate property to be charged therewith.⁶⁸ Again, a wife's name being found on a note conjointly with that of her husband, does not raise a legal presumption that she is either jointly or severally liable upon it.⁶⁹

§ 42. Where husband and wife live apart—English decisions. The question has arisen in several cases, as to whether coverture is

⁶³ Kerr v. Stripp, 40 U. C. Q. B. 125.

⁶⁴ Dages v. Lee, 20 W. Va. 584, 586, per Snyder, J.

⁶⁵ Way v. Peck, 47 Conn. 23, decided under Gen. St., p. 417, § 9.

⁶⁶ Maddox v. Maddox's Exr., 12 La. 13. See Lombard v. Guillet, 11 Mart. O. S. 581.

⁶⁷ Davidson v. Stuart, 10 La. 146. In this case the note was given for part of the price of land purchased

by the wife herself, with the consent of her husband, which property under the code became community property. See Brandegee v. Kerr, 7 Mart. (La. N. S.) 64; Durnford v. Gross, 7 Mart. (La. O. S.) 466.

⁶⁸ Buning v. Berteling, 5 Ohio N. P. 167, 7 Ohio Dec. 129.

⁶⁹ Harris v. Finberg, 46 Tex. 79. See Ruiz v. Campbell, 6 Tex. Civ. App. 714, 26 S. W. 295.

available as a defense to actions on obligations of a married woman where she and her husband are living apart. In this connection it was declared in an early decision in the English courts that a wife of a man who is under an absolute disability of coming into the country, may be sued as a *feme sole*.⁷⁰ And in a later case it was determined that in an action against a *feme covert*, who eloped from her husband, for work and labor done and materials furnished, that she was in every view, unless adultery be proved, a *feme covert* and as such could neither sue nor be sued alone, this being the general rule subject to following exceptions: 1. Local customs, as in the city of London, where a *feme covert* being a sole trader may sue and be sued. But there the husband must be joined at the outset for conformity. 2. The wife of an exile, one abjuring the realm, or perhaps one professed; who are looked upon as dead in law. 3. The same law has been extended to cases somewhat like the former, as the Duchess of Mazarine's Case, whose husband lived in France. All these are by the acts of the husband; but no act of the wife can ever make her liable to be sued alone.⁷¹ And in a later English case, which was not an action on a note, it was decided that, when a married woman having a separate estate, and living apart from her husband, contracts debts, the court will impute to her the intention of dealing with her separate estate.⁷² Again it was subsequently decided in England that, where a married woman who lived abroad in Paris alone, under circumstances which led to the belief that she was a *feme sole*, indorsed a bill of exchange, and drew a check on her London bankers, for the purpose of enabling one who acted as her agent to raise money and the bill and check were cashed by a banker at Paris but were dishonored, the separate estate of the married woman was liable to make good the amount, irrespective of any equities between her and her agent. It was said by Lord Romilly in this case: "Here is a lady not legally separated from her husband, but residing alone in Paris for above three months for the benefit of medical advice, having a separate account at her bankers', paying her bills and accounts and the like with her own money, and acting like a woman who had no husband, everything about her tending to confirm this impression, I think she cannot afterward be heard to say that she was a *feme covert*, and that

⁷⁰ Derry v. Mazarine, 1 Ld. Raym. 1079, in substance words of De-
147. This was not an action on a Grey, C. J.
note, but for wages and money lent.

⁷² Johnson v. Gallagher, 1 DeG. F.

⁷¹ Hatchett v. Baddeley, 2 W. Bl. & J. 494.

she is not liable to have her separate property applied to make good the money that was paid to her or for her benefit.”⁷³

§ 43. Same subject—United States decisions—Conclusion.—In a case in Georgia it was determined that where a husband deserted his wife, leaving her in Georgia, and he went to another state, where he continued to reside, she was competent to contract as a *feme sole* and to sue and be sued, and was bound by a note given by her for a debt due by her husband, in consideration that the creditor would not proceed to attach goods of her husband in her hands.⁷⁴ In an early Massachusetts case it is said: “At common law, while the marriage contract subsists, unless the husband is banished or has abjured the realm, the wife cannot be treated as a *feme sole*, saving, however, the custom of London, according to which, if a married woman trades by herself without the intermeddling of her husband, she may sue and be sued as a *feme sole*. Now without doubt the law is the same with us, in relation to the effect of a voluntary separation of husband and wife, or the absence of the husband. The wife is still a *feme covert*, and is to be treated as such in all judicial proceedings, for it will not be allowed to parties by their own act without, as it may be, any sufficient cause, to destroy the effect of that relation, which for most important reasons the laws of society have chosen to establish.”⁷⁵ And in another case in this state the rule is affirmed that the wife may be liable on a note given by her, where there has been an absolute desertion of her by her husband; that is, there must be a voluntary separation from and abandonment of the wife, embracing both the fact and intent of the husband to renounce *de facto*, and as far as he can do it, the marital relation and leave his wife to act as a *feme sole*.⁷⁶ In this case it was said by Chief Justice Shaw that: “The principle is now to be considered as established in this state, as a necessary exception to the common law, placing a married woman under disability to contract or maintain a suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts and sue and be sued in her own

⁷³ McHenry v. Davis, 10 L. R. Eq. 88.

⁷⁶ Gregory v. Pierce, 4 Metc. (Mass.) 478, 479. See Smith v. Silence, 4 Iowa 321, 66 Am. Dec. 137.

⁷⁴ Clark v. Valentino, 41 Ga. 143.

⁷⁵ Dean v. Richmond, 5 Pick. (Mass.) 461, per Parker, C. J.

name as a *feme sole*. It is an application of an old rule of the common law, which took away the disability of coverture when the husband was exiled or had abjured the realm." And in a case in Alabama it was declared by the court that: "If a husband permits his wife to take her children to a foreign country, or to another state, and there enter into business for their support and maintenance, and by her industry she acquires rights and property to which he never asserted any title during his life, nor ever came to the country where she had located, it must be presumed that he intended that she should contract in reference to property as a *feme sole*, and as such might receive payment of debts contracted with and due her, and indorse bills or notes which she had acquired."⁷⁷ In South Carolina it has also been decided that if a husband depart from the state, for the purpose of a residence abroad, without the intention of returning, such absence renders the wife competent to contract, and to sue and be sued as if she were a *feme sole*, and, notwithstanding her coverture, she will be bound by a note executed by her.⁷⁸ And in New York it has been determined that, where the wife, who was a resident of the United States, executed notes and in an action thereon set up coverture, she was to be regarded as a *feme sole* and liable thereon, her husband residing in Prussia, which kingdom he could not leave without a passport or permit.⁷⁹ But where a husband and wife mutually agreed to a separation, but nothing was proved showing that the separation was designed to be perpetual, further than its continuance after it took place, and no separate maintenance was provided by the husband, it was decided that the court was not satisfied that the separation was so complete that he was to be treated as having renounced his marital rights and relations, so as to enable her to contract as a *feme sole* and become liable on a note given by her.⁸⁰ So in Vermont it has been likewise held that where a wife who had been deserted by her husband, and while living apart from him gave a note for groceries and other goods purchased by her in her own support, her coverture is a good defense to an action thereon, though she made a promise after she had obtained a divorce from her husband to pay the same.⁸¹ So proof of coverture has been held a defense in an action by a payee who

⁷⁷ Roland v. Logan, 18 Ala. 307, per Dargan, C. J.

⁷⁸ McArthur v. Bloom, 2 Duer (N. Y.) 151.

⁷⁹ Bean v. Morgan, 4 McCord (S. C.) 148.

⁸⁰ Ayer v. Warren, 47 Me. 217.

⁸¹ Hayward v. Barker, 52 Vt. 429, 36 Am. Rep. 762.

knew of the marriage, though the wife had been living apart from her husband for two years, but both were within the state.⁸² In this connection it may be well to note the following decisions as to the right of a married woman to sue. Thus it has been decided that by a divorce *a mensa et thoro* the husband's power over a note to his wife before the divorce is not extinguished and an action upon such a note cannot be maintained by her.⁸³ And where a wife was driven from her husband and her home more than twenty years prior to an action of trover by her for a note made by the defendant to her, and she had all that time acted as a *feme sole* and had been treated as such by those with whom she had dealings, and her husband, so far from supporting her, had considered the connection as extinct and had married and lived with another woman, and it was agreed that the separation was caused by the cruelty and ill usage of the husband and he had obliged her to live apart from him and to get her own living by trading, and she had sustained herself as a *feme sole* within the commonwealth, it was decided that she was entitled to maintain the action.⁸⁴ From an examination of these cases the rule seems to be that a wife may contract as a *feme sole* and that she cannot defeat a recovery on her obligations by the defense of coverture where there has been an absolute desertion and abandonment of her by the husband, who has gone beyond the jurisdiction of the state or country, or where a wife has lived in another state or country under circumstances which led to the belief that she was a *feme sole*.

§ 44. Where wife signs as surety—Generally.—Coverture is usually a good defense to an action against a married woman on a note signed by her where it appears that she was a surety merely, either for an obligation or debt of her husband or of another.⁸⁵ So it is de-

⁸² *Painter v. Weatherford*, 1 Iowa 97. See *Abbott v. Bailey*, 23 Mass. (6 Pick.) 90.

⁸³ *Dean v. Richmond*, 23 Mass. (5 Pick.) 461.

⁸⁴ *Abbott v. Bailey*, 23 Mass. (6 Pick.) 89.

⁸⁵ *Federal*.—*Marchand v. Griffon*, 140 U. S. 516, 35 L. Ed. 527, 11 Sup. Ct. R. 834.

Georgia.—*Munroe v. Hass*, 105 Ga. 468, 30 S. E. 654; *Strickland v. Vance*, 99 Ga. 531, 27 S. E. 152;

Smith v. Hardman, 99 Ga. 381, 27 S. E. 731; *Lester v. Stewart*, 89 Ga. 181, 15 S. E. 42; *Love v. Lamar*, 78 Ga. 323, 3 S. E. 90; *Howard v. Simpkins*, 70 Ga. 322.

Indiana.—*Guy v. Liberenz*, 160 Ind. 524, 65 N. E. 186.

Kentucky.—*Magoffin v. Boyle Nat. Bank*, 24 Ky. L. R. 585, 69 S. W. 702; *Skinner v. Lynn*, 21 Ky. Law. Rep. 185, 51 S. W. 167; *Russell v. Rice*, 19 Ky. Law Rep. 1613, 44 S. W. 110.

Michigan.—*First Nat. Bank v.*

clared in one state that the signing of a note by a married woman as a surety of her husband is a general personal engagement on her part, without "reference to her separate estate," and is void,⁸⁶ and she is held not liable, though her intention in such a case to bind her separate estate is expressly declared.⁸⁷ And in another jurisdiction, where a married woman executed a note to a mercantile firm of which her husband was a member, the contract was held void and not enforceable at law by an indorsee.⁸⁸ So in Michigan a wife cannot become liable upon her promise to pay her husband's debt, and where she and her husband made a note in order to obtain money for his business, in which she had no interest except as a creditor of his, and some of her separate property was used therein, it was decided that the note was void as to her, as she was a mere surety.⁸⁹ So in Kentucky, no personal liability is imposed upon a married woman who as surety affixes her signature to the note of her husband, given for his debts, to which she is a stranger and in no way personally liable.⁹⁰ And in Indiana, where a note was executed by a husband, wife and another, against whom a judgment was rendered thereon, which was paid by the latter, the defense of coverture was held a good defense to an action by him, after the death of the husband insolvent, to recover as surety the sum so paid.⁹¹

Hanscom, 104 Mich. 67, 62 N. W. 167; Waterbury v. Andrews, 67 Mich. 281, 34 N. W. 575.

New Hampshire.—Citizens' Nat. Bank v. Davis, 62 N. H. 695.

New Jersey.—National Bank of Rahway v. Brewster, 49 N. J. L. 231, 12 Atl. 769; Peake v. La Baw, 21 N. J. Eq. 269.

New York.—Scudder v. Gori, 3 Rob. (N. Y.) 661.

North Carolina.—McLeod v. Williams, 122 N. C. 451, 30 S. E. 129.

Pennsylvania.—Imhoff v. Brown, 3 Phila. (Pa.) 45.

South Carolina.—Booker v. Wingo, 29 S. C. 116, 7 S. E. 49; Habenicht v. Rawls, 24 S. C. 461, 58 Am. Rep. 268.

New Brunswick.—Gaskin v. Peck, N. B. Eq. Cas. 40.

As to burden of proof see Sample v. Guyer (Ala.), 42 So. 106.

⁸⁶Booker v. Wingo, 29 S. C. 116, 7 S. E. 49, decided under Act of 1882, Gen. St., § 2037, permitting her to contract as to her separate property. Aultman & Taylor Co. v. Rush, 26 S. C. 517, 2 S. E. 402; Habenicht v. Rawls, 24 S. C. 461, 58 Am. Rep. 268.

⁸⁷Habenicht v. Rawls, 24 S. C. 461, 48 Am. Rep. 268.

⁸⁸National Bank of Rahway v. Brewster, 49 N. J. L. 231, 12 Atl. 769.

⁸⁹Littlefield v. Dingwall, 71 Mich. 223, 39 N. W. 38.

⁹⁰Magoffin v. Boyle Nat. Bank, 24 Ky. Law Rep. 585, 69 S. W. 702.

⁹¹Daudistel v. Beninghof, 71 Ind. 389.

§ 45. Same subject—Where statute expressly prohibits.—In many states it has been expressly provided by statute that a married woman shall not become liable as surety for the debt of another.⁹² The object

⁹² *Alabama*.—*Richardson v. Stephens*, 114 Ala. 238, 21 So. 949, construing Ala. Code, § 2349, and holding that a note which a married woman signs as surety for her husband is void, and the fact that the money was used to improve her land does not render it valid.

Delaware.—*Wright v. Parvis*, 1 Marv. (Del.) 325, 40 Atl. 1123.

Indiana.—*Voreis v. Nussbaum*, 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45, construing Ind. Rev. St. 1881, § 5119, and holding that in an action against a married woman on a note signed by her as surety for her husband, while the statute makes the contract of suretyship void as to her, she alone can claim the benefit thereof and being under the statute bound by an estoppel *in pais*, like any other person, it followed that she may in some cases be estopped by her conduct or representations from claiming the benefit of the statute, it being declared that this is not an affirmation or ratification of a void contract, but an estoppel against the exercise of a personal right. *Wolf v. Zimmerman*, 127 Ind. 486, 26 N. E. 173, holding that under the statute, where a wife assigns a note which belongs to her to sureties of her husband, as collateral security to an indemnifying mortgage to them, she thereby becomes surety to her husband, and the assignment is void. *Nixon v. Whitely Co.*, 120 Ind. 360, 22 N. E. 411.

New Hampshire.—*Storrs & Co. v. Wingate*, 67 N. H. 190, 29 Atl. 413, decided under N. H. Gen. Laws, ch. 183, § 12.

New Jersey.—*Vliet v. Eastburn*, 63 N. J. L. 450, 43 Atl. 741, construing 2 N. J. Stat., p. 2017, pl. 26, and holding that an accommodation note by a married woman is a contract of suretyship and void under this statute unless she obtains directly or indirectly any money, property or other thing of value for her own use or for the use, benefit, or advantage of her separate estate. *Vankirk v. Skillman*, 34 N. J. L. 109, holding that a married woman is not liable at law, as surety, under Act March 24, 1862.

Pennsylvania.—*Wiltbank v. Tobler*, 181 Pa. St. 103, 37 Atl. 188, construing Pa. Act June 8, 1893, § 2, and holding that a wife is not liable who signs as surety a note of her husband, though given to secure a loan for the payment of taxes, interest, and repairs on her separate estate. *Harrisburg Nat. Bank v. Bradshaw*, 178 Pa. St. 180, 35 Atl. 629, 34 L. R. A. 597, 39 W. N. C. 138, holding that under this act a married woman may, however, bind herself by the renewal of an accommodation indorsement which she made before marriage. *Patrick v. Smith*, 165 Pa. St. 526, 30 Atl. 1044, 36 W. N. C. 10, construing Pa. Act of June 3, 1887, and holding that a married woman was not liable on a note given by her as security for her husband's debt. *Ruffner v. Luther*, 19 Pa. Co. Ct. 349, 6 Pa. Dist. R. 588; *Bank v. Short*, 15 Pa. Co. Ct. 64, holding that the Pa. Act of June 3, 1887, § 2 (P. L. 332) enabling a married woman to contract "Provided, however, that nothing in this or the preceding sec-

of a statute declaring such paper void is to shield and protect married women from contracts from which neither they nor their estate could be benefited, and therefore they alone are held entitled to invoke the benefit afforded by the prohibition.⁹³ A defendant, however, is not entitled to a general affirmative charge on her plea of coverture on proof merely that she was the wife of the other defendant at the time the note sued on was executed, there being no proof that the note was given for the debt of the husband.⁹⁴ And the burden of proof is on a married woman in an action against her on a note and mortgage executed by her to allege and show that she executed such note and mortgage as surety, and not as principal.⁹⁵

§ 46. **Same subject—Under particular statutes.**—In Nebraska a married woman has been held not liable on a promissory note which she has signed as surety, unless it appears that it was made with reference to, and upon the faith and credit of, her separate estate.⁹⁶

tion shall enable a married woman to become accommodation indorser, guarantor, or surety for another" unfettered a married woman to a limited extent only, and did not clothe her with a general power to contract as a feme-sole, and under this act and Act of June 8, 1893, § 2 (P. L. 344), providing that "she may not become accommodation indorser, maker, guarantor or surety for another," a note given by a wife as accommodation surety for her husband is void for the reason that she had no power to make such an accommodation note, and is subject to the common-law defenses of a married woman, and a banker who discounts the promissory note of a person known by him to be a married woman is chargeable with knowledge that there is a statutory limitation on her power to contract.

⁹³ *Vories v. Nussbaum*, 131 Ind. 267, 16 L. R. A. 45, 31 N. E. 70. See also, *Plaut v. Storey*, 131 Ind. 46, 30 N. E. 886.

⁹⁴ *Englehart v. Richter*, 136 Ala. 562, 33 So. 939.

⁹⁵ *Guy v. Liberenz*, 160 Ind. 524, 65 N. E. 186, 188; *Vories v. Nussbaum*, 131 Ind. 269, 31 N. E. 70, 16 L. R. A. 45.

⁹⁶ *State Sav. Bank v. Scott*, 10 Neb. 83, 4 N. W. 314; *Barnum v. Young*, 10 Neb. 309, 4 N. W. 1054, decided under Act March 1, 1871, providing that "a married woman, while the marriage relation exists, may bargain, sell and convey her real and personal property, and enter into any contract with reference to the same, in the same manner, to the same extent, and with like effect, as a married man may, in relation to his real and personal property," and that "a woman may, while married, sue and be sued in the same manner as if she were unmarried." *Davis v. First National Bank*, 5 Neb. 242, 25 Am. Rep. 484 (same point decided). *Union Stock Yards Nat. Bank v. Coffman*, 101 Iowa 294, 70 N. W. 693 (decided under laws of Nebraska, which controlled in this case).

So under the early Nebraska statutes permitting a married woman to contract,⁹⁷ and to carry on any trade or business,⁹⁸ when she sets up coverture to avoid liability on a note signed by her as surety she must, in her answer, negative all the causes from which otherwise her liability may be inferred, as that "the contract did not concern her separate property, trade, or business," the reason being that her non-liability can only arise from her inability to contract, and this she must clearly allege.⁹⁹ And in New Jersey it was decided that the Act of March 24, 1862, should receive a somewhat rigorous construction, and that it should not be construed as rendering liable at law a married woman who signs a note purely for the accommodation of one of the makers, since, if such an obligation be valid, there is "no imaginable contract which a man or *feme sole* can make which a married woman cannot make. She can place herself as surety on all kinds of bonds. She can indorse the notes of her mercantile friends or relatives without the knowledge of her husband, or even against his express dissent, to any amount; and if this suit is to be sustained, such indorsements will form a legal basis for actions at law against herself and her husband."¹⁰⁰ And in Wisconsin it is decided that where a wife alleged in her answer that she executed the note as surety for her husband, and that the transaction did not concern her separate property or earnings, and it appeared from the evidence that she was a married woman and that the debt represented by the note was the husband's, there could be no recovery against her in an action at law unless it was shown that the transaction was necessary and convenient for the use and enjoyment of her separate estate, or the carrying on of her separate business, or in relation to her personal services.¹⁰¹ Again, under the Kentucky statute, providing that the

⁹⁷ Act March 1, 1871.

⁹⁸ See chap. 53, Comp. St.

⁹⁹ Gillespie v. Smith, 20 Neb. 455, 30 N. W. 526, holding that an answer by a married woman alleging coverture, and "that she executed said notes as surety, and that she had no interest in the transaction, nor did the consideration thereof accrue to her separate estate, and neither were given in relation thereto; that she received no part of the consideration for which said notes were given, and no benefit accrued

from said notes to her or her separate estate; that she neither contracted nor intended to make said notes a charge on her separate estate," does not constitute a defense.

¹⁰⁰ Vankirk v. Skillman, 34 N. J. L. 109, per Beasley, C. J.

¹⁰¹ Ritter v. Bruss, 116 Wis. 55, 92 N. W. 361, 362. See Hollister v. Bell, 107 Wis. 198, 83 N. W. 297; Mueller v. Wiese, 95 Wis. 381, 70 N. W. 485, all decided under R. S., §§ 2342-2345, which in substance so provide.

wife's estate is not liable for the debt of another unless set apart for that purpose by deed, mortgage or other conveyance,¹⁰² a married woman is not liable on a note which she signs jointly with her husband, but merely as his surety, where the statute has not been complied with, as it was the manifest purpose of the legislature that a wife should not contract an obligation as a surety for her husband, or any other person so as to charge her estate, unless such estate should be expressly set apart for that purpose by deed or other conveyance.¹⁰³ And in Canada it has been decided that a wife's personal property will not be charged by a joint and several note executed by her and her husband in payment of his debt, where it is provided by statute that her property shall be exempt from seizure in any way for such debts without "her consent," as the execution of the note is not such consent as is required by law.¹⁰⁴

§ 47. **Same subject—When no defense.**—Under the laws in force in some jurisdictions a married woman cannot defeat a recovery on a note on the ground that she signed it as surety. So under the Oklahoma statute,¹⁰⁵ which provides that "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts," a wife who joins with her husband in executing a promissory note for the latter's debt will be bound thereby.¹⁰⁶ And a similar rule has been affirmed under like statutes in North Dakota¹⁰⁷ and in South Dakota.¹⁰⁸ So in West Virginia it has been decided that where a married woman executes a bond as surety for her husband's debt it will be binding on her separate estate under the law of 1893, and coverture is no bar to an action thereon.¹⁰⁹ And under the statute in Missouri, per-

¹⁰² Ky. Stat., §2127, Act March 15, 1894.

¹⁰³ *Skinner v. Lynn*, 21 Ky. Law Rep. 185, 51 S. W. 167. See *Crumbaugh v. Postell*, 20 Ky. Law Rep. 1366, 49 S. W. 334.

¹⁰⁴ *Gaskin v. Peck*, N. B. Eq. Cas. 40, decided under ch. 72, Consol. St.

¹⁰⁵ § 2968 of Laws of 1893.

¹⁰⁶ *Cooper v. Bank of Indian Territory*, 4 Okla. 632, 46 Pac. 475.

¹⁰⁷ *Colonial & U. S. Mtg. Co. v. Stevens*, 3 N. D. 265, 55 N. W. 578, decided under § 2590, of Compiled Laws.

¹⁰⁸ *Colonial & U. S. Mtg. Co. v. Bradley*, 4 S. D. 158, 55 N. W. 1108, decided under § 2590, Compiled Laws.

¹⁰⁹ *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917, decided under ch. 3 Acts 1893.

mitting a married woman to contract as a *feme sole*,¹¹⁰ a recovery may be had against her on a note of her husband's which she signs as surety.¹¹¹ In Canada, under the Married Woman's Act of 1872, a married woman will be liable on a note, indorsed by her for the accommodation of her husband, she being possessed of a separate estate, and credit being extended to her husband on the faith of such separate estate and her indorsement in reference thereto.¹¹² Again, where by a judgment of a court, pursuant to statute, a married woman is empowered to "make contracts as a *feme sole*," the effect is to remove the disability of coverture and gives power to make any lawful contract and render her subject to all the remedies to which she would have been subject if unmarried, and coverture is no defense to her contract binding herself as surety on a note.¹¹³ In Nebraska a married woman may become surety for her husband and the extension of time on his past due indebtedness is a sufficient consideration.¹¹⁴ So she has been held liable on such a note, though she personally received no consideration therefor, the contemporaneous loaning of money to her husband being held a sufficient consideration for a note so executed by her pledging her separate estate.¹¹⁵ Again the circumstances in connection with the execution of the note may be such as to show that she was in reality the principal, or that she received the consideration or that it inured to the benefit of her separate estate, in which case she will be liable in most jurisdictions. So the defense that a note was given to secure a debt of the husband has been held not available, where the latter, who was the owner of the land, was indebted to a third person and an arrangement was made whereby he was to convey such land to his wife, who was to pay a certain sum in cash to him and to give a note to the debtor for the balance of the consideration, the amount of such note being the same as the debt.¹¹⁶ And where a note was given to one holding a mortgage on personalty bought by her husband for the purpose of discharging the lien, she

¹¹⁰ Mo. Rev. Stat. 1889, § 6864.

¹¹¹ Grady v. Campbell, 78 Mo. App. 502, 2 Mo. A. Rep. 276. See Sater v. Hunt, 66 Mo. App. 527; Moeckel v. Heim, 46 Mo. App. 340.

¹¹² Frazee v. McFarland, 43 Up. Can. Q. B. 281, decided under 35 Vict. Ch. 160.

¹¹³ Hart v. Grigsby, 14 Bush (Ky.) 542. See Skinner v. Carr, 51 S. W.

799, 21 Ky. Law Rep. 525; Syperst v. Harrison, 10 Ky. Law Rep. 1052, 11 S. W. 435.

¹¹⁴ Smith v. Spalding, 40 Neb. 339, 58 N. W. 952.

¹¹⁵ Briggs v. Beatrice First Nat. Bank, 41 Neb. 17, 59 N. W. 351.

¹¹⁶ Strickland v. Gray, 98 Ga. 667, 27 S. E. 155.

was held liable, it appearing that she did not sign the note as surety for her husband and that the debt which she promised to pay was really contracted by her and not by him.¹¹⁷ So she may be liable where any part of the consideration moved to her or was for her benefit.¹¹⁸ Thus a note is not within a statute forbidding a married woman to enter into any contract of suretyship, where it was given in payment of fees for preparing a transcript upon appeal from a judgment against her husband, where it appears that judgments of the wife against her husband will be given a priority in case of a reversal.¹¹⁹ And she has been held liable where she joins with her husband in a note as a partner,¹²⁰ or where the proceeds were used in the business of a corporation of which she owned the stock.¹²¹ And she cannot defeat a recovery on a note for money borrowed by her to pay the indebtedness of another unless the transaction was merely colorable and for the purpose of evading the statute forbidding her to become a surety,¹²² or where the note was given for the purpose of discharging a debt upon property which was in substance her own.¹²³

§ 48. **Same subject—Bona fide holders.**—Some discussion has arisen as to the liability of a married woman to a *bona fide* holder of a note which she claims to have signed as surety. In most of the states statutes have been passed, as we have already stated, which enlarge the power of a married woman to contract, and in pursuance of which she may, in many cases, execute a note as principal, or even as surety, and it is in those states in which she is disqualified from acting as surety, but in which she may contract as principal that the question has arisen. In such a case it would seem that if she signs a note apparently as a joint maker, and there is nothing on the face of the paper indicating that she has signed other than as a principal, she cannot defeat recovery thereon in an action by a *bona fide* holder for value and without notice of any defense thereto. So it has been declared that, where a wife signs a note as co-maker with her husband,

¹¹⁷ Jones v. Holt, 64 N. H. 546, 15 Atl. 214. Bank, 49 S. W. 183, 20 Ky. Law Rep. 1273.

¹¹⁸ Morningstar v. Hardwick, 3 Ind. App. 431, 29 N. E. 929.

¹¹⁹ Morningstar v. Hardwick, 3 Ind. App. 431, 29 N. E. 929.

¹²⁰ Compton v. Smith, 120 Ala. 233, 25 So. 300.

¹²¹ Williams v. Farmers' & D.

¹²² National Bank v. Carlton, 96 Ga. 469, 23 S. E. 388. See Villa Rica Lumber Co. v. Paratain, 92 Ga. 370, 17 S. E. 340.

¹²³ Daniel v. Royce, 96 Ga. 566, 23 S. E. 493.

there being nothing on its face to indicate that she signed as surety, and places it in the hands of the payees, she arms them with the power to negotiate it to an innocent purchaser for value, without notice of any defense, so as to cut off the defense that she was a mere surety on the note, though the code declares that she cannot directly or indirectly become surety for her husband.¹²⁴ And in Georgia it is decided that the defense of non-liability on the ground that the defendant, a married woman, signed as surety for another, is not available against an indorsee of a note which a married woman signed as joint maker with another to secure the latter's debt, where the indorsee took it for value, before due, in good faith and without notice.¹²⁵ In other decisions, however, a contrary view is taken. So in Indiana it has been determined that where a statute declares a contract of suretyship void, a married woman is not estopped from showing that she signed as surety and that the note is invalid as to her, by the fact that the note signed by her and her husband was payable in bank and has passed into the hands of an innocent holder.¹²⁶ And it has been determined in Michigan that it will be a defense against a *bona fide* holder of a note given by a married woman, that such note was given without any consideration to her, but at the request of her husband and to secure his performance of a contract and agreement of purchase made by him.¹²⁷ And in Canada, it is held that, as a married woman cannot by law bind herself to pay the debt of her husband, she may show the invalidity of a note executed by her husband in her name for a debt of a corporation of which he is the owner, though he had been authorized by her to sign said note in her name.¹²⁸

§ 49. Rules as to determining whether principal or surety.

Whether or not a married woman is surety on a promissory note or other obligation is to be determined in Indiana, not from the form of the contract, nor from the basis upon which the transaction was

¹²⁴ Scott v. Taul, 115 Ala. 529, 22 So. 447. See code as to right to contract. Code 1886, § 2349.

¹²⁵ Howard v. Simpkins, 70 Ga. 322. See also, Venable v. Stewart, 102 Ga. 208, 29 S. E. 181; Strickland v. Vance, 99 Ga. 531, 27 S. E. 152, 59 Am. St. R. 241; Laster v. Stewart, 89 Ga. 181, 15 S. E. 42; Strauss v. Friend, 73 Ga. 782.

¹²⁶ Leschen v. Guy, 149 Ind. 17, 48 N. E. 344, decided under 3 Burns' R. S. (1894), § 6964.

¹²⁷ Waterbury v. Andrews, 67 Mich. 281, 34 N. W. 575. See Emery v. Lord, 26 Mich. 431; DeVries v. Conklin, 22 Mich. 255.

¹²⁸ MacLean v. O'Brien, Rap. Jud. Que. 12 C. S. 110.

had, but from the inquiry as to whether she received in person or in benefit to her estate the consideration upon which the contract depends.¹²⁹ And in Kentucky it is decided that although a wife's name may first appear on a note, the court will look to the substance, and if in fact the contract of the wife is an attempted assumption by her of the debt of another, she will not be held liable unless she binds herself in the statutory form.¹³⁰ So where notes were signed by a married woman as "principal," and by her husband as "surety," these words following the names of the respective payors, and the wife when sued pleaded her coverture in bar of recovery on a debt which she alleged was the debt of her husband and a mere renewal of an old note for money borrowed by her husband of the payee, it was held that she was not bound thereby, the fact that she was designated as "principal" being immaterial.¹³¹ In Nebraska, in order to render a married woman liable on such a note, it must have been signed by her with the intention to bind her individual property for the payment, where it does not relate to her separate estate or business.¹³² But where the evidence showed that the woman signed as surety a note given for professional services rendered to her; that while her husband enjoyed a good practice, all the property was in her name; that she had previously signed notes as surety; that she knew the object of giving this note, and that it was necessary for her husband to give security for it; that her owning the property was the reason urged on the payee for accepting her as surety, although this conversation was not in her presence, and she testified that she presumed she was asked to sign the note because she owned the property, and that she believed that that was the reason why her signature was desired, it was decided that this was sufficient evidence to sustain a verdict against her and that the

¹²⁹ *Guy v. Liberenz*, 160 Ind. 524, 65 N. E. 186, 188, per Monks, J.; *Cook v. Buhrlage*, 159 Ind. 162, 64 N. E. 603; *Andrysiak v. Satkowski*, 159 Ind. 428, 63 N. E. 854; *Field v. Noblett*, 154 Ind. 357, 360, 56 N. E. 841; *Leschen v. Guy*, 149 Ind. 17, 48 N. E. 344.

¹³⁰ *Crumbaugh v. Postell*, 20 Ky. Law Rep. 1366, 49 S. W. 334; quoted in *Planters' Bank & Trust Co. v. Major*, 25 Ky. Law Rep. 702.

¹³¹ *Crumbaugh v. Postell*, 20 Ky. Law Rep. 1366, 49 S. W. 334. The

statute in force when the notes were executed provided that the wife's estate shall not be liable "upon a contract made after marriage, to answer for the debt, default or misdoing of another, her husband included, unless such estate shall have been set apart for the purpose by deed of mortgage or other conveyance," etc. Ky. St. § 2127.

¹³² *Smith v. Bond*, 56 Neb. 529, 76 N. W. 1062; *Eckman v. Scott*, 34 Neb. 817, 52 N. W. 822.

jury was not bound by her direct denial of the fact that she did intend to bind her separate property, and it had a right to believe from the evidence that when she signed the note, owning all the property of the family, and knowing that her signature was desired because of that fact, her intention was to charge that property.¹³³

§ 50. Liability as acceptor.—At common law a married woman could not become liable as an acceptor.¹³⁴ And it has been decided that under a statute in New Jersey she is disabled from accepting a bill of exchange.¹³⁵ So under a code in Georgia, which provided that a married woman cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, it is decided that she cannot become an accommodation acceptor, though she may be a free trader.¹³⁶

§ 51. Indorsement by married woman—Common law rule.—At common law a married woman could not, acting for herself, indorse a note or bill, payable to her, and the indorsee in such a case acquired no title through her indorsement in her own name.¹³⁷ It is a general rule of law that a bill or note made payable to a married woman, whose husband is under no civil incapacity or disability, is by operation of law payable to the husband, who may indorse, negotiate or sue upon it in his own name; for the legal existence of the wife being suspended during the coverture, or rather incorporated into that of her husband, a promise to her during coverture is a promise directly to the husband.¹³⁸ A married woman has in contemplation of law no separate existence, her husband and herself being in contemplation of law one person.¹³⁹ So it has been declared that "there is no doubt of the general rule that the husband is entitled to all the personal property which belonged to his wife at the time of the marriage, or which

¹³³ Spätz v. Martin, 46 Neb. 917, 65 N. W. 1063.

¹³⁴ Mudge v. Bullock, 83 Ill. 22; Lee Bank v. Satterlee, 24 N. Y. Sup. Ct. 1.

¹³⁵ Cooley v. Barcroft, 43 N. J. L. 363, decided under N. J. Rev. St., p. 637, § 5.

¹³⁶ Madden v. Blain, 86 Ga. 780, 13 S. E. 128, decided under §§ 1760, 1783, of the Georgia Code.

¹³⁷ Mudge v. Bullock, 83 Ill. 22; Lee Bank v. Satterlee, 24 N. Y. Sup. Ct. 1.

¹³⁸ Roland v. Logan, 18 Ala. 307; Brewer v. Hobbs, 17 Ky. L. Rep. 134, 30 S. W. 605; Hancock v. Joy, 41 Me. 568; Savage v. King, 17 Me. 301; Barlow v. Bishop, 1 East 432. Compare Cotes v. Davis, 1 Camp. 485.

¹³⁹ Howe v. Wildes, 34 Me. 566.

she may acquire during coverture; and it necessarily follows that where that property consists of negotiable paper, payable to her or her order, it is, in legal effect, payable to her husband, and an effectual transfer by judgment can, as a general rule, be made only in his name."¹⁴⁰ So where a note was given to a wife, knowing her to be such, with the intention that she should indorse it to the plaintiff in payment of a debt which she owed him, in the course of carrying on a trade in her own name by the consent of her husband, the property in the note was held to vest in the husband and an indorsement in her own name was held to pass no interest to the plaintiff.¹⁴¹ And a *feme covert* cannot indorse a bill of exchange, the right thereto being in point of law vested in the husband, and the wife having no power to dispose of it.¹⁴² And where a promissory note was made and given by a husband to his wife before their marriage, and subsequently thereto was delivered to the maker, who kept it for the benefit of his wife till a few weeks before his death, the note became a mere nullity and could not be revived by the death of the husband.¹⁴³ Again, where a note was payable to a *feme sole*, or order, and she married, the note became her husband's property, and she could not indorse it over while she was *covert*.¹⁴³ *

§ 52. **Same subject—Assent of husband.**—No power exists in a married woman to assign a note executed to her either before or after marriage, in the absence of authority by or assent of the husband, or of a statute empowering her so to act.¹⁴⁴ But if a bill or note be made payable to a married woman, although the title to it vests in the husband, if he sees fit to assert it, yet he may allow her to indorse it in her own name, and if he assents to her indorsement of it (which may be presumed from circumstances as well as expressly proved), her indorsee acquires a good title not only as against the husband, but also against the parties to the bill.¹⁴⁵ And a husband may subsequently

¹⁴⁰ *Miller v. Delameter*, 12 Wend. (N. Y.) 433, per Sutherland, J.

¹⁴¹ *Barlow v. Bishop*, 1 East. 432.

¹⁴² *Connor v. Martin*, 1 Strange 516.

¹⁴³ *Abbott v. Winchester*, 105 Mass. 115.

¹⁴³* *Rawlinson v. Stone*, 3 Wils. 5, citing 1 Strange 516.

¹⁴⁴ *Hall v. Campbell*, 5 Ky. Law

Rep. 247; *Theurer v. Schmidt*, 10 La. Ann. 293; *Stevens v. Beals*, 64 Mass. (10 Cush.) 291, 57 Am. Dec. 108; *Vann v. Edwards*, 128 N. C. 425, 39 S. E. 66.

¹⁴⁵ *Alabama*.—*Roland v. Logan*, 18 Ala. 307.

Massachusetts.—*Stevens v. Beals*, 64 Mass. (10 Cush.) 291, 57 Am. Dec. 108.

satisfy an assignment of a bill or note by his wife.¹⁴⁶ And it is declared that: "It is well settled that if the husband give the wife express authority to indorse a note payable to her or order, her indorsement is good to transfer the note, and may be made in her own name, though she acts by authority of the husband and as his agent."¹⁴⁷ So where neither the assent of the husband, nor circumstances which authorized the wife to make the transfer of a note payable to her order, are alleged in the petition by her indorsee in an action against the maker, it is decided that a plea in abatement of the coverture of the indorser is good.¹⁴⁸ In this connection it has been decided that if a husband gives his wife authority to sell her personal property and take for it a promissory note payable to herself or order, he gives her authority to indorse the note according to its tenor, and to hold the proceeds to her own use, and until this authority is revoked her indorsement of the note will be good to pass title in it, though not to bind either her or her husband as indorser.¹⁴⁹ And a married woman may make a valid indorsement of a note by a name different from that of her husband, and an authority so to endorse may be presumed from all the circumstances of the case.¹⁵⁰ Where, however, the husband went to California, and his wife continued to carry on his business, and sold a part of the furniture and fixtures, taking notes payable to herself, which she afterwards transferred, the fact that the husband may have consented that she might carry on the business does not raise a legal presumption that she was authorized to transfer the notes, but the jury must decide whether the evidence would fairly bring their minds to this conclusion.¹⁵¹ If the statute prescribes a form of assent by the hus-

Missouri.—Menkins v. Heringhi, 17 Mo. 297.

New Hampshire.—Russ v. George, 45 N. H. 467.

English.—Prestwick v. Marshall, 4 C. & P. 594. The indorsement by a married woman, with her husband's assent, of a bill of exchange drawn by her is binding upon him, and will pass the interest in the bill to the endorsee so as to enable him to sue the acceptor. Prestwick v. Marshall, 4 C. & P. 594.

¹⁴⁶ Hall v. Campbell, 5 Ky. Law Rep. 247.

¹⁴⁷ George v. Cutting, 46 N. H. 130,

88 Am. Dec. 195, per Perley, C. J. Citing Brown v. Dunnell, 49 Me. 425; Stevens v. Beal, 64 Mass. (10 Cush.) 291, 57 Am. Dec. 108; Leicester v. Biggs, 1 Taunt. 367; Prestwick v. Marshall, 1 Bing. 565, 4 C. & P. 594.

¹⁴⁸ Hemingway v. Mathews, 10 Tex. 207.

¹⁴⁹ George v. Cutting, 46 N. H. 130, 88 Am. Dec. 195.

¹⁵⁰ Miller v. Delameter, 12 Wend. (N. Y.) 433.

¹⁵¹ Krebs v. O'Grady, 23 Cal. 726, 58 Am. Dec. 312.

band there should be a compliance therewith. So where a written assent of the husband is by law expressly required to a conveyance of a wife's real or personal estate, or to an attempt to charge her separate estate, an indorsement of a note belonging to her is void for the purpose of transferring title or to charge her separate estate where made without his written assent, a verbal assent not being sufficient.¹⁵² In Alabama it is decided that under the code a transfer by a married woman of a check payable to her is illegal and inoperative to pass her title to it, unless the transfer was made with the consent of both the husband and wife.¹⁵³

§ 53. **Same subject—Under particular statutes.**—Under a statutory provision giving to married women the right to hold all personal property acquired by them before coverture to their sole and separate use, a note given to a married woman does not become null and void by her marriage with the maker, and she may sell the note to a third party or transfer it for collection.¹⁵⁴ And under a statute authorizing a married woman to make contracts and to sue and be sued in the same manner as if she were *sole*, with the restriction only that she cannot make contracts with her husband, she will be liable on her indorsement of a promissory note made by a partnership, of which her husband is a member, for the accommodation of the firm.¹⁵⁵ And under this same statute it has been decided that where a married woman, at her husband's request, indorsed a blank promissory note and gave it to him, with the knowledge that he intended to fill up the blanks and use the same; which he did, and indorsed it by writing his name above hers, it was decided in a petition in equity to vacate insolvency proceedings brought against her, wherein she claimed that the note was not a valid claim against her, that she was in a position of an indorser, and that the note having been transferred to the holders with her consent for value, she could not deny its validity as against them, and was liable as an indorser.¹⁵⁶ Under an Indiana statute, where a mar-

¹⁵² *Walton v. Bristol*, 125 N. C. 419, 34 S. E. 544, decided under N. C. Const., Art. 10, § 6 and §§ 1826, 1835, of the Code. See *Hurt v. Cook*, 151 Mo. 416, 52 S. W. 396, decided under Rev. St. 1889, § 6869.

¹⁵³ *First Nat. Bank v. Nelson*, 105 Ala. 180, 199, 16 So. 707, decided under Ala. Code, § 2348.

¹⁵⁴ *Spencer v. Stockwell*, 76 Vt. 176, 56 Atl. 661, decided under Vt. Laws 1884, p. 79, No. 84.

¹⁵⁵ *Middleborough Nat. Bank v. Cole*, 191 Mass. 168, 77 N. E. 781, decided under Mass. Rev. Laws, c. 73, §§ 82, 83; *Kenworthy v. Sawyer*, 125 Mass. 28, decided under Mass. St. 1874, c. 184.

¹⁵⁶ *Binney v. Globe Nat. Bank*, 150 Mass. 574, 23 N. E. 380, 6 L. R. A. 379, decided under St. 1874, c. 184, compare *Hunt v. Cook*, 151 Mo. 416, 52 S. W. 396.

ried woman indorsed a promissory note, she and her separate estate, real and personal, would also be liable on her contract.¹⁵⁷ And also, under an early statute in New York state, a recovery could be had where a married woman had indorsed a bill or note.¹⁵⁸

§ 54. **Same subject—General rule.**—A married woman to whose order a note is made payable can confer no right on an indorsee by her indorsement unless done under the forms provided by law, or with the implied or express assent of the husband, or under the special circumstances which would authorize her to employ her own or the community property for the benefit and preservation of her separate property, or for the support of herself and her children, or under circumstances which would authorize her separate action.¹⁵⁹ So it has been decided that an action is not maintainable against a married woman where it was without benefit or consideration to her separate estate, though the plaintiff be a *bona fide* holder for value.¹⁶⁰

§ 55. **Woman in business—Sole trader, etc.**—In most of the states the right of a married woman to engage in business in her own name and to execute a note or other obligation in connection therewith has been recognized. So in Illinois it is decided that where a married woman executes notes for goods purchased by her as her own property, for her use in a business carried on in her own name, without the interference of her husband and for her exclusive benefit, her coverture is no defense to an action thereon.¹⁶¹ So in Louisiana it has been held that a wife, who is a public merchant, separated in property from her husband, can not set up the plea that a draft accepted by her did not enure to her personal benefit.¹⁶² And in Michigan a debt for property purchased has been declared to be a valid liability against a married woman, and she is liable on a note given therefor.¹⁶³ In South Carolina a *feme sole* trader has been held bound to a third person by her indorsement to him of a note drawn by her husband payable to herself.¹⁶⁴ Under the California act of 1852,

¹⁵⁷ Mathes v. Shank, 94 Ind. 501, decided under Act 1879, p. 160.

¹⁵⁸ Lee Bank v. Satterlee, 24 N. Y. Super. Ct. 1; N. Y. Laws 1848, p. 307, ch. 200; N. Y. Laws 1849, p. 528, ch. 375.

¹⁵⁹ Hemingway v. Mathews, 10 Tex. (S. C.) 326. 207.

¹⁶⁰ Loweree v. Babcock, 8 Abb. Prac. N. S. (N. Y.) 255.

¹⁶¹ Nispel v. Laparle, 74 Ill. 306.

¹⁶² Levy v. Rose, 17 La. Ann. 113.

¹⁶³ Gillam v. Boynton, 36 Mich. 235.

¹⁶⁴ Wilthaus v. Ludecus, 5 Rich. L.

authorizing a married woman to transact business in her own name as a sole trader, she was liable on a promissory note given by her in her own name for a part of the purchase money for a tract of land sold and conveyed to her.¹⁶⁵ Under a statute in Colorado it is decided that a married woman carrying on business as a trader is bound by a note the consideration of which went to the benefit of her separate estate.¹⁶⁶ So coverture is no defense, under the Indiana act of 1876, to a note given by a married woman for money borrowed by her for the purpose of carrying on a separate trade and business.¹⁶⁷ In Mississippi, under the code of 1871, a married woman could not execute a valid promissory note except in the course of her trade and business as engaged in by her.¹⁶⁸ In New York, under the act of March 12, 1860, authorizing a married woman "to carry on any trade or business, or perform any labor or services, on her sole and separate account," she was enabled to embark in any trade or business and to give her checks and other commercial paper, and if she accepted the benefits of this act she also accepted its disadvantages, and in a mercantile business assumed the ordinary hazards incident to it, and to which merchants, in the course of whose business commercial paper is ordinarily issued, are exposed by their notes or checks, by accident or wrongful design, getting into the hands of *bona fide* holders, and for value, before maturity.¹⁶⁹ Under this act she was also held liable in another case on her note given for goods purchased by her to be used in her business.¹⁷⁰ But where there was no written obligation on the part of the wife, nor written assent of the husband, nor his assent recorded as required by statute to enable the wife to carry on business, it has been decided that, in an action on a note executed by the husband as agent, he carrying on a mercantile business for her, she is not estopped to deny her husband's authority to execute a note and may plead coverture.¹⁷¹ And the fact that a married woman is the owner of a farm does not show that she conducted a separate business so as to render her liable in Nebraska on a note given by her as surety

¹⁶⁵ Camden v. Mullen, 29 Cal. 564.

¹⁶⁸ Nelson v. Miller, 52 Miss. 410, decided under Code 1871, § 1780.

¹⁶⁶ Barnes v. De France, 2 Colo. 294, decided under Rev. St. 455, § 6, providing that a married woman could make contracts affecting her business or trade to same extent as if she were a *feme sole*.

¹⁶⁹ Lewis v. Woods, 4 Daly (N. Y.) 241.

¹⁷⁰ Barton v. Beer, 35 Barb. (N. Y.) 78.

¹⁷¹ Troy Fertilizer Co. v. Zachry, 114 Ala. 177, 21 So. 471.

¹⁶⁷ Wallace v. Rowley, 91 Ind. 586, decided under Ind. Act 1876, p. 160.

for her husband where he had entire control of the farm and she received no part of the rents or profits.¹⁷²

§ 56. *Separate estate, benefit, etc.*—A married woman's capacity to contract is only enlarged in the case specifically mentioned in the statute, and in other cases her coverture is a defense to an action on a note executed by her.¹⁷³ In most of the states this defense may be set up by her in such an action, where the consideration therefor, either in whole or in part, did not go to her benefit or to the benefit of her separate estate.¹⁷⁴

¹⁷² *Union Stock Yards Nat. Bank v. Coffman*, 101 Iowa 594, 70 N. W. 693.

¹⁷³ *Ankeney v. Hannon*, 147 U. S. 118, 37 L. Ed. 105, 13 Sup. Ct. 206, 47 Alb. L. J. 150.

¹⁷⁴ *Federal*.—*Williams v. Reid*, 18 Wash. L. Rep. (D. C.) 607, holding that a note cannot be enforced against a married woman in an action at law where it was given by her for furniture which she purchased and which was used in furnishing a house which did not belong to her separate statutory estate.

Indiana.—*Thomas v. Passage*, 54 Ind. 106, holding that a note by a married woman based on a promise to pay for medical services rendered to her is not binding on her personally and under statute she may only charge her separate estate by such contracts as are conscionable and for the betterment of such estate.

Mississippi.—*Hendrick v. Foote*, 57 Miss. 117, holding that where a married woman gives a note for the purchase price of land, the note imposes no personal obligation on her and no decree *in personam* can be obtained against her by the vendor or any subsequent holder of the note.

Missouri.—*Hagerman v. Sutton*, 91 Mo. 519, 4 S. E. 73, holding that where a married woman exe-

cutes a note and signs a mortgage of land in conjunction with her husband, her act in signing the note, she not being possessed of a separate estate in the land granted, gives her act no validity either in law or equity.

Nebraska.—*Barnum v. Young*, 10 Neb. 308, 4 N. W. 1054; citing *Hale v. Christy*, 8 Neb. 264; *Davis v. First Nat. Bank*, 5 Neb. 242, and holding that no recovery can be had against a married woman on her note except it be given with reference to and upon the faith and credit of her separate property.

New Hampshire.—*Shannon v. Canney*, 44 N. H. 592, holding that a married woman is not bound by a promissory note given during coverture and the fact that at the time of her marriage she possessed property by inheritance is of no avail where it neither appears that she held it to her sole and separate use or that the promise was made in respect to such property. See *Ames v. Foster*, 42 N. H. 381; *Bailey v. Pearson*, 29 N. H. 77.

New York.—*Eylers v. Coens*, 39 N. Y. St. R. 789, 15 N. Y. Supp. 584, holding that a note not given for the benefit of the separate estate of the wife was uncollectible.

North Carolina.—*Pippen v. Weson*, 74 N. C. 437, decided under

§ 57. Same subject continued.—Where it appears that the consideration for a note was received by her, or that it was for the use or benefit of her separate estate, she cannot under the laws in force in most jurisdictions, defeat a recovery thereon.^{174*} So her coverture has been held no defense to an action on a note executed by her for property purchased by her,¹⁷⁵ as where the note was given for the purchase price of land,¹⁷⁶ or for a sewing-machine purchased for her own use,¹⁷⁷ or for goods which her husband purchased as her agent and

Const., Art. X, § 6; Acts of 1871-72, ch. 193 (Bat. Rev. Ch. 691), holding that a married woman has no power to enter into an executory contract even with the written consent of her husband, unless her separate estate is charged with it, either expressly or by necessary implication arising out of the nature or consideration of the contract, showing it was for her benefit.

Ohio.—Jenz v. Gugel, 26 Ohio St. 527, decided under 71 Ohio L. 47, and holding that a married woman was not liable on her note whether executed before or after the date of the act March 30, 1874, unless it appeared that she had separate property subject to be charged therewith.

Pennsylvania.—Heugh v. Jones, 32 Pa. St. 432, holding that where a note is given for money borrowed by a married woman for the avowed purpose of improving her separate estate she is not liable under the act of 1848 unless it be shown further that the money was applied to that object. Sellars v. Heinbaugh, 117 Pa. St. 218, 11 Atl. 550, 20 W. N. C. 183, holding that under this act she is not liable on a judgment note for money borrowed to improve her separate estate, even though so applied.

South Carolina.—Howard v. Kitchens, 31 S. C. 490, 10 S. E. 224 holding that, under the provision of the statute in South Carolina, permit-

ting a married woman to contract in respect to her separate estate, (Gen. St., § 2037) where a part of the money was borrowed for her own use, it was such a contract and enforceable against her estate, but that she was not bound as to such part of the note as was for necessary expenses for her daughter and for which her husband was liable. It was said in this case that: "The defense to this action may seem ungracious to use a mild term. It appears that the defendant herself received part of this money at least, and that the remainder was expended for the benefit of her sick daughter and at the request of the defendant. Here are strong reasons why the defense should never have been interposed. But these ungracious surroundings can have no influence upon a court whose sole province is to determine controversies according to law." Per Mr. Chief Justice Simpson.

^{174*} Scott v. Collier (Ind. 1906), 78 N. E. 184, aff'g 77 N. E. 666. See also cases in following notes.

¹⁷⁵ Lane v. Schlemmer, 114 Ind. 296, 15 N. E. 454; Rothschild v. Raab, 93 Ind. 488; Wulschner v. Sells, 87 Ind. 71, decided under acts 1879, p. 160, § 3.

¹⁷⁶ Packer v. Taylor, 12 Pa. Co. Ct. 521, 2 Pa. Dist. R. 443, decided under Pa. Act, June 3, 1887.

¹⁷⁷ Baker v. Singer Mfg. Co., 122 Pa. St. 363, 15 Atl. 458, 22 W. N. C. 366, 19 Pitts. L. J. (N. S.) 347.

which were used for the benefit of her separate estate.¹⁷⁸ And a promissory note executed by a married woman in consideration of the sale to her of stocks, is held to be a debt contracted for the benefit of her separate estate and for which she is liable.¹⁷⁹ Nor can she defeat recovery on a note given by her for an article which was purchased for use in and about her separate estate, although her husband managed such estate.¹⁸⁰ So she has been held liable on a note given by her for a horse purchased by her to be used on a farm which she owned,¹⁸¹ and likewise on a note given in payment for a mule to be so used,¹⁸² or for agricultural implements to be used on her farm,¹⁸³ or for materials to be used in the necessary repair of her house,¹⁸⁴ or for lumber to be used in the construction of a building on her separate estate,¹⁸⁵ or to secure the payment of money loaned to her to pay off a mortgage on her property,¹⁸⁶ or to pay rent or to release her separate property from the lien of the levy thereon made by the landlord for the payment of rent which was due on land occupied by her husband and the family.¹⁸⁷ Under the Miss. Rev. Code of 1857¹⁸⁸ it was decided that a married woman could not defeat recovery on a note, on the ground of coverture, given for the money and supplies furnished "for the use and benefit of herself and family."¹⁸⁹ And where a married woman executes a note to a certain creditor of her husband for the amount of a note due from the latter to the former and surrendered, and to relieve herself from an attack upon property conveyed by her husband to her on the ground that such conveyance was voluntary and in fraud of creditors, there is sufficient consideration to render it a

¹⁷⁸ *Wolf v. Duvall* (Ark.), 13 S. W. 728, decided under Mans. Dig., §§ 4625, 4626, 4630.

¹⁷⁹ *Williams v. King*, 43 Conn. 569.

¹⁸⁰ *Dennis v. Grove*, 4 Pa. Super. Ct. 480, decided under act June 3, 1887.

¹⁸¹ *Mitchell v. Smith*, 32 Iowa 484, decided under Code, § 2506.

¹⁸² *Allen v. Long*, 19 Ky. Law Rep. 488, 41 S. W. 17, decided under Ky. Gen. St., ch. 52, art. 2, § 2.

¹⁸³ *Allen v. Johnson*, 13 Pa. Co. Ct. 218 holding that since act June 3, 1887, the burden is on her to show her contract void.

¹⁸⁴ *Baird v. Bruning*, 84 Ky. 645.

¹⁸⁵ *Ferguson v. Harris*, 39 S. C. 323, 17 S. E. 782.

¹⁸⁶ *Taylor v. American Freehold Land Mtg. Co.*, 106 Ga. 238, 32 S. E. 153.

¹⁸⁷ *Karns v. Moore*, 5 Pa. Super. Ct. 381.

¹⁸⁸ Art. 25, p. 336, providing in part that "all contracts made by the wife or by the husband with her consent for family supplies or necessaries * * * shall be binding on her and satisfaction may be had out of her separate property."

¹⁸⁹ *Pendleton v. Galbreath*, 45 Miss. 43.

contract in relation to her separate property.¹⁹⁰ In Louisiana, where a note was executed by a married woman under the authorization of the district judge in accordance with the act of 1855, it may be enforced against her by a transferee without showing that it enured to her advantage or benefit,¹⁹¹ for even as to such a holder, where the objection arises from the incapacity of the party, no additional effect to the obligation can be given by indorsement.¹⁹²

§ 58. Same subject continued—Note for borrowed money.—Where money is borrowed for the benefit or use of a married woman, or for the benefit of her separate estate, she is also liable on a note given therefor.¹⁹³ And though the money was not applied to the benefit of her separate estate, she cannot defeat recovery thereon.¹⁹⁴ Thus it has been so decided where the money was loaned to her on the representation that it was for her sole and separate use, when in fact it was borrowed for the use of her husband.¹⁹⁵ So where a married woman was carrying on the business of farming, through her husband as her agent, and she borrowed money in her own name and received it herself and then handed it over to her husband, who was carrying on the farm, it thus became part of the property employed in her business, and the fact that her husband wasted or misused it does not alter the liability of the wife, who borrowed it. The money borrowed became part of her separate estate by the act of borrowing, and her promise to pay related to her separate estate, and she was liable on note given therefor.¹⁹⁶

§ 59. Same subject—Intention as affecting.—An intention to charge the separate estate of a married woman, as evidenced by the mere execution of a note is held not sufficient, where the note does

¹⁹⁰ *Whelpley v. Stoughton*, 112 Mich. 595, 70 N. W. 1098; 121 Mich. 163, 79 N. W. 1098.

¹⁹¹ *Miller v. Wisner*, 22 La. Ann. 457.

¹⁹² *Conrad v. Le Blanc*, 29 La. Ann. 123; *Sprigg v. Bossier*, 5 Mart. (N. S. La.) 54.

¹⁹³ *Sidway v. Nichol*, 62 Ark. 146, 34 S. W. 529, decided under *Sand. & H. (Ark.) Dig.*, §§4945-4951; *Todd v. Bailey*, 58 N. J. L. 10, 32 Atl. 696;

Steffen v. Smith, 159 Pa. St. 207, 28 Atl. 295, 33 W. N. C. 520, decided under Pa. Act June 3, 1887.

¹⁹⁴ *McVey v. Cantrell*, 70 N. Y. 295, 26 Am. Rep. 605. See *Scott v. Otis*, 25 Hun (N. Y.) 33. See, also, *Rood v. Wright*, 124 Ga. 849, 53 S. E. 390.

¹⁹⁵ *Till v. Collier*, 27 Ind. App. 333, 61 N. E. 203; *Bratton v. Lowry*, 39 S. C. 383, 17 S. E. 832.

¹⁹⁶ *Smith v. Kennedy*, 13 Hun (N. Y.) 9.

not, upon its face, show any such purpose, there being no independent agreement to that effect, and the complaint showing no contract to charge her separate estate.¹⁹⁷ So it has been declared that "a promissory note in the ordinary form, signed by a married woman, payable to the order of her husband and indorsed and presented for discount by him, is not a representation upon its face that the note is made to raise money for her. No implication, presumption or impression that she was to be benefited by it in her business or estate could be drawn from its form and from the fact that she had given it to her husband for the purpose of having it discounted. To give such a note vitality and effect it must be made to appear, by evidence *aliunde* the instrument, that it was made in her separate business, or for the benefit of her separate estate. The fact that she owns a separate estate is not alone sufficient."¹⁹⁸ And in another case it is said: "It is claimed that, when a *feme covert* executes a note, the presumption arises that she intended thereby to charge her separate estate or property. To this doctrine we cannot assent. A married woman cannot contract generally, and the burden is cast upon the one seeking to enforce a contract against her to show that it is an obligation she was authorized to make under the statute."¹⁹⁹ So where a note was signed by a married woman as surety for her husband, but there was no intention expressed in the instrument to create a charge upon her separate estate, it was decided that the mere existence of such an intention on her part did not operate to render the note binding on her, and she might avail herself of the defense of coverture.²⁰⁰ And it has been held that where a note is executed jointly by a husband and wife, but is silent as to the separate estate of the wife, parol evidence is not admissible to show that it was intended to be such a charge and coverture is a good defense.²⁰¹ In other decisions, however, this doctrine is not accepted, it being declared that when a married woman gives her promissory note the presumption of law arises that she

¹⁹⁷ *Hodson v. Davis*, 43 Ind 258. See, also, *Farmers' Bank v. Boyd*, 67 Neb. 497, 93 N. W. 676; *Grand Island B'k'g Co. v. Wright*, 53 Neb. 574, 74 N. W. 82; *Bogert v. Gulick*, 65 Barb. (N. Y.) 322; *Wallace v. Goodlet*, 93 Tenn. 598, 30 S. W. 27; *Litton v. Baldwin*, 8 Humph. (Tenn.) 209, 47 Am. Dec. 605.

¹⁹⁸ *Saratoga County Bank v. Pruyn*,

90 N. Y. 250, 256, per Tracy J. See *Second Nat. Bank v. Miller*, 63 N. Y. 639.

¹⁹⁹ *Grand Island Bk'g Co. v. Wright*, 53 Neb. 574, 74 N. W. 82, per Norval, J.

²⁰⁰ *Yale v. Dederer*, 22 N. Y. 450, 78 Am. Dec. 216.

²⁰¹ *Jordan v. Keeble*, 85 Tenn. 412, 3 S. W. 511.

charges her separate property with the payment thereof,²⁰² which presumption can not be overcome by testimony of the wife that such was not her intention.²⁰² * But where a *feme covert* executes and puts into circulation a negotiable note and places upon its face a statement that it is free from all objection in respect to her condition as a married woman, she is estopped as against an innocent indorsee from denying such statement, unless she shows that by such statement he was not misled.²⁰³ And it is decided that whether a note of a married woman sued on was made with reference to her separate property, trade or business, or upon the faith and credit thereof, and with the intention on her part to thereby bind her separate property, is always a question of fact.²⁰³ * The intention to charge the separate estate may also be presumed from the nature of the transaction.²⁰⁴

§ 60. **What law governs.**—The right to defend an action on a note on the ground of coverture is to be determined by the law in force at the time of its execution.²⁰⁴ * And it is a general rule that a contract for its validity, obligation and construction is to be governed by the law of the place where made.²⁰⁵ So it has been declared that the law of the place of performance does not in any way affect the capacity of a married woman to contract in a state which authorized her to make the contract, unless it is apparent from the terms of the contract that the parties intended to incorporate the laws of the state of performance therein.²⁰⁵ * This rule is applied to the case of a note executed by a married woman residing in Missouri, payable to her son, resident at the time in the state of Indiana. The latter, who was a member of a firm doing a tailoring business, made out the note and mailed it to his mother in Missouri, with a request that she sign it for his accommodation, at the same time writing her of the stringent needs of the firm for money and promising to take up the note at or before maturity;

²⁰² Perkins v. Rowland, 69 Ga. 661.
Burnett v. Hawpe's Ex'r, 25 Gratt. (Va.) 481; see Darnall v. Smith's Adm'r, 26 Gratt. (Va.) 878.

²⁰²* Hershizer v. Florence, 39 Ohio St. 516, 524.

²⁰³ Nott v. Thomson, 35 S. C. 461, 14 S. E. 940; National Exch. Bank v. Cumberland Lumber Co., 100 Tenn. 479, 47 S. W. 85.

²⁰³* Godfrey v. Megahan, 38 Neb. 748, 57 N. W. 284.

²⁰⁴ Yale v. Dederer, 22 N. Y. 456.

²⁰⁴* Lackey v. Boruff, 152 Ind. 371, 53 N. E. 412.

²⁰⁵ Partee v. Silliman, 44 Miss. 272. See Wright v. Pennington, 47 N. J. L. (12 Vroom) 48, 32 Am. Rep. 180; Hanover Nat. Bank v. Howell, 114 N. C. 271, 23 S. E. 1005.

²⁰⁵* Hauck Clothing Co. v. Sharpe, 83 Mo. App. 385, 391.

she signed the note in Missouri and mailed it to her son, to be discounted in Indiana, to enable him to raise money on it; the latter was unable to discount it there and mailed it to plaintiff, indorsing it by writing his name across the back of it, with a request in writing to the plaintiff to let him have more goods, and the latter accepted the note and shipped the goods. The evidence was that the common law of coverture was in force in Indiana, and that if the note was an Indiana contract then it was void for want of capacity in the maker. Under the laws of Missouri, however, the defendant had legal capacity to make the note. The suit to enforce its collection was brought in Missouri, and defendant pleaded coverture, claiming that under the laws of the state of Indiana she had no power to make a personal obligation, and that she had no separate property, and that by reason of these facts said instrument of writing was void and of no effect, and still remained so.²⁰⁶ In this case the court said: "The law of the place of performance does not in any way affect the capacity of a married woman to contract in a state which authorized her to make the contract, unless made with reference to real estate situated in the state of performance, or it is apparent from the terms of the contract that the parties intended to incorporate the laws of the state of performance in the contract. * * * It is contended that the evidence proves that the parties intended to make the note an Indiana contract. What they intended as to an innocent assignee of the note can only be ascertained from the terms of the note and the circumstances attending the execution. These show no more than that the note was to be paid at a bank in Logansport, Indiana. The law presumes that when Mrs. Sharpe signed the note for the accommodation of her son that she did so in good faith, intending to be bound by it. * * * Courts will always validate contracts, where it is possible to do so without doing violence to the terms of the contract, or some well settled principle of law. The respondent signed her name to the note in Missouri, delivered it in Missouri, by mailing it to her son; she made him the payee, with legal authority written in the body of the note, without restrictions or qualifications to sell it where and to whom he would; he exercised this delegated power, this agency, by indorsing and delivering the note to appellant for value; they took it in good faith, gave value for it without notice of any restrictions on the payee as to his authority to endorse and transfer the note. The respondent expressly and directly by her voluntary act put it in the power of her son

²⁰⁶ *Hauck Clothing Co. v. Sharpe*, 83 Mo. App. 385, 391.

to transfer the note to the appellant. If he disobeyed respondent's private instructions, which were never disclosed to plaintiff, and transferred the note to them, she, not the innocent purchaser of the note, should suffer; and even if the general principle (which I do not concede) of the law of place should pronounce this an Indiana contract, the general principle should yield to the peculiar facts and the laws of Missouri should prevail, in order to make valid a contract which the law presumes the respondent intended should be valid when she made it."^{206*} So a note executed by a married woman in New York, of which she is presumed to have been a resident at the time of making it, and which note is valid by the law of that state, may be enforced in another state, though by the law of the latter state she is under a complete common law disability to make any contract.²⁰⁷ And where a note executed by a married woman at the request of her husband, and for his accommodation alone, is by the express law of the state void,^{207*} it was decided in New Jersey that in an action by an indorsee for value, such fact may be shown in defense thereto, though it may appear that the note was payable in and has been transferred to the indorsee in another state, and that by the laws of the latter state a married woman may execute such a note; since the prohibition of the statute cannot be evaded, or the public policy declared by it thwarted by the device of providing that the place of performance shall be in a foreign jurisdiction, where marriage does not curtail a woman's contracting power.²⁰⁸ But it was determined upon a review of this case that the statute was not declaratory of public policy and that where a note is signed in the state of New Jersey, but is passed away and comes first into legal existence in the state of New York, it is in contemplation of law made in the latter jurisdiction. So a note signed by a married woman domiciled in New Jersey, and intrusted by her to her husband, thus giving him power to make for her a contract of suretyship in New York, where it came into legal existence, such a contract being valid in the latter state, by his indorsement and transfer there the wife was held to be as effectually bound to the payee as if she had executed the note in New York, and it was determined that it could be

^{206*} *Hauck Clothing Co. v. Sharpe*, 83 Mo. App. 385, 391-393, per Bland, P. J.

²⁰⁷ *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138.

^{207*} See N. J. Gen. St., p. 2017, § 26, prohibiting a married woman from

becoming an accommodation indorser, guarantor or surety, or from becoming liable on any promise to pay the debt or answer for the default or liability of a third person.

²⁰⁸ *Thompson v. Taylor*, 65 N. J. L. 107, 47 Atl. 544.

enforced against her, though it would have been void if executed in New Jersey.^{208*} And it has been decided that a note signed by a married woman in Tennessee, but delivered and consummated in Ohio, and payable in the latter state, is an Ohio contract, and though it may be valid and enforceable against a married woman in that state, yet such a contract being voidable in Tennessee at the election of a married woman, coverture is a good defense to an action thereon in such state.²⁰⁹

§ 61. **Who may urge.**—The defense of coverture is a personal one and can only be availed of by a married woman and her privies in blood or representation.^{209*} So this defense does not enure to the benefit of the indorser as he, by his indorsement, has guaranteed the capacity of the maker to contract in the manner which by the terms of the instrument she purported to contract.²¹⁰ And it has been declared in

^{208*} *Thompson v. Taylor*, 66 N. J. L. 253, 49 Atl. 544.

²⁰⁹ *First Nat. Bank v. Shaw*, 109 Tenn. 237, 70 S. W. 807.

^{200*} *Lackey v. Boruff*, 152 Ind. 371, 53 N. E. 412. See *West v. Miller*, 125 Ind. 70, 25 N. E. 143.

²¹⁰ *Indiana*.—*Bennett v. Mattingly*, 110 Ind. 197, 10 N. E. 299.

Massachusetts.—*Browning v. Carson*, 163 Mass. 255, 39 N. E. 1037; *Kenworthy v. Sawyer*, 125 Mass. 28; *Prescott Bank v. Caverly*, 73 Mass. (7 Gray) 217, 66 Am. Dec. 473.

New Jersey.—*Edmunds v. Rose*, 51 N. J. L. 547, 18 Atl. 748, 2 Bkg. L. J. 175.

New York.—*Erwins v. Downs*, 15 N. Y. 575; *Archer v. Shea*, 14 Hun (N. Y.) 493.

English.—*Haly v. Lane*, 2 Atk. 181.

See *State Bank v. Fearing*, 33 Mass. (16 Pick.) 533; *Burrill v. Smith*, 24 Mass. (7 Pick.) 291, 295. It is a part of the contract of indorsement that the paper indorsed has been made by a person competent to contract in that form. Consequently the fact that the maker

was not legally bound affords no defense to an action brought upon the paper against the indorser. *Archer v. Shea*, 14 Hun (N. Y.) 493. An indorsement is a guaranty of the genuineness of the previous signature and of the capacity of the parties to contract. *Ogden v. Blydenburgh*, 1 Hilt. (N. Y.) 182. "If the husband procure his wife to draw a note, then indorses it and puts it into circulation it would be difficult to find reason or authority to discharge him." *Leitner v. Miller*, 49 Ga. 489, per *Trippe, J.* "The note was void as against the makers, because they were married women and incapable of contracting obligations in that form. But where the defendant indorsed the note, he impliedly contracted that the makers were competent to contract, and had legally contracted the obligations of joint makers of the note. He also assumed the legal obligation in most respects of the drawers of a bill. The fact, known to the plaintiff at the time he took the note, that the makers were married women, did not de-

such a case that, "while a promissory note between a husband and wife is void between the original parties, an indorser when sued upon a contract between him and his indorsee is not at liberty to deny the validity of the original note, or the capacity of the maker, for the purpose of defeating his or her own liability. The consideration moving from the party who takes the note, with the signature of the maker and of the indorser, is sufficient to support the promise of the latter, and the fact that the indorsement is for the accommodation of the maker affords no defense to the indorser."^{210*} Nor can a second indorser avail himself of the defense that the first indorser was a married woman.²¹¹ And a husband cannot avail himself of this defense in an action against him on notes executed by him jointly with his wife, as purchase money notes for land,²¹² or where notes have been signed by him as surety for his wife.²¹³ A guarantor is likewise precluded from availing himself of such a defense.²¹⁴ So it has been decided under a statute providing that "a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor or in any other manner; and such contract as to her shall be void,"²¹⁵ that one of her creditors cannot avoid such a contract. It was said in this case: "It has been uniformly held by this court since said section took effect, that contracts of suretyship made by married women are voidable, not void; that coverture is a personal defense; and therefore such contracts can only be avoided by such married women and her privies in blood or representation."²¹⁶ And the maker of a note, payable to his wife or her order, cannot set up the defense in an action by an indorsee that she had no authority to indorse or transfer the note as his promise to pay to the payee's order is a direct affirmance that the payee has the right to make the order and every rule of estoppel applies to him.²¹⁷ So the drawer of a bill in favor of

prive him of the character of a *bona fide* purchaser." *Erwin v. Downs*, 15 N. Y. 575, per Shankland, J.

^{210*} *Binney v. Globe Nat. Bank*, 150 Mass. 574, 23 N. E. 380, 6 L. R. A. 379, per Devens, J.

²¹¹ *Prescott Bank v. Caverly*, 73 Mass. (7 Gray) 217.

²¹² *Morgan v. Morgan*, 20 Ky. L. Rep. 1308, 49 S. W. 184.

²¹³ *McGavack v. Whitfield*, 45 Miss. 452; *Whitworth v. Carter*, 43 Miss.

61; *Hicks v. Randolph*, 62 Tenn. (3 Baxt.) 352, 27 Am. Rep. 760.

²¹⁴ *Nabb v. Koontz*, 17 Md. 283, 291.

²¹⁵ Burns' Rev. St. (1894), § 6964; Horner's Rev. St. (1897), § 5119.

²¹⁶ *Lackey v. Boruff*, 152 Ind. 371, 53 N. E. 412, per Monks, C. J.

²¹⁷ *Wisdom v. Shanklin*, 74 Mo. App. 428, 1 Mo. App. Rep. 238, per Ellison, J.

a *feme covert*, he having in express terms authorized her to receive the amount of the bill, cannot, in an action by the husband for non-payment, deny the wife's right to demand payment thereof.²¹⁸

§ 62. Where there is a failure to plead coverture and judgment is rendered.—Though a married woman fails to plead coverture as a defense, it has been decided that it is as competent for her to prevent the enforcement of the judgment as it would have been to set up the same defense in the original action.²¹⁹ So it has been held that a judgment by default against a married woman on a promissory note is a nullity and can be no more enforced against her at law than the note sued on. The principle that a party cannot impeach a judgment on any ground which might have been pleaded or relied on as a defense to the suit does not apply to a case like this, where the defendant is a *feme covert*, and does not *sui juris*.²²⁰

Subdivision II.

INFANCY.

Sec.

63. Infancy as a defense—Generally.

64. Effect of ratification.

65. Note given for support of bastard child.

Sec.

66. Note given in satisfaction of tort.

67. Where infant accepts bill of exchange.

68. Who may urge defense of infancy.

§ 63. Infancy as a defense—Generally.—The infancy of a maker of a note is a good defense to an action against him on the note.²²¹

²¹⁸ Cathell v. Goodwin, 1 Har. & G. (Md.) 468.

²¹⁹ Kentucky.—Stevens v. Deering, 10 Ky. L. Rep. 393, 9 S. W. 292; Green v. Page, 80 Ky. 368.

Maryland.—Hoffman v. Shupp, 80 Md. 611, 31 Atl. 505.

Pennsylvania.—Unangst v. Fidler, 84 Pa. 135.

Texas.—Smith v. Wilson (Tex. Civ. App. 1895), 32 S. W. 434. But see:

Iowa.—Guthrie v. Howard, 32 Iowa 341; Van Metre v. Wolf, 27 Iowa 341.

Kentucky.—Shanklin v. Moody, 23 Ky. L. Rep. 2063, 66 S. W. 502.

²²⁰ Griffith v. Clarke, 18 Md. 457.

²²¹ Buzzell v. Bennett, 2 Cal. 101; Des Moines Ins. Co. v. McIntire, 99 Iowa 50, 68 N. W. 565; Willis v. Twambly, 13 Mass. 204; Hefington v. Jackson (Tex. Civ. App. 1906), 96 S. W. 108.

And a *bona fide* holder is not protected against this plea.²²² And a maker is not deprived of his right to make this defense by the fact that the contract was procured by his fraudulent representation that he was of full age.²²³ So infancy is a good defense to an action on a note given by a female for an account due by her deceased husband and her right to avail herself of this defense is not affected by the fact that she married by the consent of her parents or that on becoming a widow she has administered on her husband's estate.²²⁴ Where, however, an action of debt was brought on a promissory note and defendant pleaded *nil debet* and offered evidence of infancy in support of the plea it was decided that on this plea to the action evidence of infancy was not admissible.²²⁵ The rule that a maker may avail himself of the plea of infancy is not founded on the principle that the note or bill is absolutely void from its inception but rather that it is voidable at the election of the maker.²²⁶ "It is now well settled as a part of the law merchant that an infant may make or indorse a promissory note or bill of exchange, and that, as to him, the note in the one case and the indorsement in the other will not be void, but voidable at his election."²²⁷ This is also declared to be the rule, though the note was given for necessities.²²⁸ So it has been decided that a note given by an infant for necessities is not binding, though he is responsible on a *quantum valebant* for their value, as the note determines the amount positively and it is necessary for the infant's protection that this be open to inquiry.²²⁹ And it is said in another case that: "Express contracts, as by bond or note are not as such binding, and cannot be enforced without ratification even if given for necessities. For whether the articles furnished were, in the particular case, necessities, is a question of law to be determined by the court, and if deemed necessities, then their quantity, quality, and reasonable price, is for the

²²² Howard v. Simpkins, 70 Ga. 322; Montgomery v. Brown, 1 Del. Co. Rep. (Pa.) 307.

²²³ Fitts v. Hall, 9 N. H. 441, 450. See Conroe v. Birdsall, 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105.

²²⁴ Poole v. Hines, 52 Ga. 500.

²²⁵ Young v. Bell, 1 Cranch C. C. 342, Fed. Cas. No. 18152.

²²⁶ Young v. Bell, 1 Cranch C. C. 342, Fed. Cas. No. 18152.

²²⁷ Hastings v. Dollarhide, 24 Cal. 195, 208, per Shafter, J., citing Hardy v. Waters, 38 Me. 450; Nightingale v. Withington, 15 Mass. 272; Story on Promissory Notes, § 78.

²²⁸ Ayres v. Burns, 87 Ind. 245, 44 Am. Rep. 759; Price v. Sanders, 60 Ind. 310; Fenton v. White, 4 N. J. L. 115; Swasey v. Vanderheyden, 10 Johns. (N. Y.) 33.

²²⁹ Milton v. Steward, 5 Ill. App. 533.

consideration of the jury. But if on the contrary, the express contracts of infants, even when necessities, so called, were the consideration, could be enforced, these important questions might be improvidently settled by the infant himself, beyond the supervision of the courts."²³⁰ So an infant is held not liable on his note or other contract for money, even though he spends the money for necessities.²³¹ And where a non-negotiable note payable to a minor, was transferred by him to another in exchange for a watch, but on the following day the minor tendered back the watch and demanded the note, it was decided that the note ceased to be the transferee's from the date of demand of its return and that he could not recover in an action thereon against the maker.²³² But in a case in South Carolina, where a defendant pleaded infancy to an action on a note executed by him, it was decided that a replication thereto that the note was given for necessities ought to be sustained.²³³ And in Massachusetts it has been decided that a note given by an infant is voidable, not void, and "in any action thereon the consideration is open to inquiry, and, if given for goods, it will be competent to inquire, both whether the goods were necessities, and the just value of them, and judgment may be rendered, *pro tanto* for that part of the note only for which a minor would be legally liable."²³⁴ And in Vermont, where a note was executed by an infant in payment of his board at a certain sum per week, which was reasonable, it was held that the consideration of the note being open to inquiry there might be a recovery under the facts of the case.²³⁵ Again, in New Hampshire, it has been decided that if an infant purchases necessities and gives a promissory note, signed by himself and a surety, and the surety afterward pays the note, he may recover the amount so paid of the infant.²³⁶

§ 64. **Effect of ratification.**—Where, in an action on a note executed by an infant, it appears that the note was ratified by him after he became of age, his infancy is no defense to such action, such a note being held voidable and not void.²³⁷ As to what constitutes such a

²³⁰ Henderson v. Fox, 5 Ind. 489, per Stuart, J., quoted in Ayres v. Burns, 87 Ind. 245, 44 Am. Rep. 759.

²³¹ Price v. Sanders, 60 Ind. 310.

²³² Willis v. Twambly, 13 Mass. 204.

²³³ Duboise v. Wheddon, 4 McCord (S. C.) 221.

²³⁴ Earle v. Reed, 51 Mass. (10 Metc.) 387, per Shaw, C. J.

²³⁵ Bradley v. Pratt, 23 Vt. 378.

²³⁶ Conn v. Coburn, 7 N. H. 368, 26

Am. Dec. 746.

²³⁷ Alabama.—Faut v. Cathcart, 8 Ala. 725.

ratification as will have this effect it has been declared that: "If the doctrine be, that the privilege extended to infants should be a shield, it would seem that his acts, which amount to a confirmation, ought to be of such an unequivocal nature as to establish a clear intention to confirm the contract, after coming of age, after full knowledge that it was voidable."²³⁸ The ratification may be a promise to pay after age,²³⁹ or it may be inferred against him from his positive acts in favor of the contract,²⁴⁰ or from his tacit assent, under circumstances not to excuse his silence.²⁴¹ So there has been held to be a ratification where an infant, after he came of age, agreed to deliver corn on account of the note.²⁴² And where an infant gave his note for a yoke of oxen which he converted to his use after he became of age and received their avails it was decided, in an action against him on the note by the indorsee, that he had ratified the promise and could not avail himself of the defense of infancy.²⁴³ But in another case where it appeared that the defendant had, while a minor, given his note for goods purchased by him, had sold most of them in the ordinary course of business, and the residue had been assigned and transferred by him to secure the payment of a debt, but were retained by him for

California.—Hastings v. Dollarhide, 24 Cal. 195, 208.

Indiana.—LaGrange Collegiate Institute v. Anderson, 63 Ind. 367, 30 Am. Rep. 224.

Massachusetts.—Reed v. Batchelder, 1 Metc. (Mass.) 559.

New Hampshire.—Conn v. Coburn, 7 N. H. 368, 372, 26 Am. Dec. 746.

New York.—Taft v. Sargeant, 18 Barb. (N. Y.) 320.

Wisconsin.—Stokes v. Brown, 4 Chand. (Wis.) 39.

Federal.—Hyer v. Hyatt, 3 Cranch C. C. 276, Fed. Cas. No. 6977.

Connecticut.—But see Alsop v. Todd, 2 Root (Conn.) 109.

²³⁸ Thing v. Libbey, 16 Me. 55, 57, per Emery, J. See also, Hodges v. Hunt, 22 Barb. (N. Y.) 150, holding that such new promise or ratification must be equivalent to a new contract. Everson v. Carpenter, 17 Wend. (N. Y.) 419, holding

that the promise should either be absolute, or, if conditional, the performance or happening of the condition should be proved affirmatively by the plaintiff. Goodsell v. Myers, 3 Wend. (N. Y.) 479, 481, holding that it should be a promise to a party in interest or to his agent or at least an explicit admission of an existing liability from which a promise may be implied.

²³⁹ Aldrich v. Grimes, 10 N. H. 194; Bobo v. Hansell, 2 Bailey (S. C.) 114. See Wright v. Steele, 2 N. H. 54.

²⁴⁰ Lawson v. Lovejoy, 8 Me. 405, 23 Am. Dec. 526; Aldrich v. Grimes, 10 N. H. 194.

²⁴¹ Lawson v. Lovejoy, 8 Me. 405, 23 Am. Dec. 526.

²⁴² Stokes v. Brown, 4 Chand. (Wis.) 39.

²⁴³ Lawson v. Lovejoy, 8 Me. 405, 23 Am. Dec. 526.

sale as the servant of the assignee, until after he became of age, it was decided that the facts did not show such a ratification of the contract by him as to deprive him of the right to set up infancy as a defense to an action on the note.²⁴⁴ And an affirmance or confirmation at any time, though after the filing of the plea of infancy, has been held good.²⁴⁵ Again in Kentucky it has been decided that where defendant relies on a plea of infancy in his answer, plaintiff may prove a ratification of his contract without averring it in his pleadings.²⁴⁶

§ 65. Note given for support of bastard child.—A valid note may be given by an infant father of a bastard child in settlement with the mother and the infancy of the maker is no defense to an action thereon. As the law authorizes the infant father in such a case to settle with the mother and secure to her compensation for keeping the child, it impliedly gives him power to execute the necessary instruments to effectuate such settlement.²⁴⁷

§ 66. Note given in satisfaction of tort.—The infancy of the defendant has been declared to be no defense to an action upon a note given by him in satisfaction of a tort. Thus it was so held where an infant hired a horse to drive to a certain place, but drove beyond the place agreed upon and as a result of the overdriving the horse died. A note was given by him in settlement of the claim for the damage sustained and in an action on such note he set up the plea of infancy which it was held was not available to defeat a recovery thereon.²⁴⁸ In this case it was said: "The law makes him liable for his torts, and where he elects to settle such liability by giving his note, as long as the consideration of the note is open to inquiry, we see no reason why he should not be held liable in an action upon the note, to the same extent that he would be if the action had been brought upon the cause of action which formed the consideration for the note. The note in suit having been given in settlement of a claim for which the defendant was liable, and no fraud nor imposition having been practiced in obtaining it, the plea of infancy is not available to defeat it."²⁴⁸ * In a case in South Carolina, however, it is declared that though an infant

²⁴⁴ *Thing v. Libbey*, 16 Me. 55.

²⁴⁵ *Best v. Givens*, 3 B. Mon. (Ky.) 72, 75.

²⁴⁶ *Stern v. Freeman*, 4 Metc. (Ky.) 309.

²⁴⁷ *Gavin v. Burton*, 8 Ind. 69.

²⁴⁸ *Ray v. Tubbs*, 50 Vt. 688, 28 Am. Rep. 519.

²⁴⁸ * *Per Royce, J.*

is liable for torts yet it does not follow that contracts by him in satisfaction of his torts are valid, and it was here decided that a note given by him in pursuance of an award was void, though the matter submitted was a tort committed by the infant.²⁴⁹

§ 67. **Where infant accepts bill of exchange.**—An infant accepting a bill of exchange may plead his infancy upon an action brought against him.²⁵⁰ So an infant cannot bind himself by the acceptance of a bill of exchange, even though the bill is given for the price of necessities supplied to him during infancy. In one case it was said: "The principle long established by English law is this, that an infant cannot make himself liable upon any contract whatever, except a contract for the supply of necessities. I will go further and say this, that the principle of the cases goes to this extent, that, if an infant accepted a bill of exchange or gave a promissory note for the price of necessities supplied to him and he were sued upon the bill or the note, by the man who had supplied the necessities and the plaintiff relied only on the bill or note and gave no evidence of the supply of necessities, the infant would not be liable. He is not liable upon a bill of exchange or promissory note under any circumstances. It is not necessary for the protection of persons dealing with an infant that he should be liable on such a contract. The person who has supplied an infant with necessities can also sue on that contract for the price of whatever he has supplied."²⁵¹ A person, however, is

²⁴⁹ *Hank v. Deal*, 3 McCord (S. C.) 257. The court declared in this case: "The reason of the rule which exempts infants from their liability on contracts is founded on their supposed want of capacity and discretion, and the law is so careful of the rights of infants that they are protected from contracts to pay extravagant prices even for necessities. And if the agreement be tested by this reason it must at once fall to the ground; for surely it must require at least as much capacity and discretion to contract about a tort as about the ordinary concerns of life. The fact that the consideration of the note in question was a compensation for a tort

is an assumption not warranted by the evidence. It is true that the award was on a matter of that sort, but an infant is not bound by a submission to an award; it could not, therefore, constitute evidence of the fact." Per Johnson, J.

²⁵⁰ *Williams v. Harrison*, 3 Salk. 197.

²⁵¹ *Soltkyoff, In re* (1891), 1 Q. B. 413, per Lord Esher, M. R. See also. 1 Camp. 552, in which case it was said: "This action certainly cannot be maintained. The defendant is allowed to be an infant; and did any one ever hear of an infant being liable as an acceptor of a bill of exchange?" Per Sir James Mansfield, C. J.

liable as acceptor of a bill of exchange, which was drawn while he was an infant but was accepted by him after he came of age.²⁵²

§ 68. **Who may urge defense of infancy.**—The defense of infancy is a personal privilege²⁵³ and can only be set up by the infant himself,²⁵⁴ or his heir or personal representatives.²⁵⁵ So in an action on a joint and several note the infancy of one of the defendants will not defeat a recovery against the others.²⁵⁵ * And where a person signs a note with an infant, though the latter is not liable, yet the former may be treated as the sole maker.²⁵⁶ And where an infant forms a partnership with an adult he holds himself forth to the world as not being an infant, and an adult who combines with him in practicing the fraud cannot avoid his own contract by saying that his partner is an infant and incompetent to contract. In such a case a contract of the partnership is valid as to the adult, though void as to the infant. So where one of the partners was an infant it was decided that the holder of a bill accepted by both partners might declare on it as accepted by the adult only in the names of both.²⁵⁶ * So in an action upon a note executed by a limited partnership the liability of a special partner is not affected by the fact that one of the partners is an infant.²⁵⁷ And the makers of a note payable to an infant cannot set up his liability in defense to an action thereon by the indorsee, as the maker of the note has asserted the competency of the payee to negotiate and transfer the same by the execution thereof and is estopped, to deny the assertion so made.²⁵⁸ Nor in an action by the indorsee of a bill of exchange against the drawer is the infancy of the payee any defense thereto.²⁵⁹ And in an action against the acceptor of a bill of exchange

²⁵² *Stevens v. Jackson*, 4 Camp. 164.

²⁵³ *Frazier v. Massey*, 14 Ind. 382; *Commercial National Bank v. Strauss*, 137 N. Y. 148, 32 N. E. 1066; *Hartness v. Thompson*, 5 Johns. R. (N. Y.) 160; *Rohrer v. Morningstar*, 18 Ohio 579; *Grey v. Cooper*, 3 Doug. 54.

²⁵⁴ *Nightingale v. Withington*, 15 Mass. 272, 274, 8 Am. Dec. 101; *Hartness v. Thompson*, 5 Johns. (N. Y.) 160.

²⁵⁵ *Hastings v. Dollarhide*, 24 Cal.

195; *Frazier v. Massey*, 14 Ind. 382; *Hardy v. Waters*, 38 Me. 450.

²⁵⁵* *Hartness v. Thompson*, 5 Johns. (N. Y.) 160.

²⁵⁶ *Taylor v. Dansby*, 42 Mich. 82, 3 N. W. 267.

²⁵⁶* *Burgess v. Merrill*, 4 Taunt. 468. See *Duty v. Brounfield*, 1 Pa. St. 497.

²⁵⁷ *Continental Nat. Bank v. Strauss*, 137 N. Y. 148.

²⁵⁸ *Frazier v. Massey*, 14 Ind. 382; *Nightingale v. Withington*, 15 Mass. 271, 8 Am. Dec. 101.

²⁵⁹ *Grey v. Cooper*, 3 Doug. 54.

by the indorsee, it is no defense that the drawers who had drawn the bill payable to themselves, and of course indorsed it, were infants when the bill was drawn. Lord Ellenborough said in one case: "If this action were against the drawers themselves, that might be a good defense; as in that case the drawers, who are stated to be infants, would be before the court, and claiming the protection which the law affords them. But though the plaintiff derives title under them, the note is not to be considered as void in his hands. Infants may make themselves liable by a promise after full age to pay a debt to which their infancy might be a discharge; they may here have made a new promise in this case. It would injure the circulation of a bill very materially if such facts were to be inquired into. I am of opinion the amount of the bill is recoverable."²⁶⁰ And an indorsee may recover against an indorser, though the original drawer was an infant.²⁶¹ So an assignor of a negotiable note warrants the validity of the note and that the maker is liable to pay it, and where a note so assigned is made by an infant, the assignee may proceed in the first instance against the assignor.²⁶² Where, however, an infant signs a note and at his majority disaffirms the contract, it has been decided that the defense of the maker will avail sureties who were adults, as well as the infant who made the contract,²⁶³ where the undertaking of the sureties goes to the whole consideration.²⁶⁴

Subdivision III.

INTOXICATION.

Sec.

69. Of maker or drawer.

Sec.

70. Of indorser.

§ 69. **Of maker or drawer.**—The intoxication of a person at the time of the execution of a note, which makes him incapable of knowing what he is doing or of understanding the consequences of his act, may be a defense to an action thereon.²⁶⁵ And it is essential to effect

²⁶⁰ Taylor v. Croker, 4 Esp. 187.

²⁶¹ Haly v. Lane, 2 Atk. 181. See Baker v. Kennett, 54 Mo. 82, 92.

²⁶² Henderson v. Fox, 5 Ind. 489.

²⁶³ Patterson v. Cave, 61 Mo. 439.

²⁶⁴ Baker v. Kennett, 54 Mo. 82.

²⁶⁵ Burroughs v. Richman, 13 N. J.

L. 233, 238, 23 Am. Dec. 717; Berkeley v. Cannon, 4 Rich. L. (S. C.) 136; Gore v. Gibson, 9 Jur. 140. See Stigler v. Anderson (Miss. 1893), 12 So. 831; Gore v. Gibson, 13 M. & W.

this result that the intoxication should be of such a character, for though a slight degree of intoxication may impair the mental faculties, contracts are not therefore necessarily void.²⁶⁶ As against a *bona fide* holder, however, it has been determined that intoxication is no defense.²⁶⁷ The reasons underlying this rule are that, where a man has voluntarily put himself in such a condition and a loss must fall on one of two innocent persons, it should fall on him who occasioned it. It is also founded on principles of public policy and the necessities of commerce. The circulation and currency of negotiable paper should not be unnecessarily impeded, and if the drunkenness of the maker were a defense to a note in the hands of an indorsee it would clog and embarrass the circulation of commercial paper and no man could safely take it without ascertaining the condition of the maker or drawer when it was given, though there be nothing unusual or suspicious about the appearance of the note.²⁶⁸ A case in Connecticut, however, would seem to imply that complete intoxication would be a good defense against a *bona fide* holder, it being declared in this case that partial intoxication was no defense and that to render intoxication a defense to such an action the courts supposed "it is incumbent upon the party to show what the books term excessive or complete drunkenness."²⁶⁹ It appeared in this case that the maker was able to sign the note with his own hand and that he remembered the next morning that he had signed the note. The auditor found "that the defendant signed the note with his own hand, but by reason of his intoxication was incapable of understanding the consequences of his

623. "An obligation granted by a person while he is in a state of absolute and total drunkenness is ineffectual, because the grantor is incapable of consent, for the law has thought it equitable to protect those who have not the use of their reason (even though they should have lost it by their own folly) from the fraud or circumvention of others." Ersk. Inst. 814, 5.

²⁶⁶ Taylor v. Purcell, 60 Ark. 606, 31 S. W. 567; Reynolds v. Dechaums, 24 Tex. 174, 76 Am. Dec. 181. "Sound policy requires that it should not, unless brought about by the other party, or unless it was so

total as to be palpable evidence of fraud in the person entering into a contract with one so intoxicated." Burroughs v. Richman, 13 N. J. L. 233, 238, 23 Am. Dec. 717, per Drake, J.

²⁶⁷ Miller v. Finley, 26 Mich. 248, 12 Am. Rep. 306; McSpanan v. Neeley, 91 Pa. St. 17; State Bank v. McCoy, 69 Pa. St. 204, 8 Am. Rep. 246; Smith v. Williamson, 8 Utah 219, 30 Pac. 753.

²⁶⁸ State Bank v. McCoy, 69 Pa. St. 204, 8 Am. Rep. 846; Smith v. Williamson, 8 Utah 219, 221, 30 Pac. 758.

²⁶⁹ Caulkins v. Fry, 35 Conn. 170.

act, and was unfit for duty." And also "that he had sufficient consciousness to remember the next morning that he had signed the note, and that he thereupon repudiated the contract, returned the property for which the note was given and demanded of Jaycox, the payee, the surrender thereof." The court held that a case of complete intoxication was not shown and therefore it was no defense against a *bona fide* holder. And though a person's intoxication may have been such, at the time of the execution of a note, as to defeat a recovery thereon, yet if he subsequently ratifies the transaction when sober by retaining the consideration it is held no defense.²⁷⁰ To enable a maker or representative to defend on such a ground there must have been a rescission of the contract by placing the parties in *statu quo*. So where real estate was the consideration for a note and a deed was given but title was never recognized, the intoxication of the maker was held no defense.²⁷¹

§ 70. **Of indorser.**—In an action by the indorsee of a bill of exchange against a prior indorser it is a good plea, that the defendant, at the time when he indorsed the bill, was so intoxicated and under the influence of liquor, and thereby so entirely deprived of the use of his reason, as to be unable to understand the nature and effect of the indorsement, and that the plaintiff, at the time of the indorsement, was aware of his being in that state.²⁷¹ *

Subdivision IV.

MENTAL INCAPACITY AND INSANITY.

Sec.

71. Of maker.

Sec.

72. Of indorser or surety.

§ 71. **Of maker.**—It is a general rule that an idiot or insane person is not bound by his contract.²⁷² And in an action on a bill or note the defendant may show that he was *non compos mentis* at the time of its execution.²⁷³ Nor is a *bona fide* holder protected against this defense

²⁷⁰ *Smith v. Williamson*, 8 Utah 219, 30 Pac. 753.

²⁷² *Van Patton v. Beals*, 46 Iowa 62.

²⁷¹ *Joest v. Williams*, 42 Ind. 565, 15 Am. Rep. 377.

²⁷³ *Kentucky*.—*Taylor v. Dudley*, 5 Dana (Ky.) 308.

²⁷¹* *Gore v. Gibson*, 9 Jur. 140.

Massachusetts.—*Mitchell v. Kingman*, 5 Pick. (Mass.) 431.

as one who purchases such paper takes it charged with constructive notice of the legal disability of the maker.²⁷⁴ The rule of commercial law which protects commercial paper in the hands of a *bona fide* holder who has acquired it before its maturity, for value, does not apply in the case of paper signed by persons *non compos mentis*.²⁷⁵ But it has been decided in Michigan that one who in good faith takes a note from a person without notice of want of capacity in a transaction not calculated to put him on his guard may recover thereon.²⁷⁶ And in Pennsylvania it has been decided that an instrument in the hands of a *bona fide* holder for value is not affected by a subsequent inquisition, finding the maker to have been insane at the time he executed it, the contract being executed and without fraud and the holder having no notice of the want of capacity.²⁷⁷ An exception to the general rule is held to exist in the case of a note given for necessities, though in an action on such a note the burden is declared to be upon the plaintiff to prove that they were furnished to the amount or value of the note.²⁷⁸ Where the plea of *non compos mentis* is set up it should be satisfactorily established to entitle the defendant to the benefit of the bar;²⁷⁹ and where insanity is set up as a defense to an

Mississippi.—Bates v. Hyman (Miss. 1900), 26 So. 567.

New York.—Rice v. Peet, 15 Johns. (N. Y.) 503. "There must be a limit to the civil responsibility of persons of unsound mind, otherwise their property would be at the mercy of unscrupulous and designing men."

Pennsylvania.—Moore v. Hershey, 90 Pa. St. 196, 200, per Mr. Justice Paxson.

²⁷⁴ *Indiana*.—McClain v. Davis, 77 Ind. 419.

Ohio.—Hosler v. Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. R. 1040, 35 L. R. A. 161.

Pennsylvania.—Moore v. Hershey, 90 Pa. St. 196.

English.—Sentance v. Poole, 3 Carr. & P. 1.

Illinois.—See Jeneson v. Jeneson, 66 Ill. 259.

²⁷⁵ Hosler v. Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. R.

1040, 35 L. R. A. 161. "If such paper can be protected in the hands of a holder who has paid value, however trifling, this helpless class would have little protection." Moore v. Kershey, 90 Pa. St. 196, 201, per Mr. Justice Paxson.

²⁷⁶ Shoulter v. Allen, 51 Mich. 529, 16 N. W. 888; compare Van Patton v. Beals, 46 Iowa 62, holding that one non compos mentis, is not liable on a note signed by him as surety, where given for an antecedent debt, though the person taking it had no knowledge thereof.

²⁷⁷ Lancaster Co. Nat. Bank v. Moore, 78 Pa. St. 407, 21 Am. Rep. 24.

²⁷⁸ Hosler v. Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. R. 1040, 35 L. R. A. 161.

²⁷⁹ Taylor v. Dudley, 5 Dana (Ky.) 308, 310.

action on a note, evidence is admissible that after the execution of the note the defendant, while of sound mind, received from the avails of a mortgage, given by him prior to the execution, while sane, and as security for certain responsibilities which he had assumed for the mortgagor out of which the note in suit originated, a sum more than sufficient to indemnify him for the note, such evidence not being for the purpose of showing a ratification but to show a recognition of the note and that the defendant was of sound mind when he made it.²⁸⁰

§ 72. **Of indorser or surety.**—An indorser of a note may defeat recovery thereon, on the ground of his mental incapacity at the time of the indorsement.²⁸¹ So the indorsement of a certificate of deposit by an insane person creates no valid contract of indorsement and an innocent purchaser is not protected against the defense of incapacity.²⁸² But in an action against an accommodation indorser of a renewal note his want of capacity is no defense, where there have been several renewals upon which he was accommodation indorser, at the execution of which, as well as the original, the defendant was unquestionably of sound mind.²⁸³ Again an indorsement of a promissory note by the payee is a contract which an insane person cannot make because he has not the power to give that consent which the law requires, and in an action by an indorsee against the maker the insanity of the payee and indorser at the time of the indorsement and transfer is held to be a valid defense.²⁸⁴ And where the mental incapacity of the payee of a

²⁸⁰ *Grant v. Thompson*, 4 Conn. 203, 10 Am. Dec. 119.

²⁸¹ *Wirebach v. Easton Bank*, 97 Pa. St. 543, 39 Am. Rep. 821. See *Carrier v. Sears*, 86 Mass. (4 Allen) 336, 81 Am. Dec. 707.

²⁸² *Anglo-Californian Bank v. Ames*, 27 Fed. 727.

²⁸³ *Snyder v. Laubach*, 7 Wkly. Notes Cas. 464, 466; *Memphis Nat. Bank v. Sneed*, 97 Tenn. 120, 34 L. R. A. 274, 36 S. W. 716, 56 Am. St. R. 788.

²⁸⁴ *Burke v. Allen*, 29 N. H. 106, 61 Am. Dec. 642. In this case a distinction was made between the contracts of a minor and of an insane person, and it was declared that while the minor alone can take ad-

vantage of his minority, a different rule should prevail in case of an insane person. It was said: "He understands not the effect of indorsing the note, nor whether he is receiving a valuable consideration for the same or not. He may not even know that he is parting with the property, and an indorsee who should take a note under such circumstances would be guilty of fraud. If at the time the note is given the payee should be insane, and the maker should be aware of the fact, he would be bound in equity and good conscience not to pay it to an indorsee till he had ascertained that he was the rightful and legal holder. Or, if when

note, at the time he indorsed it, is relied on as a defense to an action by the indorsee against the maker, evidence is admissible to prove his incapacity when the note was given to him.²⁸⁵ And evidence of the indorser's incapacity, before and after the indorsement, may be properly submitted to the jury, to enable them to decide correctly on the question of his incapacity, at the time of the indorsement.²⁸⁵ * Again, where in an action against a surety the plea is set up that the defendant was insane and incapable of transacting business at the time he signed the note, such mental incapacity is held to be sufficiently established by a preponderance of the evidence.²⁸⁶ But in an action by the indorsee against the maker of a promissory note, it has been held no defense to prove that the plaintiff procured the indorsement by undue influence from the payee, when he was of unsound mind and incapable of making a valid indorsement, if the payee or his legal representatives have never disaffirmed it.²⁸⁶ *

Subdivision V.

WANT OF AUTHORITY.

Sec.

73. Unauthorized signature or indorsement.
74. Where unauthorized signature is ratified—Estoppel.
75. Violation of instructions by agent.
76. Unauthorized collection of note given as collateral.

Sec.

77. Receipt of paper by public officer only authorized to receive cash.
78. Paper given to or transferred by administrator or executor.
79. Corporate want of authority as affected by illegality or statute.

it is given he should not be aware of the existence of the insanity, or if after it should be given the payee should become insane, the reason is equally strong why he should not pay it without due inquiry, if he had notice of the insanity. And if, under such circumstances, he ought not to be protected in paying the note to the indorsee, then it would seem to follow as a legitimate consequence that he should be permitted to show the existence of in-

sanity at the time of the indorsement in defense of an action brought by the indorsee," per Eastman, J. See also, *Alcock v. Alcock*, 3 Man. & G. 268; *Hannahs v. Sheldon*, 20 Mich. 278.

²⁸⁵ *Peaslee v. Robbins*, 44 Mass. (3 Metc.) 164.

²⁸⁵ * *Peaslee v. Robbins*, 44 Mass. (3 Metc.) 164.

²⁸⁶ *Gaar v. Hulse*, 90 Ill. App. 548.

²⁸⁶ * *Carrier v. Sears*, 86 Mass. (4 Allen) 336, 81 Am. Dec. 707.

Sec.	Sec.
80. Want of authority of corporate officers or agents.	87. Same subject—Municipal or public corporations.
81. Same subject—Application of rules—Illustrations.	88. Guarantee of checks beyond deposits.
82. Same subject—Bank officials' acts.	89. Want of authority—Partner.
83. Same subject—Paper issued by public officers.	90. Same subject continued.
84. Ultra vires instruments.	91. Same subject—Qualifications and limitations of rule.
85. Same subject—Corporation authorized to issue paper.	92. Note between partner and firm.
86. Same subject—Application and illustration of rule.	93. Paper given in violation of articles of partnership.
	94. Paper executed in firm name after dissolution.

§ 73. **Unauthorized signature or indorsement.**—It is a general rule, subject to certain exceptions hereinafter considered,²⁸⁷ that a person whose name is signed to a note either as maker or indorser by another without any authorization may show such fact in defense to an action against him on such paper.^{287*} The defendant in such a case has a perfect right to deny his signature. Every one taking such paper does at his own risk and when he comes to the party, whose name is signed thereto for payment, it is for him to prove that the signature is genuine.²⁸⁸ So in order to bind one of two alleged joint makers of a note, where the payee's indorsement is not genuine, in a suit by the holder of the note against such maker, it is necessary to show that the defendant's signature is genuine or was authorized by him to be signed or sanctioned by him after it was signed.^{288*} And where a partner

²⁸⁷ See § 74.

^{287*} *California*.—Hendrie v. Berkowitz, 37 Cal. 113, 99 Am. Dec. 251.

Georgia.—Stillwell v. Woodruff, 76 Ga. 347.

Indiana.—Hamilton Nat. Bank v. Nye (Ind. App. 1906), 77 N. E. 295.

Iowa.—Smith v. Framel, 68 Iowa 488, 27 N. W. 471.

Kansas.—First Nat. Bank v. Martin, 56 Kan. 247, 42 Pac. 713.

Kentucky.—Garrott v. Ratcliff, 83 Ky. 384.

Maryland.—Whiteford v. Munroe, 17 Md. 135.

Massachusetts.—Hall v. Huse, 10 Mass. 39.

Nebraska.—Dietz v. City Nat. Bank, 42 Neb. 584, 60 N. W. 896.

New York.—Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150.

Pennsylvania.—Hunter v. Reilly, 36 Pa. St. 509.

Texas.—Wilson v. Skaggs, 10 Tex. 298.

Virginia.—Union Bank v. Beirne, 1 Gratt. (Va.) 226.

Washington.—Seattle Shoe Co. v. Packard (Wash. 1906), 86 Pac. 845.

See:

Georgia.—Dobbins v. Blanchard, 94 Ga. 500, 21 S. E. 215.

Illinois.—Manufacturers' Nat. Bank v. Barnes, 65 Ill. 69, 16 Am. Rep. 576.

²⁸⁸ Crout v. DeWolf, 1 R. I. 393, 395, per Greene, C. J.

^{288*} Whiteford v. Munro, 9 B. Mon. (Ky.) 135.

makes an accommodation indorsement in the firm name without the authority or consent of the other partner want of authority of the former is a defense to an action thereon by any party who takes the security with notice and the burden of proving the authority or consent of the other partner lies on the creditor or holder of the note.²⁸⁹ A married woman is also held not estopped from showing want of authority of her husband to sign her name as principal maker in a particular case by the fact that she has given him authority to sign her name to notes as surety for his benefit.²⁹⁰ So a husband to whom written power of attorney to execute notes for his wife in a certain capacity has been given by her has no power to execute a note in her name for his own debt, and a subsequent transferee with notice of the want of authority cannot enforce it against her.²⁹¹ So it is no defense to an action against a bank to recover a balance claimed to be due on deposits made by the plaintiffs with the bank, that a clerk of the plaintiff had been given authority to draw checks on the bank, where it appeared that the authority was in writing and limited to fifteen days, and notice thereof lodged with the bank, which had continued, however, to pay checks drawn after such period, which amount plaintiff sought to recover.²⁹² But where trustees were authorized by power of attorney to indorse any bond or note and to execute any mortgage on the trust property to pay off a judgment against them, it has been decided that evidence to show a termination of such authority and that said judgment was paid off before the note was given, was properly excluded as against a purchaser before maturity, for value and without notice of any defense to or infirmity in the note.²⁹³

§ 74. **Where unauthorized signature is ratified—Estoppel.**—A person whose name is signed to commercial paper without his authority may expressly ratify the execution of such paper and acknowledge its binding validity upon him, or he may by his conduct and acts in connection therewith be estopped from setting up the defense of want of authority, and in either case his relation thereto will be precisely

²⁸⁹ *Hendrie v. Berkowitz*, 37 Cal. 113, 116, 99 Am. Dec. 251. But see, *Mitchell v. Whaley*, 29 Ky. Law R. 125, 92 S. W. 556.

²⁹⁰ *Farmington Sav. Bank v. Buzzell*, 61 N. H. 612.

²⁹¹ *Moqun v. Bennett*, 24 Misc. (N. Y.) 157, 51 N. Y. Supp. 18.

²⁹² *Man. Nat. Bank v. Barnes*, 65 Ill. 69, 16 Am. Rep. 576, approving *Weisser v. Denison*, 10 N. Y. 68. See *Adler v. Broadway Bank*, 30 Misc. (N. Y.) 382, 62 N. Y. Supp. 402.

²⁹³ *Toms v. Jones*, 127 N. C. 464, 37 S. E. 480.

the same as if he had executed it personally.²⁹⁴ So a person, by delivering a note with his signature, is held to adopt such signature and to be bound thereby whether written by himself or some one else.²⁹⁵ And where a person's name has been forged to a note as a surety, if he subsequently takes a deed of trust upon property of the principal for the purpose of indemnifying himself, the execution of the note is thereby ratified and he is liable as surety.²⁹⁶ So the execution of a mortgage in which notes are substantially described, is a sufficient ratification and will estop one from denying the proper execution of the notes.²⁹⁷ And a person has been held to be estopped to deny his signature to a note, as one of the makers thereof, by his admissions and declarations that the note was "all right" and that if plaintiff would "hold still" he would pay him, and knowingly and designedly induced the plaintiff to omit taking any measures to collect the same of the other maker while he was solvent, until after he had left the country.²⁹⁸ But where there is no evidence that the indorser had notice that his name had been indorsed by the maker, upon the notes sued on, until after such notes became due, he cannot be said to have ratified the indorsements.²⁹⁹ And it has been decided that a mere promise to pay a note is not such a ratification as will amount to an

²⁹⁴ *California*.—Goetz v. Goldbaum (Cal. 1894), 37 Pac. 646.

Illinois.—Paul v. Berry, 78 Ill. 158; Hefner v. Vandolah, 62 Ill. 483, 14 Am. Rep. 106.

Maine.—Casco Bank v. Keene, 53 Me. 103.

Massachusetts.—Wellington v. Jackson, 121 Mass. 157; Charles River Nat. Bank v. Davis, 100 Mass. 413; Greenfield Bank v. Crafts, 86 Mass. (4 Allen) 447.

Missouri.—First Nat. Bank v. Badger Lumber Co., 54 Mo. App. 327.

New Hampshire.—Hazelton v. Batchelder, 44 N. H. 40.

New York.—First Nat. Bank v. Commercial Travelers' Home Assn. (N. Y.), 78 N. E. 1103.

Ohio.—Hood v. Nicholas (Ohio), 1 Wkly. Law Bul. 227.

Oklahoma.—Cassidy v. Saline County Bank, 14 Okla. 532, 78 Pac. 324.

Pennsylvania.—Cohen v. Teller, 93 Pa. St. 123.

Rhode Island.—Crout v. DeWolf, 1 R. I. 393.

Vermont.—Bigelow v. Denison, 23 Vt. 564.

West Virginia.—Devendorf v. West Virginia Oil & Oil Land Co., 17 W. Va. 135.

Wisconsin.—Ballston Spa Bank v. Marine Bank, 16 Wis. 120.

Tennessee.—See Jones v. Hamlet, 34 Tenn. (2 Sneed) 256.

See Chap. XXIX.

²⁹⁵ Melvin v. Hodges, 71 Ill. 422.

²⁹⁶ Fitzpatrick v. School Commissioners, 26 Tenn. (7 Humph.) 224, 46 Am. Dec. 76.

²⁹⁷ Bell v. Wandby, 4 Wash. 743, 747, 31 Pac. 18.

²⁹⁸ Hefner v. Dawson, 63 Ill. 403, 14 Am. Rep. 123. See Crout v. DeWolf, 1 R. I. 393.

²⁹⁹ Walters v. Munroe, 17 Md. 150, 77 Am. Dec. 328.

estoppel,³⁰⁰ though it is evidence from which a ratification may be inferred.³⁰¹ So it has been determined that mere silence on the part of one whose name has been so signed will not estop him from setting up want of authority in affixing his signature.³⁰²

§ 75. **Violation of instructions by agent.**—Where an agent has general authority to act for his principal in making or indorsing commercial paper, it is no defense that he has misapplied the paper or violated his instructions in reference thereto, where he has acted within the apparent scope of his authority and where the party with whom he has transacted the business, or the holder of the paper, had no notice of any limitation of authority and would otherwise suffer loss.³⁰³ So where an agent was authorized by his principal to draw and negotiate paper for the latter's use, and by a course of dealing in the recognition of such paper, drawn for legitimate purposes, the principal had accredited drafts, having nothing on their face to discriminate them from such as the agent had the right to issue, he was held responsible to a *bona fide* purchaser, without notice, though such paper had been issued fraudulently for the accommodation of a third party.³⁰⁴ And where a bill of exchange drawn on a principal is accepted by his agent, in the former's name, to whom written and express authority to so act has been given, the principal cannot defeat

³⁰⁰ Gleason v. Henry, 71 Ill. 109, holding that the ratification must be with a knowledge of the facts affecting the rights of the one alleged to have ratified his signature. Omsley v. Phillips, 78 Ky. 517, 39 Am. Rep. 258; Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546, holding mere promise to pay is no ratification where no new consideration or circumstances creating an estoppel.

³⁰¹ Commerce Bank v. Bernero, 17 Mo. App. 313.

³⁰² California Bank v. Sayre, 85 Cal. 102, 24 Pac. 713, holding that mere failure to repudiate the signature or to notify the holder that he will not be bound thereby is not a ratification without some further element of estoppel. Corser v. Paul,

41 N. H. 24, 77 Am. Dec. 753, holding that mere silence of a party to whom a note is shown, purporting to be signed by him, is competent evidence that his signature is genuine or of his assent thereto, but does not operate as an estoppel unless the holder has been led to change his position or otherwise act upon it to his injury.

³⁰³ Hanover Nat. Bank v. American D. & T. Co., 148 N. Y. 612, 43 N. E. 72; City Bank v. Perkins, 29 N. Y. 554; Crawford v. Hildebrant, 6 Lans. (N. Y.) 502; Edmunds v. Bushell, L. R. 1 Q. B. 97. Compare North River Bank v. Aymer, 3 Hill (N. Y.) 262; Bank of Morganton v. Hay (N. C. 1906), 55 S. E. 811. See, also, Brittain v. Pioneer State Bank (Wash.), 87 Pac. 1051.

³⁰⁴ Exchange Bank v. Monteath, 26 N. Y. 505.

recovery thereon unless he can show that his agent, to the knowledge of the holder abused his power.³⁰⁵ Again, where two persons were joint agents of the Royal Veteran Battalion, but were not otherwise connected in business, and were in the habit of accepting bills by means of a clerk, in this form: "For agents of the R. V. B.—J. G." it was held to be no answer to a joint action against them by the indorsee of such a bill to show that it was accepted for the private advantage of one without the knowledge of the other, although it appeared that the indorsee might, if he had inquired of the clerk who accepted it, have ascertained that such was the fact.³⁰⁶ So where a principal permits an agent to do business under the name of a company and holds him out to the world as such company, he cannot question the validity of his acts as against one who deals with him in good faith without notice of the alleged relationship, and where notes are given to such agent in his own name, or the name of the company; he and the company being in legal effect one and the same, they may be assigned by him, and the defense of want of authority cannot be set up against the transferee without notice.³⁰⁷ And where full authority is given to an agent to sell notes indorsed in blank, the rights of a purchaser, who had no notice of the instructions given to such agent, are held not to be prejudiced by the fact that the latter has violated his instructions as to the manner of making the sale or as to the disposition of the proceeds.³⁰⁸ But where one was a special agent for another to sign the latter's name to a note for a certain amount, and affixed his name to one for a larger amount, and it did not appear that the one to whom the instrument was given knew that the signer was an agent for any purpose and it did not purport to be signed by him as agent, the principal was held not liable to a third person who advanced money thereon to the agent and for his benefit.³⁰⁹ And where one who is a special agent, with authority to negotiate his principal's draft for cash at a reasonable discount, transfers the draft to a third person, having knowledge of the agency, in payment of his

³⁰⁵ *Broadway Sav. Bank v. Vorster*, 29 La. Ann. 587. It was said in this case: "Those who give such extraordinary powers incur the risk of loss by the imprudence or by the fraud of the agent, but they must attribute this only to their own misfortune or want of proper caution in selecting the agent to be entrust-

ed with such large powers," per Marr, J.

³⁰⁶ *Saunderson v. Brooksbank*, 4 C. & P. 286.

³⁰⁷ *Gardner v. Wiley* (Oreg.), 79 Pac. 341.

³⁰⁸ *Howry v. Eppinger*, 34 Mich. 29.

³⁰⁹ *King v. Sparks*, 77 Ga. 285, 1 S. E. 266.

own debt, such transfer being beyond the agent's authority, it is decided that the transferee thereby acquires no rights as against the principal.³¹⁰ So mere authority to an agent to collect cash confers no authority upon him to indorse his principal's name and collect the cash upon commercial paper issued to the principal, and the latter may recover from the one so paying the value of such paper.³¹¹ Again in an English case it has been decided that the acceptance or indorsement of a bill of exchange expressed to be "per procuration" is a notice to the indorsee that the party so accepting or indorsing professes to act under an authority from some principal, and imposes upon the indorsee the duty of ascertaining that the party so accepting or indorsing, is acting within the terms of such authority.³¹²

§ 76. Unauthorized collection of note given as collateral.—It is no defense to an action on a note that defendants delivered to a third person, by plaintiff's authority, a note secured by chattel mortgage as collateral security for the note in suit and that such third person collected the collateral note by foreclosure of the mortgage where he had no authority from plaintiff to collect it.³¹³

§ 77. Receipt of paper by public officer only authorized to receive cash.—Where the clerk of a court has taken a note in payment at a judicial sale, an indorsee of such note is not subject to the defense that the clerk was only authorized to take cash and had no power to take the note, it having been transferred for its face value. The court said in this case: "He was * * * only authorized to receive money, and the note was his private property until its acceptance was ratified by the court, subject, of course, to the trust in favor of the beneficiary in case of ratification. But as he would have been clearly authorized to have received the money from Hill and delivered up the note to him, he might also, before ratification, sell the note for the money it was intended to secure. For it was the money he was directed to receive and account for."³¹⁴

§ 78. Paper given to or transferred by administrator or executor. A purchaser of property from an executor or an administrator is, at

³¹⁰ Dowden v. Cryder, 55 N. J. L. 329, 26 Atl. 941. 766. See Atwood v. Mumings, 7 B. & C. 285.

³¹¹ Goodell v. Sinclair & Co., 112 Ill. App. 594. See Bank of Morgan- ³¹³ St. Paul Grain Co. v. Rudd, 102 Iowa 78, 71 N. W. 417.
ton v. Hay (N. C. 1906), 55 S. E. 811. ³¹⁴ Harrison v. Black, 78 Tenn. (10

³¹² Alexander v. Mackenzie, 6 C. B. Lea) 117, per Cooper, J.

his own peril, required to ascertain the grounds of authority of the fiduciary, not from his declarations at the time of the sale, but from the orders of the court and the statutes of the state in regard to his special duties in the premises. The purchaser has the same means of knowing and understanding the nature of such orders and the provisions of the laws as the administrator or executor and any representations or statements which the latter may make will not operate as a fraud upon the former and cannot be set up by him in defense to an action on a note given for such purchase. Thus it was so declared where fraud in the administrator at the sale and at the execution of the note was set up, in that he stated at the sale that the bids would be in confederate money and the notes payable therewith, and that defendants relied on his representations in making the bid and in executing the note which the administrator subsequently refused to receive or its equivalent in value at its maturity.³¹⁵ And where the payee of a note has died and his wife acting as sole executrix indorses the note to a third person, the latter, in order to maintain an action thereon, should show authority to make the indorsement either by the will or by an authenticated or proved copy.³¹⁶

§ 79. **Corporate want of authority as affected by illegality or statute.**—Except where it is provided by statute that a bill or note issued by a corporation shall be void, such an instrument, which does not appear upon its face to be illegal or unauthorized, will not in the hands of a *bona fide* holder without notice, who has paid a valuable consideration therefor, be subject to the defense that it is illegal or issued without authority.³¹⁷ And although a state will not enforce foreign laws in contravention of its own policy, yet if a note is made to a foreign corporation the maker will not be permitted, as against a *bona fide* holder, to set up in defense to an action on the note that the corporation is not, by reason of non-compliance with the state laws, authorized to do business within the state, where such laws do not declare that contracts made with such corporation shall be void.³¹⁸

³¹⁵ *Hamilton v. Pleasants*, 31 Tex. 638, 98 Am. Dec. 551.

³¹⁶ *Russell v. Russell*, 1 MacArthur (D. C.) 263.

Where estate has received benefit of note by executrix she will be liable in her representative capacity. *Ellis v. Littlefield* (Tex. Civ. App.), 93 S. W. 171.

³¹⁷ *Vallett v. Parker*, 6 Wend. (N.

Y.) 615; *Pickaway County Bank v. Prather*, 12 Ohio St. 497.

³¹⁸ *Williams v. Cheney*, 69 Mass. (3 Gray) 215; *Hart v. Livermore Foundry & M. Co.*, 72 Miss. 809, 17 So. 769; *Chesbrough v. Wright*, 41 Barb. (N. Y.) 28; *Press Co. v. City Bank*, 58 Fed. 321, 7 C. C. A. 248, 17 U. S. App. 213. See *Tallapoosa Lumber Co. v. Holbert*, 5 App. Div. (N. Y.) 559, 39 N. Y. Supp. 432. But see

So although a statute provides that a note taken for insurance premiums shall express such fact upon its face, and that it shall not be collectible unless the company or its agents shall have fully complied with the laws of the state in reference thereto, this will not be a defense to an action on such note by a purchaser of the same for value before maturity, as the object of such a statute is to prevent unauthorized companies from doing business within the state and not to deprive a *bona fide* holder of commercial paper of his legal rights.³¹⁹ Nor, in an action by a *bona fide* holder of a note, can the illegality of such note, on the ground that it was given for an unauthorized purchase of stock, be set up.³²⁰ And where a note is given to a corporation formed for an illegal purpose, for consideration of dealings growing out of its illegal operations, a bank which has discounted the same before maturity and without notice will not be subject to a defense of such facts.³²¹ Again, in an action by a bank upon a note or acceptance it is decided that the organization of the bank cannot be inquired into for the purpose of a defense.³²² It has, however, been determined that the payor of a note which has been transferred by an officer of an insurance company may, where he is a creditor of the company, contest the validity of such transfer so that he may avail himself by way of set-off of existing equities between him and the company.³²³ And it has been held in the federal courts that it may be shown in defense to an action on a bill or note, even by one who is a *bona fide* holder, that such paper was executed by a corporation in violation of an express statute.³²⁴ So under a national banking act conferring no authority on national banks to purchase notes, it has been decided that no title is acquired by them to notes which they have purchased and that they cannot recover thereon.³²⁵

§ 80. Want of authority of corporate officers or agents.—The fact

First Nat. Bank v. Coughron
(Tenn. 1898), 52 S. W. 1112.

³¹⁹ Cook v. Weirman, 51 Iowa 561,
2 N. W. 386.

³²⁰ City Bank v. Barnard, 1 Hall
(N. Y.) 80.

³²¹ Burton v. Stewart, 62 Barb. (N.
Y.) 194.

³²² Southern Bank of Georgia v.
Williams, 25 Ga. 534; Smith v. Mis-
sissippi & A. R. Co., 6 Sm. & M.
(Miss.) 179.

³²³ Litchfield v. Dyer, 46 Me. 31.

³²⁴ Root v. Godard, 3 McLean (U.
S.) 102, Fed. Cas. No. 12037; Hay-
den v. Davus, 3 McLean (U. S.)
276, Fed. Cas. No. 6259.

³²⁵ Lazear v. Bank, 52 Md. 78;
First Nat. Bank v. Pierson, 24 Minn.
140. But see National Pemberton
Bank v. Porter, 125 Mass. 333, 28
Am. Rep. 235.

that an officer or agent of a corporation either abuses or disregards or exceeds his authority in the issuance or transfer of a corporate bill, note, or certificate of deposit, is no defense to an action upon such instrument by an innocent holder without notice and for value where the transaction is properly one which may pertain to the business of such corporation,³²⁶ or where the corporation has received the proceeds and may be said to have ratified or assented to the act of such officer.³²⁷ "Proof of apparent authority of a corporate officer to contract in its behalf *prima facie* establishes actual authority so to do, and evidence of want of such authority will not relieve the corporation from the burden of a contract made with reasonable reliance upon such apparent authority, if such corporation is responsible for such appearance."^{327*} But if a note is given in a transaction which does not affect the business of the corporation and it does not appear that the officer had any authority by by-law or resolution to so act, or there is no recognized course of business by which he is held out as possessing such power, it has been decided that such facts will be a good defense even as against a *bona fide* holder.³²⁸

³²⁶ *Alabama*.—Allen v. West Point Co., 132 Ala. 292, 31 So. 462.

California.—Meyer v. Brown, 65 Cal. 583.

Connecticut.—Standard Cement Co. v. Windham, 71 Conn. 668, 42 Atl. 1006.

Idaho.—Jones v. Stoddart, 8 Idaho 210, 67 Pac. 650.

Indiana.—Book v. Stinger, 36 Ind. 346.

Maryland.—Davis v. West Saratoga Building Union, 32 Md. 285.

Massachusetts.—Bird v. Daggett, 97 Mass. 494.

Missouri.—St. Louis Perpetual Ins. Co. v. Cohen, 9 Mo. 421.

New York.—Grant v. Treadwell Co., 82 Hun (N. Y.) 591, 31 N. Y. Supp. 702; National Park Bank v. German American Mut. W. & S. Co., 21 Jones & S. (N. Y.) 367; Bank of New York v. Bank of Ohio, 29 N. Y. 619; Exchange Bank v. Monteath, 26 N. Y. 505; Merchants' Bank v. McCall, 6 Bosw. (N. Y.) 473.

Ohio.—Citizens' Sav. Bank v. Blakesley, 42 Ohio St. 645.

Texas.—Manhattan Liquor Co. v. Magnus & Co. (Tex. Civ. App.), 94

S. W. 1117; Manhattan Liquor Co. v. German Nat. Bank (Tex. Civ. App.), 94 S. W. 1120.

Federal.—Irwin v. Bailey, 8 Biss. C. C. 523, Fed. Cas. No. 7079.

Virginia.—Compare Davis v. Rockingham Inv. Co., 89 Va. 290, 15 S. E. 547.

³²⁷ Cadillac State Bank v. Cadillac Stave & Heading Co., 129 Mich. 15, 88 N. W. 67, 8 Det. L. N. 851; Grant v. Treadwell Co., 82 Hun (N. Y.) 591, 31 N. Y. Supp. 702; Webster v. Whitworth (Tenn. Ch. App. 1901), 63 S. W. 290. See, also, First Nat. Bank v. Commercial, &c., Home Ass'n (N. Y.), 78 N. E. 1103.

^{327*} Bullen v. Milwaukee Trading Co., 109 Wis. 41, 85 N. W. 115, per the court.

³²⁸ Wahling v. Standard Pump Mfg. Co., 9 N. Y. Supp. 739; Dexter Sav. Bank v. Friend, 90 Fed. 703. Compare Eaton v. Berlin, 49 N. H. 219. "The officers of a corporation have no power to authorize the execution of a note as surety for another in respect to a matter having no relation to the corporate business and

§ 81. **Same subject—Application of rules—Illustrations.**—Where a treasurer of a corporation has power to accept drafts the fact that certain drafts were accepted by him without authority and contrary to the provisions of the by-laws of the corporation is no defense to an action on such paper by one who is a *bona fide* holder.³²⁹ So where the president and treasurer of a corporation had authority to sign and put in circulation commercial paper in furtherance of and in the regular course of business of the corporation and he abused his authority and gave paper for the accommodation of a stranger and it came into the hands of an innocent holder the corporation was held bound thereon.³³⁰ And where the president of a corporation was authorized by resolution of the directors to incur debts, negotiate loans and contract for the company, recovery on a note executed by the president alone could not be defeated by the fact that it was provided for by a by-law of the corporation that notes signed by the president and secretary should be binding, such provision not requiring that all notes should be signed by the secretary.³³¹ So where a corporation sent its assistant secretary, who had executed contracts in its behalf, to another state to superintend its business there and with its knowledge and assent such officer opened an account with the bank in the city where he was sent, it was decided that the corporation could not, by setting up the defense of want of authority, defeat recovery on notes given by such officer in the company's name, to cover overdrafts made of the company's account, of which it had knowledge, the amount of such notes having been placed to the credit of the company by the bank in the pass book of the contents of which the company was held to have notice and being checked against and withdrawn by the officer in charge of the account apparently so far as the bank could see for the company's business.³³² And where the secretary of a corporation is

in which the corporation has no interest. Such a transaction is not within the scope of its business, and a party receiving such a note with notice of the circumstances under which it is given cannot recover on it." *Hall v. Auburn Turnpike Co.*, 27 Cal. 256, 257, 87 Am. Dec. 75, per the court.

Unauthorized accommodation paper issued by corporation officers. *Cook v. Amer. Tubing, &c., Co.* (R. I.), 65 Atl. 641; *Tuttle v. Tuttle Co.* (Me.), 64 Atl. 496.

³²⁹ *Credit Co. v. Howe Mach. Co.*,

54 Conn. 357, 8 Atl. 473, 1 Am. St. R. 123.

³³⁰ *Dexter Sav. Bank v. Friend*, 90 Fed. 703. Corporation liable on guaranty of president. See *Lloyd & Co. v. Matthews* (Ill. 1906), 79 N. E. 172.

³³¹ *McCormick v. Stockton & T. C. R. Co.*, 130 Cal. 100, 62 Pac. 267; examine *Third National Bank v. Laboring Man's Mercantile & M. Co.* (W. Va., 1904), 49 S. E. 544, holding a president has no inherent power to bind corporation by note.

³³² *Hennesey Bros. & Co. v. Memphis National Bank*, 129 Fed. 557, 64 C. C. A. 125. The court said in

merely authorized to accept drafts and has no power to discount them for the accommodation of a third person, no recovery can be had against the corporation by a bank which has discounted such a draft with the knowledge that the indorsement was merely for accommodation.³³³ And though the by-laws of a corporation provide that a note executed in the name of the corporation shall be signed by its president and treasurer, yet the fact that it was not signed by the latter

this case: "The notes served every purpose which would have been subserved if the company had made equivalent deposits on those dates. The bank required the overdrafts to be paid, and, instead of cash, it took these notes. The authority which the company intrusted to Evans, or the exercise of which it apparently sanctioned, was sufficiently extensive to cover his dealings with the bank, including the giving of the notes. We are inclined to think that his general authority, coupled with that which was given him to open an account and transact the business of his company with the bank, was sufficient to justify his covering of the overdrafts which he had made in the company's behalf, and of which the company had the benefit. If he had made the company's note, and negotiated it with the bank, professedly for the company's business, and secured a loan of money thereon, which he used in the company's business, could it be doubted that the company would be bound by his act? We think not. If his use of the proceeds was that of paying an overdraft owing by the company, would not that be devoting it to the company's business? But there could be no distinction between such a transaction as that which occurred and that supposed, except in mere form, on which the law would lay no stress. But it was indisputably proved that the company knew that overdrafts were occurring. It took no precautions to pre-

vent them or to provide for their settlement. It must have been known that they had been provided for in some way and must be if they occurred again. The only reasonable inference is that it was intended by the company to leave the duty of attending to such contingencies to their superintendent who was in charge of the account. There is another feature of this case, however. The company had a pass book which was periodically balanced by the bank and returned to the company, that is, it was returned to its superintendent. * * * The credits obtained by the notes were shown by the book. * * * The company is affected by notice of the contents of the pass book to the same extent as if the agent had been an honest one. * * * The contention of the defendant runs counter, as, indeed, does its entire defense, to the settled rule that, when one of two persons is to suffer by the act of an agent intrusted by his principal with the appearance of authority to do the act, that one shall take the burden whose agent committed the wrong. We think this is a plain case for the application of that doctrine." Per Severens, C. J.

³³³ *Eureka Bank v. Eureka Woolen Mfg. Co.*, 33 N. S. 302. No presumption exists that secretary can bind corporation as an accommodation indorser of his personal note. *Wheeling Ice & Storage Co. v. Connor* (W. Va. 1906), 55 S. E. 982.

is no defense to an action on the note in the hands of a *bona fide* holder, the corporation having received the benefit of the proceeds.³³⁴ So it has been decided that a warehouse receipt, where issued within the apparent scope of the authority of the managing officer of a corporation is not subject to the defense, in the hands of a *bona fide* holder, that the officer issuing it acted in disregard or excess of his authority.³³⁵ And evidence is admissible in support of the authority of the president of a corporation to draw a bill of exchange that he had on various occasions, both before and after the bill in question, executed similar bills and notes which had been accepted and the sums thus expended entered into the accounts of the corporation without objection.³³⁶ But where it was provided by the articles of a corporation that all corporate notes should be executed by its president or, in case of his absence or disability, the vice-president, want of authority to execute notes signed by its secretary, who had been appointed with the vice-president merely to effect a settlement with certain creditors, was held a good defense to an action thereon.³³⁷

§ 82. **Same subject—Bank officials' acts.**—Where a bank teller certifies a check in such a form as to be apparently within his power, and so that by comparing the power with the act alleged to be done in pursuance of it the latter appears to be authorized and the security is negotiated to an innocent party who parts with value without notice that there has been any abuse of authority, it is no defense to an action on the instrument that the paper was certified in a case or for a purpose to which his authority did not extend.³³⁸ And a similar rule prevails in the case of a certification by a bank cashier,³³⁹ or of an indorsement by him.³⁴⁰ And where directors of an unincorporated and unregistered banking company issued notes as directors, for themselves "and the shareholders of the said company," promising jointly and severally to pay the same, it was decided that assuming the parties signing were authorized to sign promissory notes on account of the partnership this form of note showed sufficiently an intention

³³⁴ *Grant v. Treadwell Co.*, 82 Hun (N. Y.) 591, 31 N. Y. Supp. 702. See, also, *Houts v. Sioux City Brass Works* (Iowa 1907), 110 N. W. 166.

³³⁵ *Smith v. Capital Elevator Co.* (Kan.), 58 Pac. 483.

³³⁶ *Olcott v. Tioga Railroad Co.*, 27 N. Y. 546, 84 Am. Dec. 298.

³³⁷ *Thompson v. Des Moines Driv. Park*, 112 Iowa 628, 84 N. W. 678.

³³⁸ *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 14 N. Y. 623.

³³⁹ *Cooke v. State Nat. Bank*, 52 N. Y. 96, 11 Am. Rep. 667.

³⁴⁰ *Bank of New York v. Bank of Ohio*, 29 N. Y. 619.

to bind the partnership jointly, and though the attempt to bind the shareholders severally was *ultra vires* and void and a stockholder separately sued might successfully deny his separate liability, yet they would be liable in a joint action.³⁴¹

§ 83. **Same subject—Paper issued by public officers.**—Where paper is issued by public officers without any authority at law to so act, the want of authority may be shown in defense to an action by a purchaser of the same, as in such a case the latter is bound to look to the authority to issue the paper.³⁴² Their powers and duties are defined by statute, which is notice to the world of the limitations of their authority and no pretension of authority or customary action can amplify that authority beyond the statutory limitation.³⁴³ So negotiable paper which originates in fraud and is issued by a person incapable of entering into such contract on the part of the estate which such paper purports to represent is void and want of authority is a defense to an action thereon, as the powers and duties of state officers being defined by statute constitute notice to all the world of the limitation upon their authority to issue negotiable obligations for the state.³⁴⁴

§ 84. **Ultra vires instruments.**—Want of corporate authority to make or indorse a bill or note may in some cases be available as a defense in an action against the corporation on such instrument.^{344*} So paper issued by a corporation in contravention of a statute forbidding it to issue such paper has been held subject to this defense.³⁴⁵ And where a statute provided that no monied corporation subject to it should "issue any bill or note of the said corporation, unless the same be made payable on demand, and without interest" and notes were issued in contravention of this act by a banking corporation the notes were held void in the hands of a *bona fide* holder without notice.³⁴⁶ And a draft or warrant drawn by the corporation of a city upon the treasurer of the city, not in the course of its proper legitimate busi-

³⁴¹ *MacLae v. Sutherland*, 3 E. & B. 1, 32.

³⁴² *School Directors v. Fogelman*, 76 Ill. 189; *Eastman v. Lyon*, 40 Iowa 438; *Elliott Nat. Bank v. Western & A. R. Co.*, 70 Tenn. (2 Lea) 676. See *Loomis v. Brown Co.*, 15 S. D. 606, 91 N. W. 309.

³⁴³ *Elliott Nat. Bank v. Western & Atlantic Railroad*, 70 Tenn. 676, 680.

³⁴⁴ *State v. Hart*, 46 La. Ann. 40.

^{344*} *Scott v. Bankers' Union* (Kan. 1906), 85 Pac. 604.

³⁴⁵ *Chillicothe Bank v. Dodge*, 8 Barb. (N. Y.) 233.

³⁴⁶ *Root v. Godard*, 3 McLean 102, Fed. Cas. No. 12037.

ness, as required by the charter to render it valid, is void in the hands of a *bona fide* holder, without actual notice of its consideration, as the charter being a public act every person is bound to know the extent of the powers of the corporation.³⁴⁷ Again a corporation not established for trading purposes was held not liable on its acceptance of a bill of exchange where the act of acceptance was clearly within the prohibition of the several acts passed for the protection of the bank of England.³⁴⁸

§ 85. Same subject—Corporation authorized to issue paper.—A corporation which is authorized to issue commercial paper for any purpose and which executes such paper apparently within the scope of its corporate powers, will be estopped to set up in an action upon the instrument by a *bona fide* holder the defense of *ultra vires*.³⁴⁹ In such cases the presumption arises that the paper has been lawfully issued.³⁵⁰ This rule applies in the case of accommodation paper.³⁵¹

³⁴⁷ Halstead v. Mayor, 5 Barb. (N. Y.) 218.

³⁴⁸ Broughton v. Manchester Water Works Co., 3 Barn. & A. 1.

³⁴⁹ Georgia.—Jacobs v. Southern Banking Co., 97 Ga. 573, 25 S. E. 171; Towles Excelsior Co. v. Inman, 96 Ga. 506, 23 S. E. 418.

Kentucky.—German Nat. Bank v. Louisville Co., 97 Ky. 34, 29 S. W. 882.

Maine.—Commercial Bank v. St. Croix Mfg. Co., 10 Shep. (Me.) 280.

Massachusetts.—Monument Nat. Bank v. Globe Works, 101 Mass. 57, 36 Am. Rep. 322.

Michigan.—Genesee County Sav. Bank v. Michigan Barge Co., 52 Mich. 438, 17 N. W. 790.

Minnesota.—American Bank v. Gluck, 68 Minn. 129, 70 N. W. 1085; Auerbach v. Le Sueur Mill Co., 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285.

New Jersey.—Blake v. Manufacturing Co. (N. J. Eq.), 38 Atl. 241; National Bank of Republic v. Young, 41 N. J. Eq. 531, 7 Atl. 488.

New York.—Ellsworth v. St. Louis & C. R. Co., 98 N. Y. 553; Wile & Brickner Co. v. Richester & K. F. L. Co., 4 Misc. (N. Y.) 570, 25 N. Y. Supp. 794.

Ohio.—Pittsburg, C., C. & St. L. R. Co. v. Lynde, 55 Ohio St. 23, 44 N. E. 593.

Pennsylvania.—Wright v. Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701.

Wisconsin.—Lehigh Val. Coal Co. v. West Depere Agricultural Works, 63 Wis. 45, 22 N. W. 831.

Federal.—Maxwell v. Akin, 89 Fed. 178. See:

Illinois.—Peoria R. Co. v. Thompson, 103 Ill. 187.

Wisconsin.—Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709.

³⁵⁰ St. Joe & M. F. Consol. Min. Co. v. First Nat. Bank, 10 Colo. App. 339, 50 Pac. 1055.

³⁵¹ Alabama.—Florence R. R. & Imp. Co. v. Chase Nat. Bank, 106 Ala. 364, 17 So. 720.

Georgia.—Jacobs Pharmacy Co. v.

And a similar rule prevails where a note is taken by a corporation and is subsequently transferred to one taking the same in good faith and for value.³⁵² Nor is the fact that a by-law as to the manner of execution was not complied with available as a defense.³⁵³

§ 86. **Same subject—Application and illustration of rule.**—Where a corporation having power to make and issue commercial paper, enters into a contract prohibited by its charter and executes a note in pursuance thereof, as in the case of a contract to purchase stock in another corporation and the contract is executed by the delivery of the stock, it cannot set up in defense to an action on the note by a *bona fide* purchaser that the note was *ultra vires*, there being no evidence of illegality on the face of the instrument.³⁵⁴ And a negotiable security of a corporation, which upon its face appears to have been duly issued by such a corporation, and in conformity with the provisions of its charter, has been held valid in the hands of a *bona fide* holder thereof, without notice, although such security was in fact issued for a purpose and at a place not authorized by the charter of the corporation and in violation of the laws of the state where it was actually issued.³⁵⁵ So where a banking corporation enters into an unauthorized contract which is in the form of a negotiable instrument it cannot avail itself of the defense that the instrument was *ultra vires* as against one who, without notice, has become the holder of the paper for value.³⁵⁶ And where money was loaned in good faith to a corpora-

Southern Banking & T. Co., 97 Ga. 573, 25 S. E. 171.

Minnesota.—American Trust & Sav. Bank v. Gluck, 68 Minn. 129, 70 N. W. 1085.

New Jersey.—National Bank of Republic v. Young, 41 N. J. Eq. 531, 7 Atl. 488.

New York.—Mechanics' Banking Ass'n v. New York & S. White Lead Co., 35 N. Y. 505.

Texas.—Marshall Nat. Bank v. O'Neal, 11 Tex. Civ. App. 640, 34 S. W. 344.

Federal.—Tod v. Kentucky Union Land Co., 57 Fed. 47.

Michigan.—Compare McLellan v. File Works, 56 Mich. 579, 23 N. W. 321.

³⁵² McIntire v. Preston, 10 Ill. (5 Gilm.) 48, 48 Am. Dec. 321; Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101; First Nat. Bank v. Gillilan, 72 Mo. 77; Willmarth v. Crawford, 10 Wend. (N. Y.) 241; Gorrell v. Ins. Co., 11 C. C. A. 240, 63 Fed. 371.

³⁵³ National Spraker Bank v. Treadwell Co., 80 Hun (N. Y.) 363, 30 N. Y. Supp. 77.

³⁵⁴ Wright v. Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701.

³⁵⁵ Stoney v. American Life Ins. Co., 11 Paige (N. Y.) 635.

³⁵⁶ Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125, 69 Am. Dec. 678. In this case it appeared that a check had been

tion on a note properly executed by the corporation, which imported a valid obligation, the corporation in an action on the note has been held liable, though it did not receive the money, there being nothing to show that the lender suspected fraud any more than an ordinary person in the usual course of transactions of the company who dealt in like manner would suspect such a thing.³⁵⁷ Again where a corporation has power to indorse negotiable paper in the transaction of its legitimate business, though it may have no right to lend its name for the accommodation of another, yet the fact that it has exceeded the authority conferred upon it by indorsing paper for accommodation is no defense to an action thereon by one who was an innocent holder before maturity for value and without notice of the character of the indorsement.³⁵⁸ Where it is provided by statute that it shall not be lawful for any corporation to divert its operations to purposes not set forth in its articles of association, such a statute has been held merely declaratory of the common law and to be no defense to an action by a *bona fide* indorsee for value before maturity against the corporation on its acceptance of a bill of exchange for the accommodation of the drawee.³⁵⁹ So, though a banking corporation has not received its certificate from the bank commissioner authorizing it to transact business as required by law, yet innocent purchasers of paper negotiated by the bank will obtain a valid title thereto, as to otherwise construe such a law would be to aid in defrauding those who might deal with an unlawfully conducted bank.³⁶⁰

§ 87. **Same subject—Municipal or public corporations.**—A municipal or other public corporation which issues commercial paper in excess of the authority conferred upon it by statute may set up in defense to an action on such paper, even by a *bona fide* holder, that the act of issuing the same was *ultra vires*, as one taking such paper is bound to a knowledge of the laws under which it was issued.³⁶¹ There

certified by an authorized agent of the bank where the drawer had no funds.

³⁵⁷ *Allen v. West Point Min. & M. Co.*, 132 Ala. 292, 31 So. 462.

³⁵⁸ *Marshall Nat. Bank v. O'Neal*, 11 Tex. Civ. App. 640, 34 S. W. 344.

³⁵⁹ *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 52 Fed. 191, 3 C. C. A. 1.

³⁶⁰ *Kellogg v. Douglas Co. Bank*, 58 Kan. 43, 48 Pac. 587, 62 Am. St. R. 596.

³⁶¹ *Alabama*.—See *Cleveland School Furn. Co. v. Greenville* (Ala. 1906), 41 So. 862.

Arkansas.—*Lindsey v. Rottaken*, 32 Ark. 619; *Hancock v. Chicot Co.*, 32 Ark. 575.

Illinois.—*School Directors v. Fingleman*, 76 Ill. 189; *Bissell v. City of Kankakee*, 64 Ill. 249, 21 Am. Rep. 554.

Iowa.—*Williamson v. Keokuk*, 44

can be no *bona fide* holders of such paper, within the meaning of the law applicable to negotiable paper, which has been issued without authority. The conditions under which such paper may be issued and generally the manner of issuing the same are prescribed by statute and all persons taking the same are chargeable with knowledge of these express provisions of law and it is obligatory upon them to see whether there has been a compliance with the same before they can take this kind of paper with safety.³⁶² So it has been declared by the United States Supreme Court that: "It is the settled doctrine of this court that municipal corporations are merely agents of the state government for local purposes, and possess only such powers as are expressly given, or implied because essential to carry into effect such as are expressly granted; that the bonds of such corporations are void unless there be express or implied authority to issue them; that the provisions of the statute authorizing them must be strictly pursued; and that the purchaser or holder of such bonds is chargeable with notice of the requirements of the law under which they are issued."³⁶³ And in a case in Illinois it is said: "The authority of a municipal corporation to issue bonds

Iowa 88; *McPherson v. Foster*, 43 Iowa 48, 22 Am. Rep. 215; *Clark v. City of Des Moines*, 19 Iowa 199, 87 Am. Dec. 423.

Louisiana.—*Cecil v. Board*, 30 La. Ann. 34; *Louisiana State Bank v. Orleans Nav. Co.*, 3 La. Ann. 294.

Michigan.—*Bailey v. Tompkins*, 127 Mich. 74, 86 N. W. 400.

Mississippi.—*Supervisors of Jefferson County v. Arrighi*, 54 Miss. 668.

Missouri.—*State v. Macon Co.*, 68 Mo. 29; *Cagwin v. Hancock*, 84 N. Y. 532; *Halstead v. New York*, 3 N. Y. 430; *Citizens' Bank v. Greenburgh*, 60 App. Div. (N. Y.) 225, 70 N. Y. Supp. 68.

Tennessee.—*Galbraith v. City of Knoxville*, 105 Tenn. 453, 58 S. W. 643.

West Virginia.—*Slifer v. Howell's Adm'r*, 9 W. Va. 391.

Wisconsin.—*Fisk v. Kenosha*, 26 Wis. 23.

Federal.—*Brenham v. German American Bank*, 144 U. S. 173, 12 Sup. Ct. 559; *Young v. Clarendon*,

132 U. S. 340, 10 Sup. Ct. 107; *Merchants' Exch. Nat. Bank v. Bergen Co.*, 115 U. S. 384, 6 Sup. Ct. 88; *Hoff v. Jasper Co.*, 110 U. S. 53, 3 Sup. Ct. 476; *Ogden v. County of Daviess*, 102 U. S. 634; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154; *Lehman v. City of San Diego*, 83 Fed. 669, 27 C. C. A. 668; *County of Bates v. Winters*, 97 U. S. 83; *East Oakland v. Skinner*, 94 U. S. 255; *Chisholm v. City of Montgomery*, 2 Woods C. C. 584; *Fed. Cas. No. 2686*. Compare *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613; *Block v. Commissioners*, 99 U. S. 686; *Grand Chute v. Winegar*, 15 Wall. (U. S.) 355.

A note by a city for property it is not authorized to purchase is not binding. *Cleveland School Furn. Co. v. Greenville* (Ala. 1906), 41 So. 862.

³⁶² *Cagwin v. Town of Hancock*, 84 N. Y. 532, 542.

³⁶³ *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. 819, per Brown, J.

is derived from public laws, and the avenues to information in regard to the law and ordinances of such corporations being open to public inspection, the holder of such securities will be presumed to have examined them, and to have known whether the corporation had the requisite power to issue the bonds. He has no such opportunity in regard to private corporations. Their by-laws are not open to inspection by those who deal in securities issued by them, and hence the reason for the distinction that has been taken."³⁶⁴ So a county warrant is held binding on the county only where issued by the officers having legal authority to issue it or to contract the obligation in settlement of which it was issued; and such a warrant imposes no liability on the county when issued in violation of the law, or in fulfillment of a contract that the officers were prohibited from entering into.³⁶⁵ And where bonds are void from the beginning because of lack of power in a municipality to issue them, the municipality is not estopped from asserting their invalidity by reason of any subsequent act of its officers or agents or by reason of any supposed ratification by them.³⁶⁶ But where authority has been conferred by statute in general terms upon a municipality to issue bonds, the non-performance of conditions and details provided by the act, which are not recited in the bond, cannot be set up in defense to an action thereon by a *bona fide* holder.³⁶⁷ So the fact that bonds, which a municipal corporation has been authorized to issue, do not state upon their face the class of bond to which they belong, is no defense to an action thereon where the indebtedness which they represent is a valid one, as in such a case a technical compliance with the law in the form of the instru-

³⁶⁴ Bissell v. Kankakee, 64 Ill. 249, 252, 16 Am. Rep. 554, per Scott, J. "It must be conceded that municipal corporations, organized as they are, for restricted governmental purposes, have no power to issue commercial paper unless such power has been conferred by statute, and without such power such paper is void, even in the hands of an innocent holder for value before maturity." Coquard v. Village of Oquawka, 192 Ill. 355, 61 N. E. 660, 661, per Carter, J.

³⁶⁵ Supervisors v. Arrighi, 54 Miss. 668. See also, People v. Supervisors

of Eldorado, 11 Cal. 171; Sturtevant v. Inhabitants of Liberty, 46 Me. 457. Where county warrants appear to be genuine upon their face, having the names and signatures of proper persons and are worded in accordance with the requirements of the statute relative thereto, they are binding in the absence of proof showing the contrary. Apache County v. Barth (Ariz. 1898), 53 Pac. 187.

³⁶⁶ Sage v. Fargo, 107 Fed. 383.

³⁶⁷ Danielly v. Cabaniss, 52 Ga. 211. See Chilton v. Town of Gratton, 82 Fed. 873.

ment is immaterial.³⁶⁸ And where power exists to execute bonds and it is exercised in a lawful manner, it is not competent to set up against a *bona fide* holder that the proceeds from such bonds have been used for an unauthorized purpose.³⁶⁹

§ 88. **Guarantee of checks beyond deposits.**—Where checks have, for clearing house purposes, been guaranteed by one bank to another beyond the drawer's deposits, the latter cannot set up the *ultra vires* character of the agreement against the bank having paid the check in compliance therewith, the power to redress the wrongful act of the bank in such case being declared to be in the government only by a proceeding to forfeit the bank's charter.³⁷⁰

§ 89. **Want of authority of partner.**—The ostensible power of a partner raises a sufficient implication to bind the firm, and where a firm note is executed or transferred by one of the partners it will be no defense to an action thereon in the hands of one who is a *bona fide* holder for value and without notice that the note was given for a purpose other than the partnership business, and that the partner therefore acted without authority.³⁷¹ So it has been declared to be

³⁶⁸ *City of Gladstone v. Throop*, 71 Fed. 341, 349, 18 C. C. A. 61.

³⁶⁹ *Jones v. Camden*, 44 N. C. 319, 23 S. E. 141; *Clifton Forge v. Brush Electric Co.*, 92 Va. 289, 23 S. E. 288; *Clifton Forge v. Alleghany Bank*, 92 Va. 283, 23 S. E. 284.

³⁷⁰ *Voltz v. Bank*, 158 Ill. 532, 42 N. E. 69; citing *National Bank v. Whitney*, 103 U. S. 99; *National Bank v. Matthews*, 98 U. S. 621; *Weber v. Spokane Nat. Bank*, 64 Fed. 208.

³⁷¹ *Alabama*.—*Knapp v. McBride*, 7 Ala. 19.

Illinois.—*Wright v. Brosseau*, 73 Ill. 381; *Gregg v. Fisher*, 3 Ill. App. 261.

Iowa.—*Sherwood v. Snow*, 46 Iowa 481, 26 Am. Rep. 155.

Kentucky.—*Mitchell v. Whaley*, 29 Ky. Law R. 125, 92 S. W. 556.

Maine.—*Emerson v. Harmon*, 14 Me. 271.

Maryland.—*Porter v. White*, 39 Md. 613.

Massachusetts.—*Blodgett v. Weed*,

119 Mass. 215; *Boardman v. Gore*, 15 Mass. 331.

Mississippi.—*Hibernian Bank v. Everman*, 52 Miss. 500; *Silverstein v. Atkinson*, 45 Miss. 81; *Faler v. Jordan*, 44 Miss. 283.

Missouri.—*Bascom v. Young*, 7 Mo. 1.

New York.—*Chittenango First Nat. Bank v. Morgan*, 6 Hun (N. Y.) 346; *Smith v. Lusher*, 5 Cow. (N. Y.) 688, 709; *Wells v. Evans*, 20 Wend. (N. Y.) 251; *Onondaga County Bank v. DePuy*, 17 Wend. (N. Y.) 47; *Bank of Vergennes v. Cameron*, 7 Barb. (N. Y.) 143; *Bank of Rochester v. Monteath*, 1 Denio (N. Y.) 402, 43 Am. Dec. 681.

North Carolina.—*Cotton v. Evans*, 21 N. C. 284.

Pennsylvania.—*Potts v. Taylor*, 140 Pa. St. 601, 21 Atl. 443; *Leatherman v. Hecksher* (Pa.), 12 Atl. 485; *Sedgwick v. Lewis*, 70 Pa. St. 217; *Saylor v. Merchants' Exch. Bank*, 1

well settled that a general partner in a trading business may borrow money for the benefit of the firm and execute notes or drafts therefor, unless restrained by the articles of copartnership, of which the lender has notice, and that where money is borrowed by the partner of a trading firm in the name of the firm, and a note is executed therefor, such note is *prima facie* the obligation of the partnership, and if the other partner seeks to avoid its payment the burden of proof lies upon him to show that the note was given in a matter not relating to the partnership business, and that also with the knowledge of the holder of the note.³⁷² And this rule applies in the case of an accommodation note which has been given by one partner in the firm name.³⁷³ It is a question for the jury where the evidence is conflicting whether the act of a partner was within the scope of his authority or whether there was a subsequent ratification of such act by the firm.³⁷⁴

§ 90. Same subject continued.—If one of several partners obtain

Walk. (Pa.) 328; *Haldeman v. Bank of Middletown*, 28 Pa. St. 440, 70 Am. Dec. 142.

Rhode Island.—*Parker v. Burgess*, 5 R. I. 277.

Texas.—*Moore v. Williams*, 26 Tex. Civ. App. 142, 62 S. W. 977.

Vermont.—*Roth v. Colvin*, 32 Vt. 125.

Wisconsin.—*Sullivan v. Sullivan* (Wis. 1904), 99 N. W. 1022; *Rolins v. Russell*, 46 Wis. 594, 1 N. W. 277; *Kellogg v. Fancher*, 23 Wis. 21.

Federal.—*Michigan Bank v. Eldred*, 9 Wall. (U. S.) 544, 19 L. Ed. 763; *Union Nat. Bank v. Neil*, 149 Fed. 711; *Townsend v. Hagar*, 72 Fed. 949, 19 C. C. A. 256; *Drexler v. Smith*, 30 Fed. 754; *Babcock v. Stone*, Fed. Cas. No. 701, 3 McLean 172.

English.—*Ridley v. Taylor*, 13 East 175; *Jacaud v. French*, 12 East 322; *Swan v. Steele*, 7 East 210; *Baker v. Charlton*, Peake 80.

But compare *Pennsylvania*.—*Lerch Hardware Co. v. First Nat. Bank (Pa.)*, 5 Atl. 778; *Cooper v. McClur-*

kan, 22 Pa. St. 80; *King v. Faber*, 22 Pa. St. 21; *Tanner v. Hall*, 1 Pa. St. 417. "The indorsement and negotiation of promissory notes and bills is within the scope of the partnership business; and as to everything within the scope of that business, every partner by virtue of the partnership is clothed with the power to act for the firm—to use its name—and in that name to do every act the firm collectively might do, whether it be to make or indorse notes or bills."

Rhode Island.—*Windham County Bank v. Kendall*, 7 R. I. 77, 84, per Brayton, J.

³⁷² *Deitz v. Regnier*, 27 Kan. 94, 105, per Horton, C. J.

³⁷³ *Chemung Bank v. Bradner*, 44 N. Y. 680; *Austin v. Vandermark*, 4 Hill (N. Y.) 259; *Catskill Bank v. Stall*, 15 Wend. (N. Y.) 364. See also, *Leach v. Bank*, 2 Ind. 488; *Waldo Bank v. Lumbert*, 16 Me. 416.

³⁷⁴ *Cassidy v. Saline County Bank*, 14 Okla. 532, 78 Pac. 324.

a loan of money for his individual use, by giving the note or check of the firm, but within their authority, the other partners will nevertheless be bound thereby unless there be something in the transaction to induce the lender to suspect that the money is not borrowed for their benefit or the circumstances were such as to put him upon inquiry.³⁷⁵ And where a note was made payable to an individual partner for partnership property, it is decided that the right of a transferee, who is a *bona fide* holder, to recover can not be defeated by the fact that such partner transferred the note in satisfaction of his individual debt, and in fraud of the other partner's rights, except there be evidence of a participation by the transferee in the fraud or misconduct of such partner.³⁷⁶ So where a partnership was formed for the purpose of, and was engaged in, selling and buying, an instruction in an action upon a note executed by one of the partners in the firm name that if the other partner did not authorize the note to be so executed or did not subsequently ratify it, he was not bound, is erroneous.³⁷⁷ And though the name of a firm be affixed by one of the members to negotiable paper for the accommodation of a third person, if the note is discounted by a bank without knowledge of such fact, the other members of the firm are liable, though the note is given out of the course of the partnership business, and without their knowledge or consent.³⁷⁸ Again, where a partnership firm is pledged by the acceptance of a bill of exchange by one partner in the name of the firm, the partnership, of whomsoever it may consist, whether they are named or not, and whether the partners are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached or he be shown to have knowledge of the misapplication by such partner of the bill or its proceeds.³⁷⁹

§ 91. Same subject—Qualifications and limitations of rule.—Where the partnership is not in the trade of merchandise, want of authority may be shown in an action on a firm note given by one of the partners in a transaction which has no connection with the business of the joint concern.³⁸⁰ The general rule as to the authority of a partner to bind

³⁷⁵ Wagner v. Freschl, 56 N. H. 416; Catskill Bank v. Stall, 15 465; Miller v. Manice, 6 Hill (N. Y.) 114. ³⁷⁹ Wintle v. Crowther, 1 Crompton & Co. v. Wintle, 114.

³⁷⁶ Nichols v. Sober, 38 Mich. 678. J. 316.

³⁷⁷ Carter v. Steele, 83 Mo. App. 211. ³⁸⁰ Cocke v. Branch Bank, 3 Ala. 175; Grey v. Ward, 18 Ill. 32.

³⁷⁸ Waldo Bank v. Lumbert, 16 Me.

his co-partner by the execution or indorsement of paper in the firm name does not control in the case of a partnership of the non-trading class, which holds itself out as engaged in an employment or occupation which does not necessarily or fittingly embrace buying and selling, or a pledging of the firm's credit, unless it be shown to be the common usage, or the business is of a character to make the power essential to a proper transaction thereof, and in such case the burden is held to be on the holder of such paper to prove its validity against the firm.³⁸¹ And want of authority may be shown against the payee taking a note with full knowledge of the fact that the note was not given in connection with the partnership business.³⁸² So this is a good defense against one to whom a firm note is given by a partner for the individual debt of the latter.³⁸³ And where a partner borrowed money without his co-partner's knowledge, which money was with the lender's knowledge borrowed and used by such partner for the purpose of speculating in "cotton futures," and the firm note was given for such money, the other partner signing it in the belief that it was given for a lawful partnership debt, it was held that the lender could not recover thereon as against such partner.³⁸⁴ And a holder with notice of the want of authority is subject to this defense.³⁸⁵ So where a note is executed to the order of a firm by one of the partners, who indorses

³⁸¹ *Marsh v. Wheeler*, 77 Conn. 449; *Schele v. Wagner*, 163 Ind. 20, 71 N. E. 127; citing *Dowling v. National Bank*, 145 U. S. 512, 12 Sup. Ct. 928, 36 L. Ed. 795; *Schellenbeck v. Studebaker*, 13 Ind. App. 438, 41 N. E. 845, 55 Am. St. R. 240. Commercial or trading partnerships "are those whose conduct so involves buying and selling whether incidentally or otherwise, that it naturally comprehends the employment of capital, credit and the usual instrumentalities of trade and frequent contact with the commercial world in dealings which in their character and incidents are like those of trades generally." *Marsh v. Wheeler*, 77 Conn. 449, 454, per Prentice, J.

³⁸² *Benson v. Warehouse Co.*, 99 Ga. 303, 25 S. E. 645; *Sherwood v.*

Snow, 46 Iowa 481, 26 Am. Rep. 155; *Rice v. Doane*, 164 Mass. 136, 41 N. E. 126; *Roberts v. Pepple*, 55 Mich. 367, 21 N. W. 319.

³⁸³ *Lanier v. McCabe*, 2 Fla. 32; *Taylor v. Hillyet*, 3 Blackf. (Ind.) 433, 26 Am. Dec. 430.

³⁸⁴ *Benson v. Warehouse Co.*, 99 Ga. 303, 25 S. E. 645.

³⁸⁵ *New York*.—*Gansevoort v. Williams*, 14 Wend. (N. Y.) 133; *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251.

North Carolina.—*Weed v. Richardson*, 19 N. C. 535.

Pennsylvania.—*Brown v. Pettit*, 178 Pa. St. 17, 35 Atl. 865, 56 Am. St. R. 742, 34 L. R. A. 723; *Stockdale v. Keyes*, 79 Pa. St. 251.

English.—*Wintle v. Crowther*, 1 Cromp. & J. 316.

the firm name thereon and delivers it to a bank for discount, with a direction that the proceeds be placed to his personal credit, this is declared to be a sufficient indication of the nature of the transaction to make it the duty of the bank, which discounts it, to inquire into his authority to use the firm name for the occasion unless there are circumstances from which the authority can be implied.³⁸⁶ And it has been declared that "it is not necessary to secure a person giving credit to a partnership, that he should know or believe that each individual of the firm would approve the transaction; but it is necessary that he should not know that the debt attempted to be secured was not the debt of the partnership, or the property sold was not to inure to their benefit."³⁸⁷ But where a note is made payable to one member of a partnership, upon the purchase of partnership property, and the name of the partnership is different from that of the payee of the note, it is decided that the legal title does not pass by an indorsement by another one of the partners in the name of the payee, there being nothing whatever on the face of the note to indicate the connection of any partnership with it.³⁸⁸

§ 92. **Note between partner and firm.**—Though a partner cannot sue the firm of which he is a member or be sued by it, yet if a note is executed by him to the firm or by the firm to him, a subsequent indorsee, who is not a member of the firm, may recover in an action against it on the note.³⁸⁹ The reason underlying this is that though a party cannot sue himself as promisor, yet "this is a difficulty attending the remedy only, not the right, and when the note is indorsed by those having the right to indorse it, to one against whom there is no such exception, whereby he acquires a legal interest and right to sue in his own name, the difficulty vanishes. It is like a note payable to

³⁸⁶ *Brown v. Pettit*, 178 Pa. St. 17, 35 Atl. 865, 56 Am. St. R. 742, 34 L. R. A. 723; *Tanner v. Hall*, 1 Pa. 417.

³⁸⁷ *Huntington v. Lyman*, 1 D. Chip. (Vt.) 438, 448, per Skinner, Ch. J.

³⁸⁸ *McCauley v. Gordon*, 64 Ga. 221, 37 Am. Rep. 68.

³⁸⁹ *Illinois*.—*Kipp v. McChesney*, 66 Ill. 460.

Maine.—*Hapgood v. Watson*, 65 Me. 510.

Massachusetts.—*Thayer v. Bufum*, 52 Mass. (11 Metc.) 398.

Missouri.—*Young v. Chew*, 9 Mo. App. 387.

Vermont.—*Ormsbee v. Kidder*, 48 Vt. 361.

Compare *Michigan*.—*Davis v. Merrill*, 51 Mich. 480, 16 N. W. 864.

one's own order, which, though till indorsement is not a good legal contract, becomes such by the indorsement."³⁹⁰

§ 93. **Paper given in violation of articles of partnership.**—The fact that a note was given in violation of the articles of partnership is no defense as against a *bona fide* holder for value and before maturity.³⁹¹ "Whenever there are written articles of agreement between the partners, their power and authority, *inter se*, are to be ascertained and regulated by the terms and conditions of the written stipulations. * * * Any restriction which, by agreement among the partners, is attempted to be enforced upon the authority which one partner possesses, as a general agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restrictions have been made."³⁹² So where a note was given by one of the partners in a firm name to pay certain partnership expenses, and signed by him as agent, it was decided in an action thereon by a *bona fide* holder, who had discounted the same, that the partner had the power to make the note in suit and thereby bind his co-partners, and that the restriction on his authority contained in an agreement between the partners did not affect the plaintiff, as it was not communicated to him.³⁹³ So the *bona fide holder*, for a valuable consideration, without notice, of a bill of exchange indorsed by one of the partners of a firm, may recover the amount against all the partners, notwithstanding the indorsement of the name of the firm was expressly prohibited in the articles of partnership.³⁹⁴ And though partners may have agreed between themselves that no member of the firm should indorse paper to make the others liable, yet this will be no defense to an action on such paper made payable to the firm and indorsed by one of the partners in the firm name to a *bona fide* pur-

³⁹⁰ *Pitcher v. Barrows*, 17 Pick. (Mass.) 361, 363, 28 Am. Dec. 306.

³⁹¹ *Cottam v. Smith*, 27 La. Ann. 128; *Michigan Bank v. Eldred*, 9 Wall. (U. S.) 544; *Winship v. Bank*, 5 Pet. (U. S.) 529; *Hogg v. Skeen*, 34 L. J. C. P. 153. See *Sandilands v. Marsh*, 2 B. & A. 678. "If by an agreement *inter se*, a different rule were established by commercial partners, it would be without effect

against third parties unless it were shown that such third party had knowledge of that agreement." *Cottam v. Smith*, 27 La. Ann. 127, 128, per Taliaferro, J.

³⁹² *Kimbrow v. Bullitt*, 22 How. (U. S.) 256, 266, per Clifford, J.

³⁹³ *National Union Bank v. London*, 66 Barb. (N. Y.) 189.

³⁹⁴ *Bank of Kentucky v. Brooking*, 2 Litt. (Ky.) 41.

chaser for value.³⁹⁵ In the case, however, of an action by an indorsee against the members of a firm on a bill accepted in the name of the firm, upon its being proved that the acceptance was by one of the partners in fraud of the partnership and contrary to the partnership articles, it has been decided that the burden rests on the plaintiff to show that he gave value.³⁹⁶ And the fact that a note was executed or transferred in violation of the articles of partnership will be a good defense as against a holder with notice.³⁹⁷

§ 94. **Paper executed in firm name after dissolution.**—If after the dissolution of a firm by one or more of the parties retiring, a bill or note is reexecuted in the firm name by the remaining partners, in the usual course of business, the retiring partners cannot set up in defense to an action thereon by a holder for value and without notice the fact that the firm has been dissolved, as the authority and obligation of the partners continue until legal notice of the dissolution has been given.³⁹⁸ "When a partnership has once existed the presumption is that it still exists until its dissolution is made known, and, until this is done, the public have the right to presume on its continued existence, and when a former member contracts a debt in its name, to allow a retired member to escape liability from its payment would be to allow the perpetration of a fraud. * * * Until notice of the dissolution of a firm is given, the public, who has no such knowledge, may treat the firm as in existence, and a note given by one member

³⁹⁵ *Barrett v. Russell*, 45 Vt. 43.

³⁹⁶ *Hogg v. Skeen*, 34 L. J. C. P. 153. See *Dickson v. Primrose*, 2 Miles (Pa.) 366.

³⁹⁷ *Monroe v. Connor*, 15 Me. 179; *Dickson v. Primrose*, 2 Miles (Pa.) 366; *Gallway v. Mathew*, 10 East 264.

³⁹⁸ *Connecticut*.—*Marsh v. Wheeler*, 77 Conn. 449.

Georgia.—*Ewing v. Trippe*, 73 Ga. 776.

Illinois.—*Holtgreve v. Wuntker*, 85 Ill. 470.

Indiana.—*Stall v. Cassidy*, 57 Ind. 284.

Kentucky.—*Merritt v. Pollys*, 16 B. Mon. (Ky.) 355.

Massachusetts.—*Goddard v. Pratt*, 33 Mas3. (16 Pick.) 412.

New Hampshire.—*Wagner v. Freschl*, 56 N. H. 495.

New York.—*Buffalo City Bank v. Howard*, 35 N. Y. 500; *Van Epps v. Dullaye*, 6 Barb. (N. Y.) 244.

South Carolina.—*Hammond v. Aiken*, 3 Rich. Eq. (S. C.) 119.

Texas.—*Davis v. Willis*, 47 Tex. 154.

Wisconsin.—*Clement v. Clement*, 69 Wis. 599, 35 N. W. 17, 2 Am. St. R. 760.

New York.—*Compare Gale v. Miller*, 54 N. Y. 536.

Vermont.—*Woodford v. Dorwin*, 3 Vt. 82.

of such firm is binding upon all the other members, notwithstanding such dissolution."³⁹⁹ So where, after the dissolution of a partnership, a note is given by one of the members in the firm name in payment of a firm debt to one who has had no notice of the dissolution, the firm will be held liable thereon.⁴⁰⁰ But there can be no recovery against a firm on a note given by one of the partners in the firm name after dissolution where the payee knew that it was given for his private debt, and knew also, or what amounts to the same thing, was chargeable with notice of the dissolution.⁴⁰¹

Subdivision VI.

TO WHOM DEFENSE IS AVAILABLE.

§ 95. **Who may set up incapacity or want of authority.**—The makers of a note negotiable under the law merchant warrant the capacity of the payee to transfer it in the usual course of business, and in an action by a *bona fide* holder can not dispute the authority of the payee to accept and transfer the note executed by them.⁴⁰² The defendant, who owes the debt, has no interest beyond the *bona fides* of the holder. This rule is declared to be "founded in the most obvious dictates of reason and sound policy" and one which should be inflexibly maintained.⁴⁰³ So the incapacity to contract of one party to a bill does not determine the responsibility of the other competent parties to each other, or to third parties.⁴⁰⁴ The rights of the third parties do not

³⁹⁹ *Ewing v. Trippe*, 73 Ga. 776, 777, 778, per Blandford, J.

⁴⁰⁰ *Long v. Garnett*, 59 Tex. 229.

⁴⁰¹ *Lansing v. Gains*, 2 Johns. (N. Y.) 300.

⁴⁰² *Wolke v. Kuhne*, 109 Ind. 313, 10 N. E. 116 (so holding where a note was made payable to order of "T. W. Wollen, attorney-general," the words added to the name of the payee being regarded as merely descriptive of the person, and which could in no way trammel the rights of a *bona fide* holder"; *City Bank of New Haven v. Perkins*, 29 N. Y.

554 (holding that defendant cannot question the legality of the transfer of a note to a *bona fide* holder, nothing short of notice or bad faith enabling a maker or indorser to defeat an action brought upon it by one who is apparently a regular indorsee or holder).

⁴⁰³ *City Bank of New Haven v. Perkins*, 29 N. Y. 554. See also, *Gage v. Kendall*, 15 Wend. (N. Y.) 640.

⁴⁰⁴ *Knox v. Reside*, 1 Miles (Pa.) 294, 297. See *Hennen v. Bourgeat*, 12 Rob. (La.) 522.

depend in such cases "upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power, which, through negligence or mistaken confidence, he caused or allowed to be vested in the party making the conveyance."⁴⁰⁵ This rule is based upon the principle that when one of two innocent parties must suffer for the wrongful act of another the one who puts the latter in a position to do it must be the sufferer.⁴⁰⁶ So this rule has been applied in the case of a bill of exchange, where it was claimed that the paper was not a bill of exchange or negotiable because the drawee was an officer of the government and as such had no authority to contract, and having been drawn upon him in his official character, his acceptance did not affect him personally.⁴⁰⁷ Again, in an action on a note by an assignee thereof for value and without notice before maturity, the makers cannot deny the existence of the corporation to whom he has executed such note as payee.⁴⁰⁸ Nor can a maker avail himself of the defense that the payee to whom he executed the note is a fraudulent association,⁴⁰⁹ or that it had no authority to loan the money which was the consideration of the note.⁴¹⁰ And an indorser cannot set up against the indorsee that the corporation made the note in violation of the statute, as by the indorsement he has admitted the capacity of every prior party to the paper.⁴¹¹ The indorser ordinarily warrants by his indorsement the existence of every essential necessary to constitute the instrument a valid and subsisting obligation. It is a part of his contract that the maker was competent to contract in that form, and he cannot escape liability on the ground that the act of the corpora-

⁴⁰⁵ *McNeil v. Tenth Nat. Bank*, 46 N. Y. 329, per Papallo, J.; cited with approval in *Lee v. Turner*, 89 Mo. 489; *International Bank v. German Bank*, 71 Mo. 195.

⁴⁰⁶ *Neuhoff v. O'Reilly*, 93 Mo. 164, 6 S. W. 78.

⁴⁰⁷ *Knox v. Reside*, 1 Miles (Pa.) 294.

⁴⁰⁸ *Reynolds v. Rath*, 61 Ark. 317, 33 S. W. 105; *Studebaker Bros. Mfg. Co. v. Montgomery*, 74 Mo. 101; *First Nat. Bank v. Gillilan*, 72 Mo. 77; *Camp v. Byrne*, 41 Mo. 525.

"The giving of a note to a corpora-

tion is an admission by the defendant of the existence of the corporation and he is not permitted to deny that there is a duly organized corporation." *Nashua Fire Ins. Co. v. Moore*, 55 N. H. 48, per Smith, J.

⁴⁰⁹ *Reynolds v. Roth*, 61 Ark. 217, 33 S. W. 105.

⁴¹⁰ *Brown v. United States Home & D. Ass'n (Ky.)*, 13 S. W. 1085.

⁴¹¹ *Glidden v. Chamberlain*, 167 Mass. 486, 46 N. E. 103. See *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 909.

tion in issuing the paper was *ultra vires*.⁴¹² The maker of a note is only interested in paying the same to one who is authorized to receive payment and to discharge him from liability, and the fact that the transaction between corporations, in consequence of which a note held by one of the corporation has been transferred to the other was unauthorized by their charters, does not constitute a defense by the maker.⁴¹³ Again, where a note was payable to the maker's wife, or bearer, and was indorsed by her in blank, it was decided that the maker could not defeat a recovery by setting up in defense to an action on the note by a third party, to whom it had been transferred, that the payee was his wife at the time the note was executed and had no separate estate, and that she was incompetent to indorse the same.⁴¹⁴ And the acceptor of a bill of exchange payable to the order of the drawer cannot question the authority of the drawer to draw or indorse such bill.⁴¹⁵ But where a person has entered into an unlawful contract for the purchase of corporate stock, and a third party purchases such stock from him and gives his promissory note, it has been decided that he cannot be compelled to perform the contract and may set up in defense to an action on the note the want of power on the part of the directors to sell the stock.⁴¹⁶

⁴¹² *Monarch v. Farmers' & Drovers' Bank*, 105 Ky. 430, 49 S. W. 317, 88 Am. St. R. 31.

⁴¹³ *Union Cent. Life Ins. Co. v. Ehrman*, 2 Wkly. Law Bul. (Ohio) 3. See also, *Brown v. Donnel*, 49 Me. 421, 77 Am. Dec. 266.

⁴¹⁴ *Leitner v. Miller*, 49 Ga. 486. See *Ormsbee v. Kidder*, 48 Vt. 361.

⁴¹⁵ *Halifax v. Lyle*, 3 Exch. 446.

⁴¹⁶ *Sturges v. Stetson*, 1 Biss. C. C. 246, Fed. Cas. No. 13586.

CHAPTER IV.

FORGERY.

Sec.	Sec.
96. General rule as to forgery.	100. Payment of or by forged paper
97. Particular cases where forgery no defense.	—Duty as to notice.
98. Of name of maker or drawer.	101. In case of certified check.
99. Where drawee obligated to know signature of drawer.	102. Of name of payee.
	103. By agent of owner.
	104. To whom defense available.

§ 96. **General rule as to forgery.**—The fact that a person is an innocent holder of a forged bill or note does not render the paper valid, nor does the good faith of such a holder confer upon him any equity as against the one whose name is forged. And in an action against such a person the forgery of his name is a good defense thereto,¹ unless he has so acted in respect to the instrument as to estop him from interposing this infirmity.³ In an action on such an instrument, where the defense of forgery is set up, testimony of persons familiar with the signature affixed to the instrument is admissible to show that it is not genuine.⁴ And a disputed signature may be compared with one admitted to be genuine for the purpose of aiding in the determination of the question whether the signature in dispute is genuine or not.⁵ So the use of an admittedly genuine lead-pencil signature as a standard of comparison, where the genuineness of a signa-

¹ Ehrler v. Braun, 120 Ill. 503, 12 N. E. 996. "If forged no amount of good faith would profit the holder, who has no equity against the party whose name is forged," per Campbell, J., in Camp v. Carpenter, 52 Mich. 375, 379, 18 N. W. 113. "A forged bill or note derives no validity from being passed to an innocent holder," per Denio, C. J., in Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 14 N. Y. 626. "The loss resulting from the

act of forgery must fall upon the purchaser of forged paper," per Young, J., in Porter v. Hardy, 10 N. D. 551, 88 N. W. 461. See Havorka v. Hemmer, 108 Ill. App. 443; Coffin v. Anderson, 4 Blackf. (Ind.) 395.

³ Ehrler v. Braun, 120 Ill. 503, 507, 12 N. E. 996.

⁴ Ellis v. Watkins, 73 Vt. 371, 50 Atl. 1105.

⁵ Tyler v. Todd, 36 Conn. 218.

ture is in dispute, is proper.⁶ So it has been held proper to admit enlarged photographs of the signature in contest and of admittedly genuine ones, after proof by the photographer of their accuracy, this being declared to be merely a more enduring form of showing the signatures to the jury as under a magnifying glass.⁷ The question as to the genuineness of a signature which is in dispute is one for the jury.⁸ Again, the fact that in an affidavit of defense there is an allegation of forgery does not change the rule of law that forgery is a matter of defense, and it is not required in the first instance to be disproved by the plaintiff.⁹

§ 97. Particular cases when forgery no defense.—Where one executes a note to a bank as security with a guarantee indorsed thereon by another of the payment of notes of third persons, which are deposited by him in and discounted by the bank, neither the maker of the note nor the guarantor can avail himself, as a defense, of the fact that some of the notes so deposited and discounted were forged.¹⁰ So an action on a note by an assignee, who occupies the position of a *bona fide* holder, cannot be defeated by the fact that an assignment of a forged note by the payee to the maker of the note in controversy was the consideration for such note.¹¹ And it is not a defense to one note that the person who presents it has forged another note, or that his general character is bad.¹²

§ 98. Of name of maker or drawer.—In an action against the maker or drawer of an instrument it is a good defense thereto that the signature which purports to be that of such maker or drawer is in fact a forgery.¹³ This defense is as available against a suit by an assignee before maturity as against the payee.¹⁴ And where the name of the former owner of land is signed to notes which purport to reserve a vendor's lien on the land, if it is shown that the notes are forged

⁶ *Groff v. Groff*, 209 Pa. St. 603, 59 Atl. 65.

⁷ *First National Bank v. Wisdom's Exrs.*, 23 Ky. Law Rep. 530, 536, 63 S. W. 461.

⁸ *Groff v. Groff* (Pa. S. C. 1904), 59 Atl. 65.

⁹ *Towles v. Tanner*, 21 App. D. C. 530, 543.

¹⁰ *Pennsylvania Trust Co. v. McElroy*, 112 Fed. 509, 50 C. C. A. 371.

¹¹ *McCauley v. Murdock*, 97 Ind. 229.

¹² *Dodge v. Haskell*, 69 Me. 429. See *Patton v. Lund*, 114 Iowa 201, 86 N. W. 296.

¹³ *Caulkins v. Whisler*, 29 Iowa 495. See *Mersman v. Werges*, 3 Fed. 378; *Mechanics' Bank v. Woodward*, 74 Conn. 689, 51 Atl. 1084.

¹⁴ *Miers v. Coates*, 57 Ill. App. 216.

no lien will be created.¹⁵ And as the law prescribes the method in which school bonds are to be issued and the powers of the officers to issue the same, a school district will not be liable on such bonds where they are fraudulently issued, with forged signatures affixed thereto, even though they are in the hands of an innocent holder. It was declared by the court in one case: "It may be said that the bonds being negotiable and having passed into the hands of *bona fide* purchasers for value the district is bound by the recitals therein. It is sufficient answer to this objection to say that while *bona fide* purchasers are protected against equities between the parties they are not protected against a want of power to execute."¹⁶ Again, where a note purporting to be that of an incorporated banking company was issued after the cashier had signed it, but before the signature of the president was affixed, as required by law to render it binding, and the signature of the latter officer was forged thereto, the company was held not liable on the instrument.¹⁷

§ 99. Where drawee obligated to know signature of drawer.—It is incumbent upon a drawee to know the signature of a drawer, and in the absence of any fraud a drawee cannot recover back money paid by him on his acceptance of an instrument to which the drawer's name is forged.¹⁸ So it was said by Lord Mansfield in an early case: "It can never be thought unconscientious in the defendant to retain this money when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bona fide* paid without the least privity or suspicion of the forgery. Here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted or paid it, but it was not incumbent on the defendant to inquire into it."¹⁹ So a bank is obligated to know the signatures

¹⁵ Neal v. Parker (Tenn.), 62 S. W. 170.

¹⁶ State v. School District, 10 Neb. 544, 7 N. W. 315, per Maxwell, C. J.

¹⁷ Salem Bank v. Gloucester Bank, 17 Mass. 1.

¹⁸ Price v. Neal, 3 Burr 1354. See also, McCall v. Corning, 3 La. Ann. 409, 48 Am. Dec. 454.

¹⁹ Price v. Neal, 3 Burr 1354. In Redington v. Woods, 45 Cal. 406, 13 Am. Rep. 19, it was also said by the

court: "The rule is well settled that the drawee of a check is bound, at his peril, to know the handwriting of the drawer; and if he pays a check to which the signature of the drawer was forged, he must suffer the loss, as between himself and the drawer, or an innocent holder, to whom he has made payment. As between himself and the drawer, he undertakes that he will pay no checks except such as have

of those whose money it receives upon deposit, and if it pays a forged check the loss must fall upon the bank and not upon the one to whom the money has been paid, the latter having acted in good faith and without notice of the forgery.²⁰ So where an acceptance was forged, and the bankers of the acceptor, where the bill was payable, paid the bill at maturity to a holder for value, and the forgery was discovered about a month after, when notice was given to the defendant, it was decided that the bankers were not entitled to recover the money so paid.²¹ And where a consignor drew a bill of exchange on his consignee with a forged bill of lading attached, and had the drafts discounted by a bank, ignorant of the fraud, and the drafts were accepted and paid by the consignee in accordance with the ordinary custom between the consignor and consignee, it was decided that the latter had no recourse against the bank.²²

§ 100. Payment of or by forged paper—Duty as to notice.—One who has made a payment on a forged bill or note may forfeit any right which he possesses to recover such payment by a failure to give a notice until after an unreasonable period of time has elapsed after his discovery of the forgery.²³ And a bank which has paid a check on the forged indorsement of the name of the payee may be relieved from liability to the maker by a failure to give notice within a reasonable time after it has learned that such indorsement was forged. So where the drawer of a check waited for over a month after knowledge of the fact that it had been paid on a forged indorse-

the genuine signature of the drawer, which he assumes to know; and, as he is presumed to be acquainted with the signature, he will not be allowed to recover the money back from an innocent holder, who is not presumed to have such knowledge."

²⁰ "A bank which receives money on deposit and hence derives profit is justly held to the obligation to know the signature of its depositors to their checks, and if it pays in mistake a forged check there is no reason why the loss should be shifted to another innocent party upon whom the law casts no such obligation, and who, upon the faith

of such payment, has parted with his own money or been placed in a worse position than he would have been but for such payment," per Miller, J., in *Commercial Bank v. First National Bank*, 30 Md. 11. See also, *Bernheimer v. Marshall*, 2 Minn. 78; *Bank of St. Albans v. Farmers' & Merchants' Bk.*, 10 Vt. 141; *Smith v. Mercer*, 6 Taunt. 76.

²¹ *Smith v. Mercer*, 6 Taunt. 76.

²² *Hoffman v. Bank of Milwaukee*, 12 Wall. (U. S.) 181, 20 L. Ed. 366.

²³ *Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190; *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455. See *Thomas v. Todd*, 6 Hill (N. Y.) 340. See also, *Ford & Co. v. People's Bank*, 74 S. C. 180, 54 S. E. 204.

ment before it gave notice to the bank of such fact, and that it intended to hold the bank liable, it was decided that this was an unreasonable time to wait and that the bank was released from liability, as notice should have been given without unnecessary delay so as to enable the bank to pursue any remedy it might have against the forger or indorsers.²⁴ This duty to give notice in either case does not mean that notice must be given on the very day of payment, but does require notice promptly, according to the circumstances and usage of the business.²⁵ So it has been decided that where forged checks are paid by a bank, charged to the depositor's account, and returned to him, he need not examine the vouchers at once so as to discover fraud. Only reasonable care is required, and if this is exercised by him or his agent the bank cannot complain, though it is too late when the forgery is discovered to enable it to retrieve its position or make reclamation from the forger.²⁶ So where a bank without instructions paid a forged acceptance and sent the same to the firm whose name was forged as acceptor, it was decided that there was no legal obligation on the firm to examine such acceptance immediately upon its reception for the purpose of ascertaining if it was genuine, that the firm was not guilty of negligence in not discovering the forgery at once, and that notice of the forgery, when discovered, was sufficient.²⁷ Again, where one pays out a counterfeit bill in good faith it has been decided that he is not obligated to receive it back unless it is returned within a reasonable time after it is discovered to be spurious.²⁸ So where a bank note was delivered to a party as payment and it was believed by both parties to be genuine, but it was discovered to be a counterfeit by the creditor at about the same time as he received it, he was held to have lost his remedy by failing to make an offer to return it for about two months.²⁹ What is reasonable diligence in giving notice of forgery after its discovery is a question of fact under the circumstances of each particular case.³⁰

§ 101. In case of certified checks.—Where a bank certifies a check

²⁴ *United States v. National Exchange Bank*, 45 Fed. 163.

²⁵ *Simms v. Clark*, 11 Ill. 137.

²⁶ *Iron City Nat. Bank v. Fort Pitt Nat. Bank*, 159 Pa. St. 46, 28 Atl. 195, 23 L. R. A. 615. See *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 77 N. E. 693.

²⁷ *Thomas v. Todd*, 6 Hill (N. Y.)

340.

²⁸ *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455. See *Kearny v. Metropolitan Trust Co.*, 110 App. Div. (N. Y.) 236, 97 N. Y. Supp. 274.

²⁹ *Frank v. Bank*, 84 N. Y. 209.

³⁰ *First National Bank v. Tappan*, 6 Kan. 456, 7 Am. Rep. 568.

drawn upon it as good, and in the ordinary course of business such check comes into the hands of a third person, who takes it in good faith and for value, it is no defense to an action against the bank that the check was forged, as the bank is liable to make good its certification by paying the check.³¹

§ 102. **Of name of payee.**—The forgery of the name of a payee of a bill or note is a good defense to an action against him even by a *bona fide* holder,³² as no title can be acquired by such indorsement.³³ An action can only be maintained on notes or obligations by those in whom the legal title is vested, and to divest a person, to whom such an instrument is made payable, of his title a transfer from him or his indorsement is necessary.³⁴ So it is said in a case in Iowa that: "Where a person has obtained possession of a promissory note belonging to another person, and without authority undertakes to transfer it by indorsing it in the name of the owner, we think that neither the person whose name is thus wrongfully used, nor the wrongdoer, would become liable to the transferee upon the note. The transferee would acquire no title to it."³⁵ So where one personated another and received a letter addressed to the latter, which contained a check, and forged the indorsement of the payee, it was decided that the forgery was a good defense even as against a *bona fide* holder, as no title passed by the forgery, and also because defendants remained responsible upon the check to the real payee.³⁶ Again, a check drawn in favor of a particular payee or order, is payable only to the actual

³¹ Hagen v. Bowery National Bank, 64 Barb. (N. Y.) 197, 6 Lans. 490; citing Commercial Bank v. First National Bank, 30 Md. 11; Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 26 How. Pr. (N. Y.) 1; Price v. Neal, 3 Burr. 1354.

³² Citizens' State Bank v. Adams, 91 Ind. 280; Woodruff v. Munroe, 33 Md. 146; Union Sav. Ass'n v. Diebold, 1 Mo. App. 323; McCarville v. Lynch, 14 Misc. (N. Y.) 174, 35 N. Y. Supp. 383. See also, Kibby's Admr. v. Kibby, Wright (Ohio) 607; Roach v. Woodall, 91 Tenn. 206, 18 S. W. 407, 30 Am. St. R.

883, overruling, Duke v. Hall, 9 Baxt. (Tenn.) 282.

³³ Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 336; Buckley v. Second National Bank, 35 N. J. L. 400, 10 Am. Rep. 249; Gilbert v. Sharp, 2 Lans. (N. Y.) 412; Palm v. Watt, 7 Hun (N. Y.) 317; Terry v. Allis, 16 Wis. 478.

³⁴ Foltier v. Schroeder, 19 La. Ann. 17, 92 Am. Dec. 521.

³⁵ Thorpe v. Dickey, 51 Iowa 676, 2 N. W. 581, per Adams, J.

³⁶ Palm v. Watt, 7 Hun (N. Y.) 317. See Rowe v. Putnam, 131 Mass. 281, holding forgery of name of payee a defense in an action against the maker.

payee, or upon his genuine indorsement; and if the bank mistake the identity of the payee, or pay upon a forged indorsement, it is not a payment in pursuance of authority, and it will be responsible.³⁷ But where the maker of a note payable to a real person forges the indorsement of such person, or procures it to be done, and puts the note into circulation, he is estopped from denying that the indorsement is genuine.³⁸ And it has been determined that a maker or prior indorser of a note is not relieved from liability thereon by the addition of a forged name of another as a subsequent indorser.³⁹

§ 103. By agent of owner.—Where a note is indorsed by an agent of the payee, in the latter's name, without any actual or apparent authority to so act, the one so taking, though for value and without notice, acquires no valid legal title thereto and does not become a bona fide holder, in the sense of that term. Nor in such a case does a ratification of the indorsement by the payee after the commencement of an action by the indorsee relate back so as to cut off a defense on the merits. Under such circumstances the note is subject to defenses existing between the original parties.⁴⁰

§ 104. To whom defense available.—In an action by a payee against one who has signed a note as surety it is no defense thereto that the name of one or more of the obligors on such instrument has been forged, though the surety signed the same in the belief that the signatures were genuine, where it appears that the instrument was

³⁷ *Pickle v. Muse*, 88 Tenn. 381, 12 S. W. 919, 17 St. R. 900, 7 L. R. A. 93. See *Chism v. Bank*, 96 Tenn. 641, 36 S. W. 387, 54 Am. St. R. 863, 32 L. R. A. 778; *First National Bank v. Whitmore*, 94 U. S. 343; *Buckley v. Bank*, 35 N. J. L. 400; *Talbot v. Bank of Rochester*, 1 Hill (N. Y.) 295.

³⁸ *Meacher v. Fort*, 3 Hill L. (S. C.) 227, 30 Am. Dec. 364. See *York Bank v. Asbury*, Fed. Cas. No. 18142, 1 Biss. C. C. 233.

³⁹ *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577, 58 N. E. 162. See *Meisman v. Werges*, 112 U. S. 139, 28 L. Ed. 641 declaring that where a forged signature is

added, though in form that of a joint promissor, is in fact that of a surety or guarantor only, the original maker is as between himself and the surety exclusively liable for the whole amount and his ultimate liability to pay is neither increased nor diminished, and according to the general current of American authorities the addition of the name of a surety, whether before or after first negotiation of the note, does not discharge the maker. Per Mr. Justice Gray. As to alteration by addition of names, see § 174, herein.

⁴⁰ *Gilbert v. Sharp*, 2 Lans. (N. Y.) 412.

accepted by the payee without notice of the forgery.⁴¹ And it is no defense to an action against an indorser of an instrument by his indorsee or a *bona fide* holder that an indorsement previous to that of the defendant was a forgery,⁴² as an indorsee by his indorsement warrants the genuineness of the prior indorsements and that the instrument is the valid one it purports to be.⁴³ So in a case in Louisiana, in which this question was considered, the court said: "The defense relied on is, that a previous indorsement on the note was not genuine, but a forgery committed by the drawer himself, and that the note was indorsed by the defendant through error, he believing the previous indorsement to be genuine. * * * We are of opinion that he is not entitled to be relieved on the ground of error or fraud without showing that such error was caused by the plaintiff or that he participated in the fraud. Such in substance was the charge of the judge on the trial in the first instance, and we think it correct. * * * The plaintiff took the note on the credit of the defendant's indorsement and no privity is shown between the plaintiff and the drawer in relation to the forgery. Whether the indorsement was for the accommodation of the maker, or in the regular course of business, is, in our opinion, immaterial. Every indorsement is essentially an original contract, equivalent to the drawing of a new bill in favor of the holder, on the acceptor or obligor. The obligation of the indorser is, that if the obligor or acceptor does not pay at maturity, he will pay on due notice of the dishonor of the bill. The forgery of a previous indorsement does not release him from that obligation towards a *bona fide* holder, who took the note on the credit of his indorsement. The doctrine on this subject appears well settled."⁴⁴

⁴¹ Wayne Agricultural Co. v. Cardwell, 73 Ind. 555; Helms v. Wayne Agricultural Co., 73 Ind. 325, 38 Am. Rep. 147. See Second National Bank v. Hewitt, 59 N. J. L. 57, 34 Atl. 988.

⁴² Olivier v. Andry, 7 La. 496; Rambo v. Metz, 5 Strob. (S. C.) 108.

⁴³ Cochran v. Atchison, 27 Kan. 728.

⁴⁴ Olivier v. Andry, 7 La. 496, per Bullard, J.

CHAPTER V.

DURESS.

Sec.	Sec.
105. General rule as to duress.	111. Giving of paper indorsed by fear of violence.
106. Equity may decree cancellation.	112. Threatened criminal prosecution and imprisonment as inducing.
107. What does not constitute duress.	113. Availability of as between parties.
108. Where procured from one under illegal arrest or restraint.	114. Same subject—Against subsequent parties.
109. By abuse of legal process.	115. Same subject—Parties with notice.
110. Effect of threat to lawfully invoke legal process.	

§ 105. **General rule as to duress.**—Consent is one of the ordinary requisites to a valid contract and it is essential as between the parties that it should be voluntarily given. This principle applies in the case of bills and notes, and it is therefore in many cases a good defense to an action on such an obligation to show that it was executed under duress.¹ The common-law strictness as to what duress would avoid a contract has been much relaxed in modern times, especially in American courts, upon the principle that the very essence of a contract is the agreement of the minds entering into it. A mind constrained by fear cannot be said to have agreed.² As showing that the courts are not holding to the strict rule of the common law as to what is necessary to constitute duress which will avoid a contract the following quotation from a recent case in Nebraska is pertinent. It is here said: "This state has already taken its position in line with the more advanced position upon this subject. * * * To constitute duress sufficient to avoid a contract in this state, the means adopted

¹ *Georgia*.—Whitt v. Blount, 124 Ga. 671, 53 S. E. 205. *Iowa*.—Veatch v. Thompson, 15 Iowa 380. *Kentucky*.—Hall v. Commonwealth Bank, 5 Dana (Ky.) 258, 30 Am. Dec. 685. *New York*.—Mills v. Young, 23 Wend. (N. Y.) 314. *Tennessee*.—Mc-

Lin v. Marshall, 1 Heisk. (Tenn.) 678. See *French v. Talbot*, 100 Mich. 443, 59 N. W. 166.

² *Coffelt v. Wise*, 62 Ind. 451, per Biddle, J.; *Phelps v. Zuschlag*, 34 Tex. 371.

need only be of a character necessary to overcome the will and desire of the injured party, whether that person be above or below the average person in firmness and courage, and whether the means employed come clearly within the common-law definition of duress or otherwise. In other words, the law extends its protection to the individual without reference to whether he is strong or weak intellectually, and refuses to measure his rights by an arbitrary yardstick avowedly applicable only to men of ordinary intellect, firmness and courage. Under this view of the law the jury is properly directed to inquire into the mental capacity of the defendant, and whether the threats, whatever they were, probably deprived him of his free will, inducing him to make a contract that he would not otherwise have made rather than to the particular threats, made to see whether they meet with an arbitrary standard, which may or may not be applicable to the person injured."³ This defense is available though there may be some consideration to support the instrument.^{3*} And it is decided that the fact that the defendant did not act as a reasonable man in resisting the coercion exercised upon him will not prevent him from setting up the defense of duress in such a case though it might be a circumstance from which the jury might find he did not yield and sign the note on that account.⁴ Where a person relies upon duress as a defense to an action on such an instrument it is held that facts sufficient to show duress should be pleaded.^{4*}

§ 106. Equity may decree cancellation.—Where it clearly appears that a bill or note has been given by a person while under duress a court of equity may decree that the obligation so given shall be cancelled.⁵ So where a mother executed and gave a note to the employer of her son, the latter having embezzled money from the former, and it appeared, to the satisfaction of the court, that the motive controlling the mother's action was to protect her son from prosecution, it was

³ Nebraska Mut. Bond Ass'n v. Klee (Neb. 1903), 97 N. W. 476, 478, 486.

per Kirkpatrick, C., citing First National Bank v. Sargent, 65 Neb. 594, 91 N. W. 595, 59 L. R. A. 296; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 501, 47 L. R. A. 417.

^{3*} Magoon v. Reber, 76 Wis. 392, 49 N. W. 112.

⁴ Overstreet v. Dunlap, 56 Ill. App. 486.

^{4*} Bond v. Kidd (Ga. 1905), 50 S. E. 934.

⁵ McLin v. Marshall, 1 Heisk. (Tenn.) 678. See White v. Rasines, 21 N. Y. Supp. 243, 66 Hun (N. Y.) 633 *mem.*, citing with approval Sistare v. Hecksher, 18 N. Y. Supp. 475, 63 Hun (N. Y.) 634 *mem.*

held that, as the evidence showed that she did not act of her own free will, the note should be cancelled.⁶ And it was likewise so held where, under similar circumstances, a note was given by a father to take up forged notes executed by his son.⁷

§ 107. **What does not constitute duress.**—In an action against a wife on a note signed by her it is no defense that she was induced to execute the same by a threat of suicide made by her husband, as this does not constitute duress within the meaning of that term.⁸ Nor does the fact that a note was signed under protest constitute a defense.⁹ Nor can recovery be defeated on the ground of duress by the fact that the defendant was coerced into the performance of his duty.¹⁰ And a threat by one to remove property in the assertion of a claim that he is the owner thereof has been held no defense to an action on a note given to compromise such claim.¹¹ And duress has been held not established by evidence that a wife executed notes through fear of her husband, it not appearing that she was ever threatened by him in regard to the notes, or even requested by him to execute the same, and that she subsequently wrote a letter, not claimed to have been dictated by fear, recognizing her husband's interest in the note and expressing a desire not to disturb such interest.¹² Nor does a refusal by a party to a contract to perform his part thereof and the exaction of a larger amount than the contract designates for the doing of the acts specified therein, though he thereby takes advantage of the necessities of the other party, constitute duress which will defeat recovery on a note executed on the basis of the new demand. Thus it was so held where a party refused to supply ice on the basis of the contract and demanded an increased price, which the other party to the contract accepted and gave his note therefor.¹³

⁶ *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419.

⁷ *Coffman v. Lookout Bank*, 5 Lea (Tenn.) 232, 40 Am. Rep. 31.

⁸ *Remington v. Wright*, 43 N. J. L. 451; *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180.

⁹ *Jacoby v. Ross*, 12 Mo. App. 577.

¹⁰ *Smith v. Paris*, 70 Mo. 615 so holding where the effect of coercion was to hasten the performance of

a duty which devolved upon the defendant.

¹¹ *Heysham v. Oeltre*, 89 Pa. St. 506.

¹² *Gillespie v. Simpson* (Ark.), 18 S. W. 1050.

¹³ *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723. The court said in this case: "The defense is * * * that a note for a sum greater than the contract price has been extorted under circum-

§ 108. Where procured from one under illegal arrest or restraint.

One who wrongfully restrains another of his liberty cannot obtain the benefit of any obligation which he may obtain from him while so restrained and which is executed as a consequence of such restraint.¹⁴

stances amounting to duress. It is to be observed of these circumstances that if we confine our attention to the very time when an arrangement for an increased price was made the defendants make out a very plausible case. They had a very considerable stock of beer on hand and the case they make is one in which they must have ice at any cost or they must fail in business. If the ice company had the ability to perform their contract, but took advantage of the circumstances to extort a higher price from the necessities of the defendants its conduct was reprehensible, and it would perhaps have been in the interest of good morals if defendants had temporarily submitted to the loss and brought suit against the ice company on their contract. No one disputes that at their option they might have taken that course, and that the ice company would have been responsible for all damages legally attributable to the breach of the contract. But the defendants did not elect to take that course. They chose for reasons which they must have deemed sufficient at the time to submit to the company's demand and pay the increased price rather than rely upon their strict rights under the existing contract. * * * If unfair advantage was taken of defendants, whereby they were forced into a contract against their interests, it is very remarkable that they submitted to abide by it as they did for nearly eight months without in the meantime taking any steps for

their protection. Whatever compulsion there was in the case was to be found in the danger to their business in consequence of the threat made at the beginning of May to cut off the supply of ice, but the force of the threat would be broken the moment they could make arrangements for a supply elsewhere; and there is no showing that such a supply was unattainable. The force of the threat was therefore temporary; and the defendants, as soon as they were able to supply their needs elsewhere, might have been in position to act independently, and to deal with the ice company as freely as they might with any other party who declined to keep his engagements. On any view, therefore, which we may take of the law, the defense must fail. But if our attention were to be restricted to the very day when notice was given that ice would no longer be supplied at the contract price, we could not agree that the case was one of duress. It is not shown to be a case even of a hard bargain; and the price charged was probably not too much under the circumstances," per Cooley, J.

¹⁴Bennett v. Ford, 47 Ind. 264; Osborne v. Robbins, 36 N. Y. 365, 4 Abb. Prac. N. S. (N. Y.) 15; Strong v. Grannis, 26 Barb. (N. Y.) 122; Behl v. Schuett, 88 Wis. 471, 60 N. W. 701. See Preston v. Bacon, 4 Conn. 471, holding that a note given by a person under arrest in civil process to the officer having him in custody, for fees to which he was not entitled, was void on the

So "when a party is arrested, without just cause, and from motives which the law does not sanction, any contract into which he may enter with the authors of the wrong, to procure his liberation from restraint, is imputed to illegal duress. It is corrupt in its origin, and the wrongdoer can take no benefit from its execution."¹⁵ The rule is said, in an early case in New York, to be "that where there is an arrest for improper purposes without a just cause, or where there is an arrest for a just cause but without lawful authority; or where there is an arrest for a just cause and under lawful authority, for unlawful purposes, it may be construed a duress."¹⁶ So the defense of duress has been held good in an action on a note exacted from one under arrest on a false charge of felony, and which was given to procure his liberation from illegal restraint.¹⁷ But if a man be lawfully imprisoned and to procure his discharge gives his note it will not be subject to the defense of duress.¹⁸ It is necessary to show either an unlawful imprisonment or an oppression under a lawful detention.¹⁹ So where a party who was under arrest in a criminal prosecution for an assault in which he had participated gave a note in settlement of the injury sustained by such an assault, it was decided that the note could not be avoided on the ground that its execution was procured by threats unless it appeared that they were such as would intimidate a person of ordinary firmness.²⁰

§ 109. **By abuse of legal process.**—A person cannot claim the benefit of an instrument which another has been induced by him to sign by an abuse of legal process, and it is a good defense as between the parties thereto that it has been so obtained.²¹ In the case of an abuse

ground of extortion, which was defined to be any oppression by color or pretense of right, and particularly the exaction by an officer by color of his office of money not due.

¹⁵ *Osborne v. Robbins*, 36 N. Y. 365, 371, 4 Abb. Pr. N. S. (N. Y.) 15, per Porter, J.

¹⁶ *Strong v. Grannis*, 26 Barb. (N. Y.) 122, per Welles, J.

¹⁷ *Osborne v. Robbins*, 36 N. Y. 365, 4 Abb. Pr. N. S. (N. Y.) 15. See *Meadows v. Smith*, 7 Ired. Eq. (N. C.) 7.

¹⁸ *Bates v. Butler*, 46 Me. 387, citing 1 Black. Com. 136.

¹⁹ *Heaps v. Dunham*, 95 Ill. 583; *Soule v. Bonney*, 37 Me. 128; *Stroufer v. Latshaw*, 2 Watts (Pa.) 165, 27 Am. Dec. 297. See also, *Waterman v. Barratt*, 4 Har. (Del.) 311.

²⁰ *Walbridge v. Senold*, 21 Conn. 424. See *Pritchard v. Sharp*, 51 Mich. 432, 16 N. W. 798.

²¹ *Thurman v. Burt*, 53 Ill. 129; *Shenk v. Phelps*, 6 Ill. App. 612; *Modlin v. Northwestern Turnpike Co.*, 48 Ind. 492; *Gorham v. Keyes*, 137 Mass. 583; *Downing v. Ely*, 125 Mass. 369; *Osborn v. Robbins*, 36 N. Y. 365, 4 Abb. Prac. 15.

of criminal process the rule is based on the ground of public policy, which will not permit the process of the state to be perverted and used by a person for the mere purpose of obtaining the execution of contracts.²² So where a requisition was procured for the arrest and delivery of a person on the ground that a crime had been committed in obtaining goods under false pretenses, and the process was made use of to compel defendant to settle the claims of his creditors and give the note in suit, it was decided that it was a use of process wholly unauthorized by the law and the note was void.²³ So it has been decided that if one fraudulently threaten to attach property upon a groundless suit for the purpose of compelling the giving of notes by another, and the sole inducement for the giving of the notes is to prevent such attachment, there can be no recovery thereon.²⁴ And it has been decided that a note given under a threat to bring in a United States Marshal and to turn defendant and his family out of doors, and to take the defendant out of the state, is not binding as between the parties.²⁵ And there can be no recovery on a note given to secure the possession of property which has been unlawfully detained,²⁶ as in the case of an illegal levy.²⁷ But it has been decided that the fact that a suit was brought to recover possession of land, claim thereto being made only under a tax deed, which fact the defendant knew, and the deed was in fact void, does not as a matter of law constitute duress so as to render a note given in settlement of such action void even though he may have been induced through fear of losing his land to execute the note in question.²⁸

§ 110. Effect of threat to lawfully invoke legal process.—Courts are constituted for the purpose, among others, of enabling persons to obtain the proper remedies and process for the enforcement of their legal rights. The mere fact, therefore, that one threatens to sue an-

²² *Shenk v. Phelps*, 6 Ill. App. 612.

²³ *Shaw v. Spooner*, 9 N. H. 197,
32 Am. Dec. 348.

²⁴ *Modlin v. Northwestern Turn-
pike Co.*, 48 Ind. 492.

²⁵ *Ganz v. Weisenberger*, 66 Mo.
App. 110, 2 Mo. App. 1323.

²⁶ *Crawford v. Cato*, 22 Ga. 594;
Oliphant v. Markham, 79 Tex. 543,
15 S. W. 569, 23 Am. St. R. 363.

²⁷ *Bingham v. Sessions*, 6 Sm. &
M. (Miss.) 13.

²⁸ *Perkins v. Trinka*, 30 Minn. 241,
15 N. W. 115.

²⁹ *Davis v. Rice*, 88 Ala. 388, 6 So.
751; *McClair v. Wilson*, 18 Colo.
82, 31 Pac. 502; *Bond v. Kidd* (Ga.
1905), 50 S. E. 934; *Perryman v.
Pope*, 94 Ga. 672, 21 S. E. 715; *Peck-
ham v. Hendren*, 76 Ind. 47; *Snyder
v. Braden*, 58 Ind. 143; *Jones v.
Houghton*, 61 N. H. 51.

other or to invoke some legal process in respect to his property or person in order to enforce some right which the former may possess does not constitute duress so as to render void a note given as a result of such threat.²⁹ So a threat of a judgment creditor to levy execution on the property of the debtor will not render a note void as being given under duress.³⁰ Nor will a threat of bankruptcy proceedings against a third person which would affect the maker of the note.³¹ And where a person's son was under arrest in a civil suit it was decided that a note given in settlement of such suit, in consideration of its withdrawal and of the release of the son, was not void for duress.³²

§ 111. Giving of paper induced by fear of violence.—That the paper was executed under threats of death, violence, or bodily harm will be a good defense, as between the parties, to an action on the instrument where it appears that the threat was such as to reasonably excite the fear of the person to whom it was made and induce the belief that the threat would be presently carried into execution.³³ The question whether the threat was such as to excite the fear of a person of ordinary courage is not made the test by the later decisions, but rather the determination of the question whether the threat was such as to reasonably excite the fear of the person to whom it was made and thus overcome his will without regard to whether his courage was that of an ordinary person or not is said to control, as it would seem it properly should.³⁴ So where one executed notes to his uncle under threats by the latter that he would take his nephew's life if he

²⁹ *Wilcox v. Howland*, 23 Pick. (Mass.) 167; *Brown v. Tyler*, 16 Vt. 22.

³⁰ *Barnes v. Stevens*, 62 Ind. 226.

³¹ *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. 714, 29 Am. St. R. 170.

³² *Bond v. Kidd* (Ga. 1905), 50 S. E. 934; *Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; *Magoon v. Reber*, 76 Wis. 392, 45 N. W. 112. "Duress by threats exists, not wherever a party has entered into a contract under the influence of a threat, but only where such a threat excites a fear of some grievous wrong,—as of death or of great irremediable injury or unlaw-

ful imprisonment about to be then and there, or at least to be very shortly inflicted. The threat must be such as would naturally excite such a fear (grounded upon the reasonable belief that the person who threatens has at hand the means of carrying his threat into present execution) as would overcome the will of a person of ordinary courage." 6 Am. & Eng. Ency. Law 64, cited in *Barrett v. Mahnken*, 6 Wyo. 541, 48 Pac. 202.

³⁴ *Nebraska Mut. Bond Ass'n v. Klee* (Neb. 1903), 97 N. W. 476, 478. See § 105 herein.

refused, it was held that the courts would not enforce the same.³⁵ And where a person who owned a fourth interest in a mine, which had been leased to another, was surrounded by employes of the lessee, who threatened to shoot him unless he settled their claims, and he gave his notes therefor, it was decided that they were void as being given under duress.³⁶ And a note given by a father as principal, and his son as surety, under the threat that the father would be taken off and killed, was held void as to both.^{36*} Though no actual threats are made to a person, yet the circumstances may be such as to create such a fear of violence or bodily harm as to constitute duress, which will be a defense to an action on paper given under these circumstances. Thus where the plaintiff had demanded entrance and had come into defendant's house with an armed force, shortly after the latter had been injured by the plaintiff, it was held sufficient to awaken his apprehensions, and the court declared that a note given under such circumstances did not deserve the countenance of a court or jury.³⁷ Threats of personal violence, however, to a third person, who lives at a distance, as where he resided in another state, have been held to be no defense to an action on a note induced by such threat.³⁸

§ 112. Threatened criminal prosecution and imprisonment as inducing.—That the execution of paper was induced by a threat of criminal prosecution and unlawful imprisonment, made in bad faith and for the purpose of procuring the execution of the paper in controversy, is a good defense to an action thereon.³⁹ So where a woman was re-

³⁵ *Mollere v. Harp*, 36 La. Ann. 471.

³⁶ *Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560.

^{36*} *Owens v. Mynatt*, 1 Heisk. (Tenn.) 675.

³⁷ *Evans v. Huey*, 1 Bay (S. C.) 13.

³⁸ *Barrett v. Mahnken*, 6 Wyo. 541, 48 Pac. 202.

³⁹ *California*.—*Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. R. 207.

Colorado.—*Lighthall v. Moore*, 2 Colo. App. 554, 31 Pac. 511.

Iowa.—*Henry v. State Bank* (Iowa 1906), 107 N. W. 1034.

Massachusetts.—*Bryant v. Peck & Whipple Co.*, 154 Mass. 460, 28 N. E. 678.

Nebraska.—*Hullhorst v. Scharner*, 15 Neb. 57, 17 N. W. 259.

New York.—*Haynes v. Rudd*, 30 Hun (N. Y.) 237.

Wisconsin.—*Schultz v. Culbertson*, 46 Wis. 313, 1 N. W. 19.

See *Colorado*.—*Jackson v. Allen*, 4 Colo. 263.

Maine.—*Thompson v. Hinds*, 67 Me. 177.

Virginia.—*Keckley v. Union Bank*, 79 Va. 458.

"If a person execute an instrument from a well-grounded fear of illegal imprisonment he may avoid it on the ground of duress," per Downey, J., in *Bush v. Brown*, 49 Ind. 573, 19 Am. Rep. 695.

strained illegally in the office of an attorney, who stated to her that her husband would be arrested on a charge of felony unless she executed a certain mortgage and note, which she did to avoid his arrest, it was held that the defense of duress was good.⁴⁰ And where a note was given by a sister because of threats of the plaintiff to prosecute her brother for an alleged felony it was held that recovery could be defeated on the ground of duress, though the threats were not made directly to the maker of the note, but to her brother, with the intention that they should be communicated to her.⁴¹ And where it appeared that notes were executed by a wife, who also turned over to the payee certain of her individual property in payment of her husband's debts to avoid a criminal prosecution against her husband, it was decided that such facts, which were both alleged and admitted, were sufficient to sustain a finding of duress.⁴² In order to constitute duress in case of menace of imprisonment it has been decided that it must be unlawful imprisonment and that the party was put in fear and thereby induced to execute the note.⁴³ And in a case in Illinois it has been decided that: "Where the party making the threats is not, and is not represented to be, in any position, and has no means for carrying out his threat other than one possessed by all members of the community, that is, where the liberty of the person against whom the threat is made is in no wise restrained and the threatener has made no complaint, has no warrant, and is not represented to have, and neither has or appears to have, at hand or within his control any means for carrying into execution his announced purpose, mere threats of arrest do not constitute duress."⁴⁴

"A contract made under threat of unlawful imprisonment, the fear induced by the threat being the moving cause for its execution, is a contract made under duress and its maker may avoid it," per Stayton, C. J., in *Morrison v. Faulkner*, 80 Tex. 128, 15 S. W. 797.

⁴⁰ *First National Bank v. Bryan*, 62 Iowa 42, 17 N. W. 165.

⁴¹ *Schultz v. Catlin*, 78 Wis. 611, 47 N. W. 946.

⁴² *Delta County Bank v. McGranahan* (Wash. 1905), 79 Pac. 796.

⁴³ *Alexander v. Pierce*, 10 N. H. 494. See *Eddy v. Herrin*, 5 Shep. (Me.) 338, 35 Am. Dec. 261, holding,

in the the case of a threatened arrest for assault and battery on a warrant already issued, that a note obtained from one under the threat of lawful imprisonment and in satisfaction of the injury sustained, is not subject to the defense of duress; *Thorn v. Pinkham*, 84 Me. 101, 24 Atl. 718, holding that where money was embezzled and a promissory note given in payment of the same on a threat of criminal prosecution it is not void for duress. See, on same point as last, *Catlin v. Henton*, 9 Wis. 476. Compare *Henry v. State Bank* (Iowa 1906), 107 N. W. 1034.

⁴⁴ *Youngs v. Sim*, 41 Ill. App. 28, per *Waterman, J.*

§ 113. **Availability of as between the parties.**—In an action on a bill or note it is a good defense, as between the parties, that the instrument was executed under duress.⁴⁵ This rule has been applied where a note has been procured by an abuse of criminal process, such process having been used not for the punishment of the offender for an offense against the public, but to coerce him by threatened imprisonment into the payment of a debt by giving the note in controversy.⁴⁶ It has also been applied in the case of a note which has been obtained by the use of military force.⁴⁷ It has been held, however, that it is no defense that the note was given for the debt of the maker in order to procure his release from prison,⁴⁸ or for money embezzled for the maker, in pursuance of a threat to criminally prosecute him,⁴⁹ or in pursuance of a declaration that he could not leave the state until he signed the note.⁵⁰ And if the maker has received a valuable consideration for the note, duress will be no defense to an action thereon where there has been neither a return of nor an offer to return such consideration.⁵¹ A note given under duress may be validated by subsequent acts of ratification, and where it appears that it has been so ratified the maker will be precluded from setting up the defense of duress.⁵²

§ 114. **Same subject—Against subsequent parties.**—A *bona fide* holder of a bill or note, having obtained the same before maturity and without notice, is not subject to the defense that it was obtained by duress.⁵³ But upon proof that a note was executed under duress the burden is then cast upon the plaintiff to show that he is a *bona*

⁴⁵ Hatch v. Barrett, 34 Kan. 223, 8 Pac. 129; Magoon v. Reber, 76 Wis. 392, 45 N. W. 112. See Woodham v. Allen, 130 Cal. 194, 62 Pac. 398.

⁴⁶ Shenk v. Phelps, 6 Ill. App. 612; Phelps v. Zuschlag, 34 Tex. 371; Schultz v. Catlin, 78 Wis. 611, 47 N. W. 946.

⁴⁷ Voiers v. Stout, 4 Bush (Ky.) 572.

⁴⁸ Bates v. Butler, 46 Me. 387; St. Albans Bank v. Dillon, 30 Vt. 122, 73 Am. Dec. 295.

⁴⁹ Beath v. Chapoton, 115 Mich. 506, 73 N. W. 806.

⁵⁰ Seymour v. Prescott, 69 Me. 376.

⁵¹ City National Bank v. Kusworm, 91 Wis. 166, 64 N. W. 843.

⁵² Bartle v. Breniger, 37 Iowa 139.

⁵³ Hogan v. Moore, 48 Ga. 156; Peckham v. Hendrew, 76 Ind. 47; O'Keefe v. Handy, 31 La. Ann. 832; Farmers' Bank of Grand Rapids v. Butier, 48 Mich. 192, 1 N. W. 36; Mundy v. Whitmore, 15 Neb. 647, 19 N. W. 694; Keller v. Schmidt, 104 Wis. 596, 80 N. W. 935; Mack v. Prang, 104 Wis. 1, 79 N. W. 770.

fide holder.⁵⁴ Again, in an action against an indorser it has been decided that he cannot avail himself as a defense of the fact that the maker executed the note under duress, it being declared that the duress of a principal does not affect the free agency of the indorser.⁵⁵ In other decisions, however, the rule is affirmed that in an action against a surety upon a bill or note he may avail himself of the fact that the paper was executed by his principal under duress.⁵⁶ In this connection it has been said by the court in an Indiana case: "There are reasons, which, to our minds are conclusive, why a surety should not be held bound upon a contract to which his principal has a valid defense, not of a personal character, but going to the contract itself as fraud, duress, want or failure of consideration, etc. If the surety is bound by such a contract one of two things must follow. The surety, having been compelled to pay the money due by the contract, must either have his action against his principal to recover the amount paid, or he must lose it. If the first alternative is to be adopted, and the surety may maintain an action against his principal to recover the money paid, then the principal will be compelled virtually to pay upon a contract to which he had complete defense. It is but a mockery to say that a man has a valid defense to a claim, and yet say that he must pay the amount due thereon to his surety, whom the law compels to pay to the creditor. On the other hand, if the surety, having been compelled to pay the money to the creditor, cannot recover it from his principal, he must lose it, and an equal injustice is done."⁵⁷ And in an action by the assignee of a non-negotiable note against the maker the defense of duress may be set up.^{57*} And where a note was executed by a married woman under duress which purported to charge her separate estate and contained a statement that the consideration was for the benefit of such estate, it was decided that in view of the circumstances under which the note was executed and the

⁵⁴ Clark v. Pease, 41 N. H. 414. See Duncan v. Scott, 1 Camp. 100, holding that where the drawer of a bill of exchange executed the same under duress, in an action against him by an indorsee the latter must show that he gave some consideration therefor.

⁵⁵ Bowman v. Hiller, 130 Mass. 153, 39 Am. Rep. 442. Compare Griffith v. Sitgreaves, 90 Pa. St. 161,

holding that the defense of duress was available in an action against an indorser for the maker's accommodation by a holder who was guilty of the duress by means of which the note was obtained.

⁵⁶ Osborn v. Robbins, 36 N. Y. 365.

⁵⁷ Per Biddle, J., in Coffelt v. Wise, 62 Ind. 451.

^{57*} Butterfield v. Davenport, 84 Ind. 590.

facts that the note was not given in the course of any separate business carried on by her, and that the consideration did not go to the benefit of her separate estate, the instrument could not be enforced against her even by a *bona fide* holder.⁵⁸ A purchaser after maturity is also subject to this defense to the same extent as his indorsee.⁵⁹

§ 115. **Same subject—Parties with notice.**—It is a good defense as against a transferee with notice that the note was procured from the maker by means of duress.⁶⁰ But a surety who signs a note with notice of the duress of his principal cannot avail himself of this fact as defense to an action on the instrument.⁶¹

⁵⁸ *Loomis v. Ruck*, 56 N. Y. 462. The court said in this case: "The law merchant which gives to the *bona fide* transferee of negotiable paper greater rights than those of the transferer has no application to this class of obligations. They are not recognized at law and we have been referred to no authority tending to sustain the position, that the transferee of an obligation of a married woman obtained from her by fraud or duress, and against which she had a good defense, when in the hands of the original holder, can be enforced in equity out of her separate estate, simply because it has passed into the hands of a *bona fide* transferee. The rules applicable to commercial paper can not

govern this case. It must be governed by the rule of equity, which, in case of equal equities, and in the absence of sufficient grounds of estoppel, give preference to the equity which is prior in point of time." Per Rappallo, J.

⁵⁹ *Linton v. King*, 4 Allen (Mass.) 562.

⁶⁰ *Thompson v. Niggley*, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803; *Osborn v. Robbins*, 36 N. Y. 365, 4 Abb. Prac. N. S. 15. That the note was procured from the maker by threats of great bodily harm is a good defense against an assignee with notice. *McGowen v. Bush*, 17 Tex. 195.

⁶¹ *Graham v. Marks*, 98 Ga. 67, 25 S. E. 931.

CHAPTER VI.

FRAUD AND FRAUDULENT REPRESENTATIONS.

Sec.	Sec.
116. Rule as to fraud and fraudulent representations—Generally.	125. Paper in fraud of creditors.
117. What constitutes a misrepresentation which is a defense.	126. Fraudulent procurement of indorsement.
118. Fraudulent concealment.	127. Fraud as to amount.
119. As against <i>bona fide</i> holder—Generally.	128. Fraud as to surety.
120. Same subject—Rule illustrated.	129. Same subject— <i>Bona fide</i> holders.
121. Same subject—Fraud of particular persons.	130. Fraudulent transfer.
122. False representations as to consideration.	131. Same subject—By partner.
123. Same subject— <i>Bona fide</i> holder.	132. Same subject—By administrator.
124. Certified check—Effect of fraud— <i>Bona fide</i> holder.	133. Availability of defense—Maker.
	134. Same subject—Other parties.

§ 116. Rules as to fraud and fraudulent representations—Generally.—Courts will always carefully scrutinize a contract and the surrounding circumstances in connection with its execution or consideration where it is alleged to have been procured by the fraud of the plaintiff or to which he was a party or had notice of. It is a general principle that courts will not allow one who has by fraud or deceit procured the execution of a contract to enforce the same against the one so induced to execute it and thus obtain an advantage or benefit by his fraudulent conduct. These principles apply in the case of commercial paper, and in an action between the parties fraud may be shown in defense thereto,¹ as it may also against a subsequent holder

¹ *Alabama*.—Wyatt v. Ayers, 2 Port. (Ala.) 157.

Connecticut.—Reynolds v. Bird, 1 Root (Conn.) 305.

Georgia.—Farkas v. Monk, 119 Ga. 115, 46 S. E. 670.

Illinois.—Sims v. Rice, 67 Ill. 88.

Iowa.—Sullivan v. Collins, 18

Iowa 228. See Palo Alto Stock Farm v. Brooker (*Iowa* 1906), 108 N. W. 307.

Kentucky.—Merchants' & Farmers' Bank v. Cleland, 25 Ky. Law Rep. 1169, 77 S. W. 176, 719.

Massachusetts.—Bilafsky v. Conveyancers' Title Ins. Co. (*Mass.* 1906), 78 N. E. 534.

Michigan.—Roberts v. Sholes, 144 Mich. 215, 107 N. W. 904.

Minnesota.—Schaller v. Borger, 47 Minn. 357, 50 N. W. 247.

who is not a *bona fide* holder,² or who took the paper with notice of the fraud.³ And where prior to the maturity of a note a renewal note is given to the payee at the request of an innocent indorsee it has been decided that, in an action by the former on the renewal note, fraud is a good defense.⁴ So the fact that a person was induced to execute a note by false and fraudulent representations may be shown in defense to an action between the parties,⁵ or by a holder with notice.⁶ And it is available in defense to an action by one who, though he is a purchaser for value, is not shown to have bought the paper in the usual course of business or for full value.⁷ And in an action against an indorser it may be shown that the plaintiff procured the indorsement to himself by means of fraud,⁸ or that he was a privy to or participant in the fraud, and therefore had notice.⁹ A party may, however, be precluded by waiver or estoppel from availing himself of the

Missouri.—Carter v. McClintock, 29 Mo. 464.

Nebraska.—Hauptman v. Pike (Neb.), 108 N. W. 163.

New York.—Bergman v. Salmon, 79 Hun (N. Y.) 456, 29 N. Y. Supp. 968.

Ohio.—Loffland v. Russell, Wright (Ohio) 438.

See *South Dakota*.—Kirby v. Berguin, 15 S. D. 44, 90 N. W. 856.

Vermont.—Kelly v. Pember, 35 Vt. 183.

Wisconsin.—Hodge v. Smith (Wis.) 110 N. W. 192; Knott v. Tidyman, 86 Wis. 164, 56 N. W. 632.

² Knott v. Tidyman, 86 Wis. 164, 56 N. W. 632.

³ *Indiana*.—Irwin v. Guthrie, 28 Ind. App. 341, 62 N. E. 709.

Maine.—Nichols v. Baker, 75 Me. 334.

Michigan.—Lenheim v. Fay, 27 Mich. 70.

Missouri.—Fisk v. Collins, 9 Mo. 137.

Nevada.—Swinney v. Patterson, 25 Nev. 411, 62 Pac. 1.

⁴ Sawyer v. Wiswell, 91 Mass. (9 Allen) 39; Adams v. Ashman, 203 Pa. St. 536, 53 Atl. 375.

⁵ *California*.—Wenzel v. Schultz, 78 Cal. 221, 20 Pac. 404.

Illinois.—Knotts v. Preble, 50 Ill. 226, 99 Am. Dec. 514.

Indiana.—Elsass v. Institute, 77 Ind. 72; Taylor v. Fletcher, 15 Ind. 80; Union Central Life Ins. Co. v. Huyck, 5 Ind. App. 474, 32 N. E. 580.

Mississippi.—Hall v. Clofton, 56 Miss. 555.

Missouri.—Live Stock Remedy Co. v. White, 90 Mo. App. 498.

Nebraska.—Hauptman v. Pike (Neb.), 108 N. W. 163.

New Jersey.—Mueller v. Buck (N. J. S. C. 1904), 58 Atl. 1092.

See *Vermont*.—Wilbur v. Prior, 67 Vt. 508, 32 Atl. 474.

Virginia.—Brown v. Rice's Admr., 26 Gratt. (Va.) 467.

England.—Grew v. Bevan, 3 Starkie 134.

House v. Martin, 125 Ga. 642, 54 S. E. 735.

⁶ Armstrong v. Cook, 30 Ind. 22; National Bank v. Mackey, 5 Kan. App. 437, 49 Pac. 324.

⁷ Millard v. Barton, 13 R. I. 601, 43 Am. Rep. 51.

⁸ Shaw v. Stein, 79 Mich. 77, 44 N. W. 419; Nethercutt v. Hopkins, 38 Wash. 577, 80 Pac. 798.

⁹ Lenheim v. Fay, 27 Mich. 70.

defense of fraud.¹⁰ These general rules have been applied in the case of a false representation that accommodation paper was business paper;¹¹ and where a note was given in satisfaction of an injury sustained by the payee and the nature and extent of the injury was fraudulently exaggerated.¹² And where the plaintiff had a joint interest with the payee of the note in the contract with the maker in connection with which the note was given, it was held that the defense of fraud was available against him.¹³ But where a party seeks to avoid an instrument on the ground of fraud the defense will not be upheld where it appears that he was the principal party in the perpetration and that it is doubtful whether plaintiff had any knowledge thereof.¹⁴ And as between the parties to a bill or note there is no obligation on the defrauded party towards the one who defrauded him to use due diligence to discover the fraud. One who perpetrates a fraud cannot complain because his victim has confidence in him which a more vigilant person would not have.¹⁵ The defense, however, that a note was obtained by fraud is held to be inconsistent with a plea of *non est factum*.¹⁶

§ 117. What constitutes a misrepresentation which is a defense.

A person cannot avail himself as a defense to an action on a bill or note of a misrepresentation in reference to a matter which is wholly disconnected with the instrument. In order to render a false representation available as a defense it must be material, that is, of something constituting an inducement or motive to the contract.¹⁷ It must also be an assertion of a fact, a statement which is a mere expression of an opinion being no defense.¹⁸ And a person cannot set

¹⁰ *Morgan v. Nowlin*, 126 Mich. 105, 85 N. W. 468, holding that one who retains the consideration of a note cannot by setting up the defense of fraud defeat all recovery on the instrument; examine *Griffiths v. Parry*, 16 Wis. 218.

¹¹ *Webb v. Odell*, 49 N. Y. 583. See *Trask v. Wingate*, 63 N. H. 474, 3 Atl. 926, holding that in an action by an indorsee it is no defense that the note was for the accommodation of the payee and that there was no consideration.

¹² *Thompson v. Hinds*, 67 Me. 177.

¹³ *Kelly v. Pember*, 35 Vt. 183.

¹⁴ *Price v. Winnebago National Bank*, 14 Okla. 268, 79 Pac. 105.

¹⁵ *Smith v. McDonald* (Mich. 1905), 103 N. W. 738.

¹⁶ *Tenney v. Turner* (Mo. App. 1905), 86 S. W. 506.

¹⁷ *Ingram v. Jordan*, 55 Ga. 356; *Dahlman v. Antes* (Iowa 1906), 109 N. W. 784; *Hodges v. Torrey*, 28 Mo. 99; *Jackson v. Stockbridge*, 29 Tex. 394, 94 Am. Dec. 290. See *Blee v. Giltinan* (Pa.), 12 Alt. 479.

¹⁸ *Taylor v. Ford*, 131 Cal. 440, 63 Pac. 770, holding that a representation as to the value of book accounts in the case of a sale of a business and stock is an expression

up in defense to an action on a bill or note, the fact that there was a misrepresentation as to the legal effect of the instrument.¹⁹ Nor can one avail himself of a misrepresentation as a defense where it was of such an absurd character that it cannot be regarded as fraud.²⁰ So it has been held no defense to an action on a note that the maker was induced to sign it by a false representation as to the legal effect of an order of arrest,²¹ or that it was necessary for the maker to sign the note to release her dower in real estate which was conveyed as security for certain notes.²² Again it has been decided that a person cannot defeat recovery on a note on the ground that he was induced to sign it by a misrepresentation as to his liability thereon.²³ The fact, however, that the execution of a bill of exchange was procured by false representations that it was only an ordinary note on which statement the party relied, has been held to constitute a fraud on the latter which entitled him to relief as against an indorsee who did not pay value.²⁴ Again it is determined that recovery cannot be defeated on the ground of a false representation unless damage has been sustained.²⁵

§ 118. Fraudulent concealment.—One who induces another to affix his signature to commercial paper by the fraudulent concealment of a material fact cannot enforce such instrument against the latter. This will be a good defense as against the one guilty of such fraudu-

of opinion; *Garber v. Bressee*, 96 Va. 644, 32 S. E. 39, holding that a representation by an agent, in the case of a note given for a premium, that there would be no trouble in getting the cash surrender value of a policy held by the maker, was an expression of opinion. *Consumers' Brewing Co. v. Tobin*, 19 App. D. C. 353; *Black v. Epstein*, 93 Mo. App. 459, 67 S. W. 736.

¹⁹ *Juggar v. Winslow*, 30 Minn. 263. "A representation that an instrument is valid or that a party to it is legally bound by its terms and conditions, is not the statement of a fact. It is an expression of opinion upon a question of law. And, while it may be erroneous, it

is not a false representation, in the legal acceptance of the term, and cannot be made the subject of either action or defense." *Court Valhalla, Foresters of America, v. Olson*, 14 Colo. App. 243, 59 Pac. 883, per Thomson, J.

²⁰ *Webb v. Moseley*, 30 Tex. Civ. App. 311, 70 S. W. 349.

²¹ *Reed v. Sidener*, 32 Ind. 373.

²² *Croft v. Aldrich*, 54 Ill. App. 541.

²³ *Shropshire v. Kennedy*, 84 Ind. 111; *Grocers' Bank v. Murphy*, 9 Daly (N. Y.) 510. But see *Wilbur v. Prior*, 67 Vt. 508, 32 Atl. 474.

²⁴ *Ross v. Drinkard*, 35 Ala. 434.

²⁵ *Bomar v. Roser*, 131 Ala. 215, 31 So. 430.

lent conduct or a subsequent holder with notice.²⁶ So where the payee of a note had knowledge, at the time of its execution, of a defect in the article for which it was given, but fraudulently concealed such knowledge, it was decided that there could be no recovery.²⁷ An omission, however, by the payee of a note to state all the facts will not necessarily defeat an action by him against the maker where the latter has knowledge of such facts from other sources.²⁸

§ 119. **As against bona fide holders—Generally.**—The liability of the maker or acceptor of a negotiable instrument cannot be varied from that which is apparent from the instrument itself, by setting up, in an action by one who is a *bona fide* holder for value, before maturity and without notice, the fact that the paper was procured from him by fraud.²⁹ A person is held to be a *bona fide* holder within the appli-

²⁶ *Conger v. Bean*, 58 Iowa 321, 12 N. W. 284; *Brown v. Montgomery*, 20 N. Y. 287; *March v. Bank*, 4 Hun (N. Y.) 466.

²⁷ *Sides v. Hilleary*, 6 Har. & J. (Md.) 86.

²⁸ *Sullivan v. Collins*, 18 Iowa 228; *Sachleben v. Hentze*, 117 Mo. 520, 24 S. W. 54.

²⁹ *Alabama*.—*Bomar v. Rosser*, 123 Ala. 641, 26 So. 510; *Saltmarsh v. Tuthill*, 13 Ala. 390; *Barney v. Earle*, 13 Ala. 106.

California.—*McMahon v. Thomas* (Cal.), 39 Pac. D. 783.

Colorado.—*King v. Mechlenburg*, 17 Colo. App. 312, 68 Pac. 984.

Delaware.—*McCarty v. Lockwood*, 6 Houst. (Del.) 451; *Bush v. Peckard*, 3 Har. (Del.) 385.

District of Columbia.—*Mason v. Jones*, 7 App. D. C. 247.

Georgia.—*Walters v. Palmer*, 110 Ga. 776, 36 S. E. 79; *Merritt v. Bagwell*, 70 Ga. 578; *Robinson v. Vason*, 37 Ga. 66.

Illinois.—*Culver v. Hide & Leather Bank*, 78 Ill. 626; *Taylor v. Thompson*, 3 Ill. App. 109.

Indiana.—*Brickley v. Edwards*, 131 Ind. 3, 30 N. E. 708; *Palmer v.*

Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; *First National Bank v. Latton*, 67 Ind. 256; *Riley v. Schawacker*, 50 Ind. 592.

Iowa.—*Hawkins v. Wilson*, 71 Iowa 761, 32 N. W. 416; *Fayette County Savings Bank v. Steffes*, 54 Iowa 214, 6 N. W. 267; *Loomis v. Metcalf*, 30 Iowa 382; *Bridge v. Livingston*, 11 Iowa 57.

Kansas.—*Draper v. Cowles*, 27 Kan. 484.

Kentucky.—*Early v. McCarthy*, 2 Dana (Ky.) 414.

Louisiana.—*Clark v. Stackhouse*, 2 Mart. (O. S. La.) 319.

Maine.—*Roberts v. Lane*, 64 Me. 108, 18 Am. Rep. 242; *Wait v. Chandler*, 63 Me. 257; *Fletcher v. Gusbie*, 32 Me. 587.

Maryland.—*Black v. First National Bank*, 96 Md. 399, 54 Atl. 88; *Crampton v. Perkins*, 65 Md. 22, 3 Atl. 300; *Davis v. West Saratoga Bldg. Union*, 32 Md. 285.

Massachusetts.—*Fort Dearborn National Bank v. Carter*, 152 Mass. 34, 25 S. E. 38; *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471; *Thurston v. McKeown*, 6 Mass. 428.

cation of the rule, though he may have taken the paper under suspicious circumstances,³⁰ or may have paid less than its face value.³¹

Michigan.—Davis v. Seely, 71 Mich. 209, 38 N. W. 901.

Minnesota.—Rosemond v. Graham, 54 Minn. 323, 56 N. W. 38, 40 Am. St. R. 336.

Missouri.—Famous Shoe and Clothing Co. v. Crosswhite, 124 Mo. 34, 27 S. W. 397, 46 Am. St. R. 424, 20 L. R. A. 568; Corby v. Butler, 55 Mo. 398; Jaccard v. Shands, 27 Mo. 440; Clark v. Porter, 90 Mo. App. 143; Emmert v. Meyer, 65 Mo. App. 609.

New Hampshire.—Paige v. Chapman, 58 N. H. 333; Perkins v. Chellis, 1 N. H. 254.

New Jersey.—Second National Bank v. Hewitt, 59 N. J. L. 57, 34 Atl. 988.

New York.—Clothier v. Adriance, 51 N. Y. 322; Merchants' Loan Co. v. Bank of Metropolis, 7 Daly (N. Y.) 137.

Ohio.—Gano v. Samuel, 14 Ohio 592.

Pennsylvania.—Phelan v. Moss, 67 Pa. St. 59, 5 Am. Rep. 402; Gray v. Bank, 29 Pa. St. 365; Taylor v. Gitt, 10 Pa. St. 428.

South Carolina.—Sims v. Lyles, 1 Hill. (S. C.) 39, 26 Am. Dec. 155.

Tennessee.—Holeman v. Hobson, 27 Tenn. (8 Humph.) 127.

Texas.—Mulberger v. Morgan (Tex. Civ. App.), 34 S. W. 148.

Vermont.—Powers v. Ball, 27 Vt. 662.

Washington.—Jamieson v. Heim (Wash.), 86 Pac. 165.

Federal.—Goodman v. Simonds, 20 How. (U. S.) 343; O'Rourke v. Mahl, 109 Fed. 276; Seymour v. McDonald Lumber Co., 58 Fed. 957, 7 C. C. A. 593, 16 U. S. App. 245; White v. How, 3 McLean (U. S.) 291, Fed. Cas. No. 17549.

Delaware.—"When a third party

acquires the ownership of a promissory note before maturity, in good faith and for a valuable consideration, he is regarded in law as an innocent holder for value, and entirely unaffected by any fraud that may have existed in the inception of the note on the part of the person to whom the note was given." Journal Printing Co. v. Maxwell, 1 Penn. (Del.) 511, 513, 43 Atl. 615, per Pennewill, J., in charging the jury.

Kentucky.—"To assure credit and circulation to bills of exchange, as a species of useful currency, the law merchant in most cases forbids a party to such a bill, when sued by a bona fide holder for a valuable consideration without notice, to plead either fraud or want of consideration as between himself and the party with whom he directly contracted." Bement v. McClaren, 1 B. Mon. (Ky.) 296, 298, per Robertson, C. J.

Maine.—"The rule is firmly established that the holder of negotiable paper, taking it in the usual course of business for a sufficient consideration before its maturity, and ignorant of any facts impeaching its validity, can recover against the maker." Burrill v. Parsons, 71 Me. 282, per Appleton, C. J.

See also Waddell v. Hanover Nat. Bank, 48 Misc. R. (N. Y.) 578, 67 N. Y. Supp. 305.

³⁰ Brewer v. Slater, 18 App. (D. C.) 48; Smith v. Livingston, 111 Mass. 342; Wilson v. Ridler, 92 Mo. App. 335; Second National Bank v. Morgan, 165 Pa. St. 199, 30 Atl. 957, 44 Am. St. R. 652.

³¹ Lay v. Wissman, 36 Iowa 305; Sully v. Goldsmith, 32 Iowa 397; Williams v. Huntington, 68 Md. 590, 13 Atl. 336, 6 Am. St. R. 477.

And one who takes a note as pledgee without any notice of fraud or misrepresentation inducing its execution is to be regarded as a *bona fide* holder for value.³² And an injunction will not lie to restrain proceedings by such a holder of a note on the ground of fraudulent representations by the payee to the maker.³³ If, however, it is established that the execution of the paper was procured by fraud on the part of the payee, the burden is then cast on the plaintiff to show that he is a *bona fide* holder as a *prima facie* good defense is presented by proof of such fraud.³⁴ So where it appears that a check was obtained by the payee through fraud, in an action by his indorsee, it has been declared that the burden rests on him to show that he took the check in the usual course of business, for a valuable consideration and without knowledge of facts or circumstances which impeached its validity as between the original parties and without knowledge of facts or circumstances that would lead a careful and prudent man to suspect that the check was invalid as between the antecedent parties.³⁵ If the paper is non-negotiable, it is a good defense to an action thereon that it was procured by false representations, even though it is in the hands of a *bona fide* holder.³⁶ Nor can a *bona fide* holder recover upon an instrument where the fraud is patent upon its face.³⁷ And it has been decided that it may be shown by the assignee of a note payable to order and not to bearer that it was procured by false and fraudulent representations.³⁸ Again, if a purchaser has notice of the fraud prior

See *Holcomb v. Wyckoff*, 35 N. J. L. 35, 10 Am. Rep. 219, holding that in such a case there can only be a recovery of the sum paid.

³² *Watzlavzick v. Oppenheimer* (Tex. Civ. App. 1905), 85 S. W. 854.

³³ *Dougherty v. Scudder*, 17 N. J. Eq. 248.

³⁴ *Alabama*.—*Alabama National Bank v. Halsey*, 109 Ala. 196, 19 So. 522.

California.—*Ames v. Crosier*, 101 Cal. 260, 35 Pac. 873.

Missouri.—*Clifford Banking Co. v. Donovan Commission Co.*, 195 Mo. 262, 94 S. W. 527.

Montana.—*Herrington v. Butte & B. Min. Co.*, 27 Mont. 1, 69 Pac. 102.

New York.—*Consolidation National Bank v. Kirkland*, 99 App. Div. 121, 91 N. Y. Supp. 353, decided under Laws 1897, p. 703, c. 612.

Iowa.—"The rule of the authorities unquestionably is that when the defense to a note is fraud in its inception, and such defense is supported by evidence, the onus is thereby cast upon the holder, who brings the action, to show that he gave value for it, and that he is a *bona fide* purchaser before maturity." *Woodward v. Rogers*, 31 Iowa 342, per Beck, J.

³⁵ *Capital Savings Bank & T. Co. v. Montpelier Sav. Bank & T. Co.* (Vt. 1905), 59 Atl. 827.

³⁶ *Wickham v. Grant*, 28 Kan. 517; *McLaughlin v. Brady*, 63 S. C. 433, 41 S. E. 523.

³⁷ *Clafin v. Farmers' & Citizens' Bank*, 25 N. Y. 293.

³⁸ *Kennedy v. Jones* (Miss.), 29 So. 819.

to the payment by him of the full consideration, he can only recover to the extent of the payments made by him before he received such notice, and where he makes no payments until after he received notice he will not be regarded as a *bona fide* holder.³⁹

§ 120. **Same subject—Rule illustrated.**—The rule stated in the preceding section as to the right of a *bona fide* holder to recover, though there has been fraud in the procuring of the note, has been applied where a note was given in payment of an order for goods and the order turned out to be fraudulent;⁴⁰ where it was made for a larger amount than was stated to the maker, whose eyesight was impaired and who was in a state of extreme physical weakness;^{40*} where the owner has been deprived of the instrument by fraud and it had been deposited with the holder as collateral;⁴¹ where there has been fraud or mistake in the adjustment of the account for which the note was given;⁴² where the consideration of the note was a sale of goods by an insolvent debtor in fraud of the insolvent laws;⁴³ where there was a misrepresentation as to the quality of the goods sold, in payment for which the note was given, and the maker of the paper had ample opportunity to examine them for himself;⁴⁴ and where a party was induced to sign a note as a co-maker on the misrepresentation that a certain other party had signed the same, when in fact the signature of the latter person was forged.⁴⁵ And where the consideration for a note was a worthless patent right, it was decided that the fact that on the margin of the note were written the words "this note is given for a patent right" did not authorize the jury to infer that the indorser had notice or knowledge that the patent was of no value.⁴⁶ Negotiable warehouse receipts are also subject to the same rule and the title of a *bona fide* holder is not affected by fraud on the part of the original holder to-

³⁹ *Crandall v. Vicery*, 45 Barb. (N. Y.) 156; *Dresser v. Construction Co.*, 93 U. S. 92. See *Loftin v. Hill*, 131 N. C. 105, 42 S. E. 548; *Campbell v. Brown*, 100 Tenn. 245, 48 S. W. 970.

⁴⁰ *Hoats v. Aschbach*, 160 Pa. St. 6, 28 Atl. 437.

^{40*} *McSparron v. Neeley*, 91 Pa. St. 17.

⁴¹ *Bealle v. Bank*, 57 Ga. 274; *First*

National Bank v. Adam, 138 Ill. 483, 28 N. E. 955.

⁴² *Lanier v. Union Mortgage Banking & T. Co.*, 64 Ark. 39, 40 S. W. 466.

⁴³ *Potter v. Belden*, 105 Mass. 11.

⁴⁴ *Farrell v. Lovell*, 68 Me. 326, 28 Am. Rep. 59.

⁴⁵ *Gridley v. Bane*, 57 Ill. 529.

⁴⁶ *Hereth v. Merchants' National Bank*, 34 Ind. 380.

ward the warehouseman.⁴⁷ And coupon bonds, payable to bearer, and issued under competent legislative authority, can be transferred by delivery, and the title of a *bona fide* holder is not affected by the fact that he received them from one who obtained possession of them by fraud.⁴⁸ Nor will fraud and irregularity touching the issue of such bonds and their disposal be admissible to affect the right of a *bona fide* holder to coupons detached therefrom.⁴⁹ So bank notes, though fraudulently put into circulation, become the property of one who gives valuable consideration therefor without notice of the fraud.⁵⁰ Again, it has been decided that a *bona fide* holder of a note is not subject to the defense that the maker was induced to sign the same by false representations as to the character of the paper he was signing.⁵¹ In this latter class of cases, however, there are several decisions which hold that it is a good defense against a *bona fide* holder providing the maker has not been guilty of negligence in signing the instrument.⁵²

§ 121. **Same subject—Fraud of particular persons.**—One who occupies the position of a *bona fide* holder of a bill or note is not subject to the defense, in an action by him thereon, that there has been fraud on the part of a maker toward his co-makers;⁵³ or of a principal toward his guarantor;⁵⁴ or of a surety upon the maker in an action against the latter;⁵⁵ or of a corporate officer toward the corporation

⁴⁷Early Times Distilling Co. v. Earle, 21 Ky. Law Rep. 1709, 56 S. W. 13. See Fletcher v. Great Western Elevator Co., 12 S. D. 643, 82 N. W. 184, holding that a *bona fide* holder of negotiable warehouse receipts is not affected by the fact that the agent of the warehouseman issued the receipts for grain which had not been received.

⁴⁸Fifth Ward Savings Bank v. First National Bank, 48 N. J. L. 513, 7 Atl. 318.

⁴⁹Macon Co. v. Shores, 97 U. S. 272.

⁵⁰Robinson v. Bank, 18 Ga. 65; White v. Howe, 3 McLean (U. S.) 291, Fed. Cas. No. 17549. See Solomans v. Bank, 13 East 135.

⁵¹Kimble v. Christie, 55 Ind. 140;

Douglas v. Matting, 29 Iowa 498, 4 Am. Rep. 238; Chapman v. Rose, 56 N. Y. 137.

⁵²Hewitt v. Jones, 72 Ill. 218; Hubbard v. Rankin, 71 Ill. 129; Sims v. Rice, 67 Ill. 88; First National Bank v. Deal, 55 Mich. 592, 22 N. W. 53.

⁵³Gridley v. Bane, 57 Ill. 529.

⁵⁴McWilliams v. Mason, 31 N. Y. 294; Rothermal v. Hughes, 134 Pa. St. 510, 19 Atl. 677, holding that a note is not invalidated by the fact that the principal debtor or maker secured the signatures of the sureties by fraud or fraudulent representations.

⁵⁵First National Bank v. Fitts, 67 Vt. 57, 30 Atl. 697.

which he represents;⁵⁶ or of a partner toward his firm;⁵⁷ or of one who holds the paper in trust for another;⁵⁸ or who holds or obtains it for some temporary or particular purpose;⁵⁹ or who holds the paper

⁵⁶ *Grand Rapids & I. R. Co. v. Sanders*, 17 Hun (N. Y.) 552, so holding in the case of negotiable bonds put in the hands of the president of a corporation with full power and authority to dispose of and negotiate them, where he used them as collateral for personal loans and they were subsequently transferred to the plaintiff, who was a *bona fide* holder. See also, *Wormer v. Agricultural Works*, 50 Iowa 262; *Pittsburg Railway Co. v. Lynde*, 55 Ohio St. 23, 44 N. E. 596; *Long Island L. & T. Co. v. Columbus C. & I. C. R. Co.*, 65 Fed. 455. But where a corporation has no power to accept a draft it cannot be bound by the fraudulent act of one of its officers in accepting such paper, even to an innocent holder. Thus it has been said: "Corporations are not bound by the abuse of its officers when such act of abuse is wholly and clearly outside the field of the corporation's power. Neither the president nor the directory of a corporation can do such acts as the corporation itself has no power to do. The law of estoppel does not enlarge corporate powers and in consequence corporate liability. Where the powers of the corporation stop, the powers of its officers also stop, and that point of limitation the public are bound at their peril to know." *Towle v. American Bldg. L. & I. Co.*, 78 Fed. 688, 689, per Grosscup, D. J.

⁵⁷ *Barber v. Van Horn*, 54 Kan. 33, 36 Pac. 1070, holding that, where a partnership executed a firm note for money borrowed and one of the

partners drew money to pay the same at maturity and entered it on the books as paid, but appropriated the money and renewed the note, that the fraudulent conduct of the partner toward the firm was no defense against a holder for value, before maturity and without notice; *Albietz v. Hellon*, 37 Pa. St. 367; *Rogers v. Batchelor*, 12 Pet. (U. S.) 221. See *Henderson v. Anderson*, 3 How. (U. S.) 73.

⁵⁸ *Reid v. Bank*, 70 Ala. 199; *Geddes v. Blackmore*, 132 Ind. 551, 32 N. E. 567; *Thompson v. Bank*, 113 N. Y. 325, 21 N. E. 57. Where bonds payable to bearer are deposited as collateral with a *bona fide* holder he will be protected in his title even as against the true owner until he has been repaid or he realizes sufficient thereon to repay him. *Bealle v. Bank*, 57 Ga. 274.

⁵⁹ *First National Bank v. Adam*, 138 Ill. 483, 28 N. E. 955, holding where notes pledged with a bank were returned to the pledgor to be sold by him and the proceeds applied on his indebtedness and he pledged them as collateral with another creditor before maturity and without notice, that the latter was protected in his title as against the bank; *Stoner v. Brown*, 18 Ind. 464, holding that where a payee, after pledging a note to another without indorsement, subsequently obtained it from the pledgee for a pretended temporary purpose and assigned the same for a valuable consideration to a *bona fide* purchaser, the latter may recover, as he has a legal title against all persons.

as agent for another and fraudulently disposes of the same in violation of his instructions.⁶⁰ So the fact that an agent, to whom the paper has been entrusted for collection, and who is the apparent owner thereof, has acted in fraud of his principal and transferred the same to another, who occupies the position of a *bona fide* holder, will be no defense to an action thereon by the latter.⁶¹ And a similar rule applies where a note has been given to an agent for the purpose of having it discounted and he has fraudulently negotiated the same in violation of his instructions.⁶² And fraud of the pledgee of negotiable paper in transferring the same is no defense to an action by a *bona fide* holder.⁶³ Nor can it be shown against such a holder that securities, which have been pledged as collateral for the note have been fraudulently transferred by the payee.⁶⁴

§ 122. **False representations as to consideration.**—False representations affecting the consideration may be shown in defense to an action between the original parties to a bill or note,⁶⁵ or by a holder

⁶⁰ *Silverman v. Bulloc*, 98 Ill. 11; *Murrell v. Jones*, 40 Miss. 565. See *Dovey's Appeal*, 97 Pa. St. 153.

⁶¹ *Wyman v. Bank*, 5 Colo. 30, 40 Am. Rep. 133; *Pond v. Agricultural Works*, 50 Iowa 596; *Bank of New York v. Muskingum Branch of Bank of Ohio*, 29 N. Y. 619. See *Lowndes v. Anderson*, 13 East 130.

⁶² *Davis v. Building Union*, 32 Md. 285; *Gwynn v. Lee*, 9 Gill (Md.) 137; *Hanks v. Dunlap*, 10 Rich. Eq. (S. C.) 139; *Bank of Pittsburgh v. Neal*, 22 How. (U. S.) 96. See *Murrell v. Jones*, 40 Miss. 565.

⁶³ *Bancroft v. McKnight*, 11 Rich. L. (S. C.) 663.

⁶⁴ *Kiel v. Reay*, 50 Cal. 61.

⁶⁵ *Alabama*.—*Alabama National Bank v. Halsey*, 109 Ala. 196, 19 So. 522.

Georgia.—*Carithers v. Levy*, 111 Ga. 740, 36 S. E. 958.

Illinois.—*Conkling v. Vail*, 31 Ill. 166.

Indiana.—*Cross v. Herr*, 96 Ind. 96.

Kansas.—*Snyder v. Hargue*, 26 Kan. 416.

Missouri.—*Beall v. January*, 62 Mo. 434.

Montana.—*First National Bank v. Howe*, 1 Mont. 604.

New York.—*Beauford v. Patterson*, 63 How. Prac. (N. Y.) 81.

Vermont.—*Still v. Snow*, 66 Vt. 277, 29 Atl. 250.

See *Connecticut*.—*Barkhamsted v. Case*, 5 Conn. 528.

New York.—*Jones v. Dana*, 24 Barb. (N. Y.) 395.

Texas.—*Breckenridge v. Berrier*, 2 Posey Unrep. Cas. (Tex.) 324.

Where a note was given to a bank it was held that fraudulent representations could be set up as well as a defense to an action by the receiver of the bank as against the bank itself.

Connecticut.—*Litchfield Bank v. Peck*, 29 Conn. 384.

with notice,⁶⁶ or by an indorsee who is not a holder for value.⁶⁷ So it may be shown in defense to an action by a payee of a note, or a holder with notice that the defendant was induced to sign the same by false representations as to the value and character of the property for which the note was given,⁶⁸ or by fraudulent pretense of selling goods to be delivered in the future, but with no intention to actually deliver them.⁶⁹ But a misrepresentation as to the quality or quantity of the property in payment of which a note was given will not operate as a complete defense to an action thereon where the plaintiff has not rescinded or offered to reconvey but still retains possession thereof.⁷⁰ Again, mere exaggeration will not constitute such fraud as will be a defense to an action on a note.⁷¹ If the note is non-negotiable fraudulent representations will be defense thereto even in an action by a purchaser for a valuable consideration.⁷² And likewise one who has taken a note without due indorsement will be subject to such a defense.⁷³ It is essential in order to render a representation available

⁶⁶ *Alabama National Bank v. Halsey*, 109 Ala. 196, 19 So. 522; *Russ Lumber Co. v. Muscupiabe Land & W. Co.*, 120 Cal. 521, 52 Pac. 993; *Fleming v. Greene*, 48 Kan. 646, 30 Pac. 11; *Nichols v. Baker*, 75 Me. 334.

⁶⁷ *Hawley v. Hirsch*, 2 Woodw. Dec. (Pa.) 158.

⁶⁸ *Carithers v. Levy*, 111 Ga. 740, 36 S. E. 958. See *Keller v. Vowell*, 17 Ark. 445.

⁶⁹ *Nichols v. Baker*, 75 Me. 334.

⁷⁰ *Morgan v. Nowlin*, 126 Mich. 105, 85 N. W. 468; *Soper v. St. Regis Paper Co.*, 38 Misc. (N. Y.) 294, 77 N. Y. Supp. 896. See *Eskridge v. Barnwell*, 106 Ga. 587, 32 S. E. 635; *Harlan v. Reid*, 3 Ham. (Ohio) 285, 17 Am. Dec. 594.

⁷¹ *Dawson v. Graham*, 48 Iowa 378, so holding in the case of exaggeration as to the amount of mineral deposits on land in payment for which the note was given.

⁷² *Wickham v. Grant*, 28 Kan. 517.

⁷³ *Goshen National Bank v. Bank of Bingham*, 118 N. Y. 349, 23 N. E. 180, 16 Am. St. R. 765, 7 L. R. A.

595. The court said in this case: "It is too well settled by authority, both in England and in this country, to permit of questioning, that the purchaser of a draft, or check, who obtains title without an indorsement by the payee, holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities. The reasoning on which this rule is founded may be briefly stated as follows: The general rule is that no one can transfer a better title than he possesses. An exception arises out of the rule of the law merchant, as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by indorsement for value, in good faith and before maturity, they become available in the hands of the holder notwith-

as a defense not only that it be false but also that it was known to be such to the party making it at the time he made it, and that the one to whom it was made did not have the same opportunity open to him to obtain knowledge in regard to the consideration as was possessed by the one making it.⁷⁴ So if the maker of a note had the opportunity of inspecting land, in payment of which the note was given, and failed to do so, fraudulent representations in reference to the land will be no defense to an action on the note, where an inspection would have revealed their falsity.⁷⁵ And representations that certain improve-

standing the existence of equities, and defenses which would have rendered them unavailable in the hands of a prior holder. The rule is only applicable to negotiable instruments which are negotiated according to the law merchant. When, as in this case, such an instrument is transferred, but without an indorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all the title of the assignor and may maintain an action thereon in his own name. And like other choses in action it is subject to all the equities and defenses existing in favor of the maker or acceptor against the previous holder. Evidence of an intention on the part of the payee to indorse does not aid the plaintiff. It is the act of indorsement, not the intention, which negotiates the instrument, and it cannot be said that the intent constitutes the act." Per Parker, J.

⁷⁴ *Journal Printing Co. v. Maxwell*, 1 Penn. (Del.) 511, 43 Atl. 615, from which we quote as follows: "A mere affirmation or declaration as to the character of the property which is the consideration for the note, which is in fact untrue, is not sufficient in law to establish fraud, but the representation must have been false and known by the party making it to be false at the time he

made it. And if the party who buys the property relies upon the representations and advice of some one other than the seller, or upon an examination or investigation made by himself, or made by some one he procured to do it for him, or if the means and opportunity of the purchaser of acquiring knowledge of the property bought were equal to those of the seller, the representation made by the seller would be no defense." Per Pennewill, J., in charge to jury.

⁷⁵ *Harwell v. Martin*, 115 Ga. 156, 41 S. E. 686. The court said in this case: "From the allegations of this plea it will appear that the defendant chose to rely upon the representations made by Harwell & Rogers respecting the quantity and character of the timber upon the tract of land containing twelve hundred acres. It is alleged that these representations were false and fraudulent and that defendant was injured by relying and acting upon the same. The defect in the plea is that it did not disclose any emergency or condition authorizing the defendant to rely upon those representations without making for himself an examination of the premises. If he had a reasonable opportunity to do this and failed to avail himself thereof, he is not, from a legal standpoint, entitled to complain of

ments were to be made near the land purchased and for which the note was given have been held no defense unless it appear that the purchaser has, and could acquire, no actual knowledge upon the subject.⁷⁶

§ 123. **Same subject—Bona fide holder.**—One who is a *bona fide* holder of a note, before maturity and without notice, will not be subject to the defense of fraudulent representations affecting the consideration for which the note was given.⁷⁷ So an indorser cannot set up the defense of fraudulent representations affecting the consideration for his indorsement, in an action by a *bona fide* holder.⁷⁸ And a like rule prevails in the case of a guarantor,⁷⁹ and of an acceptor of a bill of exchange.⁸⁰ Where, however, it is established by the evidence

the deception which he alleges was practised upon him. The allegations of the plea do not sufficiently show either that the defendant had no such opportunity, or that he was by the fraud or deceit of Harwell or Rogers prevented from thoroughly examining the timber upon the twelve hundred acres." Per Lumpkin, P. J.

⁷⁶ Clark v. Tanner, 100 Ky. 275, 38 S. W. 11.

⁷⁷ California.—Russ Lumber Co. v. Muscupiapi Land & W. Co., 120 Cal. 521, 52 Pac. 995.

Connecticut.—Bissell v. Dickerson, 64 Conn. 61, 29 Atl. 226; Ross v. Webster, 63 Conn. 64, 26 Atl. 476; Rowland v. Fowler, 47 Conn. 347.

Georgia.—Taylor v. Gribb, 100 Ga. 94, 26 S. E. 468; Meritt v. Bagwell, 70 Ga. 578.

Indiana.—Ruddell v. Dillman, 73 Ind. 518, 38 Am. Rep. 152; Woollen v. Whitacre, 73 Ind. 198; Strough v. Gear, 48 Ind. 100.

Iowa.—Loomis v. Metcalf, 30 Iowa 382.

Massachusetts.—Bill v. Stewart, 156 Mass. 508, 31 N. E. 386.

Michigan.—Wright v. Irwin, 33 Mich. 32.

Missouri.—Fitzgerald v. Barker, 96 Mo. 661, 10 S. W. 45, 9 Am. St. R. 375.

Nebraska.—Cannon v. Canfield, 11 Neb. 506, 9 N. W. 693.

New York.—Heuertemette v. Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657.

Pennsylvania.—McSparran v. Neeley, 91 Pa. St. 17; Heist v. Hart, 73 Pa. St. 286.

Federal.—Doane v. King, 30 Fed. 106.

See Indiana.—Moore v. Moore, 112 Ind. 149, 13 N. E. 673, 2 Am. St. R. 170.

Kansas.—Converse v. Bartels (Kan.), 46 Pac.

Wisconsin.—Andrews v. Hart, 17 Wis. 297.

⁷⁸ Humphrey v. Clark, 27 Conn. 381.

⁷⁹ McWilliams v. Mason, 31 N. Y. 294, aff'g 1 Rob. 576.

⁸⁰ Morrison v. Farmers' & Merchants' Bank, 9 Okla. 697, 60 Pac. 273. It was said by the court in this case: "It is a well settled rule of law that an acceptor of a bill of exchange will not be permitted to vary his liability from that which is apparent upon the face of the bill by setting up against *bona fide* hold-

that the payee of a note procured the same by such a representation, the burden then rests on the holder of the instrument to show that he is a *bona fide* holder.⁸¹

§ 124. **Certified check—Effect of fraud—Bona fide holder.**—The fact that false representations were made by the drawer of a check as to his solvency to a bank in order to induce it to certify such check, which it does in consequence of such representations, will be no defense to an action thereon by one who has purchased the same for value, before dishonor, and without any notice of such fraudulent conduct.⁸² And where a bank certified a check and the drawer, finding he had been defrauded, requested the bank not to pay the same and when it was presented for payment the bank wrote on it “payment stopped” and returned it to the holder, who subsequently erased these words so that it was not noticeable, affixed a revenue stamp over the erasure, and transferred it to a *bona fide* holder, the title of the latter was held good.⁸³ Where, however, it is apparent upon the face of a certified check that the acceptance was a fraud, a holder takes it with notice of such fraud and he cannot be said to be a *bona fide* holder. In such a case, therefore, he cannot recover thereon from the bank.⁸⁴

ers for value, who took the bill before maturity, statements made by the drawers to the drawees whereby they were induced to accept the bill, and we have been unable to find that any distinction is made in this respect between holders of bills who took them before acceptance and those who took them afterwards.” Per Burford, C. J.

⁸¹ *David v. Merchants' National Bank*, 103 Ky. 586, 45 S. W. 878.

⁸² *Bank of the Republic v. Baxter*, 31 Vt. 101. See *Justh v. National Bank of Commonwealth*, 56 N. Y. 478.

⁸³ *Nassau Bank v. Broadway Bank*, 54 Barb. (N. Y.) 236.

⁸⁴ *Claffin v. Farmers' & Citizens' Bank*, 25 N. Y. 293. The court said in this case: “A *bona fide* holder of commercial paper must receive the same in the usual course of business, for value, and without any notice of facts tending to impeach the

character or validity of the paper as between the original parties. The plaintiffs cannot claim the protection of this rule. They had distinct notice, by the face of the certificate and the signature thereto, that the acceptance was improper and irregularly made. It was patent on the face of the paper, that the acceptance was a fraud; that the president of defendant's bank, in accepting such checks, was violating his duty, and using his official character for his personal benefit, and thereby perpetrating an act of dishonesty in palpable violation of his trust. No business man of common intelligence could take these checks in good faith, and without suspicion or notice of this fraud. Upon this distinct fact I would hold that the plaintiffs are not *bona fide* holders of these checks, and are not entitled to recover the same of the defendants.” Per Smith, J.

§ 125. **Paper in fraud of creditors.**—The maker of a note cannot set up as a defense to an action thereon by a *bona fide* holder, the fact that the note was executed by him in fraud of his creditors or of those of the payee.⁸⁵ So where one sells property for the purpose of defrauding his creditors and the purchaser gives notes therefor, which are transferred to a *bona fide* holder, the purpose of the sale is no defense to an action thereon by the latter.⁸⁶ And the *bona fide* title of a holder protects all subsequent holders as a general rule, but this protection does not extend to a party to the original fraud.⁸⁷ Again, the maker of a note or check cannot obtain any relief as against a defrauded creditor, for fraud to which he is a party.⁸⁸ Nor can the maker of a note defeat recovery thereon on the ground that it was transferred by the original owner in fraud of his creditors, this being a matter with which the maker is not concerned.⁸⁹ In an action, however, between the original parties to such a fraud they will be kept to themselves and the contract will not be enforced.⁹⁰ And where an

⁸⁵ *Murray v. Jones*, 50 Ga. 109; *Fury v. Kempin*, 79 Mo. 477; *Dalrymple v. Hillenbrand*, 62 N. Y. 5, 20 Am. Rep. 438, aff'g 2 Hun (N. Y.) 488, 5 Thomp. & C. 57; *Warren v. Lynch*, 5 Johns. (N. Y.) 239; *Crouch v. Wagner*, 63 App. Div. (N. Y.) 526, 71 N. Y. Supp. 607; *Winton v. Freeman*, 102 Pa. St. 366. *Examine Marine Bank v. Clements*, 31 N. Y. 33.

⁸⁶ *Gregory v. Harrington*, 33 Vt. 241.

⁸⁷ *Erie Boot & Shoe Co. v. Eichenlaub*, 127 Pa. St. 164, 17 Atl. 889.

⁸⁸ *Allen v. Bank*, 127 Pa. St. 51, 17 Atl. 886, 14 Am. St. R. 829; *Longmire v. Fain*, 89 Tenn. 393, 18 S. W. 70, holding that, where a check was given to be used in lieu of cash to cover up the default of an official and enable him to continue in office, the maker was liable thereon to the creditors of such officer. Compare *First National Bank v. Felt*, 100 Iowa 680, 69 N. W. 1057, holding that where a note was given to a bank, without consideration, by one of the debtors, under an agreement

that it should create no liability, the maker was not liable where the bank was solvent and no right of creditors was involved.

⁸⁹ "Such defense does not deny that the maker of the note owes the money to some one. It only disputes the transferee's right to the proceeds, as against the creditors of the transferor. This is a question that does not concern the defendant, as debtor. As between transferor and transferee, no matter how fraudulent the intent of the transfer, the right to the note and its proceeds passes. Only creditors can assail the validity of the transfer and they may never assert the right. Such defense opposes no obstacle to a judgment against the debtor thus sued." *Wood v. Steele*, 65 Ala. 436, 438, per Stone, J.

⁹⁰ *Sternburg v. Bowman*, 103 Mass. 325; *Appeal of Taylor*, 45 Pa. St. 71; *Walker v. McConnico*, 18 Tenn. (10 Yerg.) 228. See *Stevens v. Parker*, 89 Mass. (7 Allen) 361; *Howden v. Haigh*, 11 Adol. & E. 1033. But see *Harcrow v. Gardiner*,

action is brought by the executors of the payee against the sureties of a note it has been decided that they may show in defense to the action that it was given by the principal in fraud of his creditors and was without consideration, of which facts they had no knowledge.⁹¹ And fraud of this character is also available as a defense to an action on a note by one to whom it has been indorsed for collection, after maturity, by the payee.⁹² But where the maker has set up the defense of want of consideration it is held that the payee cannot, in rebuttal, avail himself of fraud on the part of the maker toward his creditors.⁹³

§ 126. **Fraudulent procurement of indorsement.**—In an action by a *bona fide* holder against an indorser the latter cannot set up the fact that his indorsement was fraudulently obtained.⁹⁴ So one who takes

69 Ark. 6, 58 S. W. 553; *Carpenter v. McClure*, 39 Vt. 9. In a case in New Jersey in which the defendant to an action offered a promissory note under plea of payment and notice of set-off in disproof of plaintiff's claim, evidence was admitted showing the consideration of the note was the transfer to the plaintiff by the defendant of certain personal property in fraud of his creditors and the court charged that if the jury believed this evidence a full defense to the note was established. On appeal the court said: "In equity the fraudulent parties are left as between themselves, in the position in which they put themselves by their misconduct. Why should a different rule prevail at law? In the present case there has been a past performance of the illegal arrangement—the goods have been delivered to the one party: the opposite party, in offsetting this note is seeking the aid of the court to consummate the execution of the agreement. It is settled in this state, that in equity no such relief would be granted and in my judgment, the same result must obtain at law." *Church v. Muir*, 33 N. J. L. 318, 323, per Beasley, C. J.

⁹¹ *Goodwin v. Kent*, 201 Pa. St. 41, 50 Atl. 290. Compare *Harcrow v. Gardiner*, 69 Ark. 6, 58 S. W. 553.

⁹² "The indorsement by the payee of the note, sued on after it was due, for the purpose of enabling the plaintiffs to collect it as his agents, did not confer upon them any greater rights, as against the maker, than the payee himself had. If, as against the payee, the note was liable to the objection of having been given upon an illegal consideration, he certainly could not be allowed to obviate the difficulty by assigning it to an agent to collect for him. The law denouncing a contract founded in fraud would be untrue to itself, if it allowed itself to be defeated by so simple and obvious a contrivance." *Powell v. Inman*, 52 N. C. 28, per Battie, J.

⁹³ *Wearse v. Pierce*, 41 Mass. (24 Pick.) 141.

⁹⁴ *Von Windlich v. Klaus*, 46 Conn. 433; *Follain v. Dupre*, 11 Rob. (La.) 454. See *Cristy v. Campan*, 107 Mich. 172, 65 N. W. 12, holding that in an action by a *bona fide* holder against an accommodation indorser the latter cannot escape liability on the ground that his indorsement was procured by the fraudulent rep-

a bill or note in payment of a pre-existing debt is held to be a *bona fide* holder, and not subject to the defense, in an action by him against an indorser, that the indorsement was fraudulently obtained by the maker.⁹⁵ And an indorsee cannot set up, in an action against him, false representations in respect to the note or the transaction in which it was given, which were made subsequent thereto and after the note had been transferred to the holder.⁹⁶ Nor is such a defense available to an accommodation indorser in an action against him by a payee who is to be regarded as a purchaser for value and who has taken the note without notice of the fraud.⁹⁷ Nor can indorsers of renewal notes defeat a recovery on the original notes by the fact that they were induced by fraudulent representations to indorse the renewals.⁹⁸ An indorser may, however, avail himself of this defense against one who was a party to the fraud.⁹⁹

§ 127. **Fraud as to amount.**—It is a good defense to an action representations of the maker. *Clothier v. Adriance*, 51 N. Y. 322.

⁹⁵ *Blanchard v. Stevens*, 57 Mass. (3 Cush.) 162, 50 Am. Dec. 723. See *Mangan v. Sunwall*, 60 Minn. 367, 62 N. W. 398. Where one to whom such paper is transferred cannot be regarded as an innocent holder, an accommodation indorser may, in an action against him by such transferee, set up the defense of fraud in obtaining his indorsement. *Henriques v. Ypsilanti Savings Bank*, 84 Mich. 168, 47 N. W. 558.

⁹⁶ *Alpena National Bank v. Greenbaum*, 80 Mich. 1, 44 N. W. 1123; *Palmer v. Hawes*, 73 Wis. 46, 40 N. W. 676. In this case the court said: "It is alleged, in effect, that some six months after plaintiff obtained such stock he falsely represented to the appellant that the affairs and business of the company were in good condition, whereby she was lulled into inactivity and rest concerning her liability on the note. But that is no ground for defending against the note, nor of any action against the plaintiff, since the appel-

lant parted with nothing on the faith of such representations." Per *Cassoday, J.*

⁹⁷ "Accommodation indorsers, beyond all doubt, are liable precisely to the same extent as if they had received value, when the paper upon which their names appear, has come into the hands of a holder for value, who has taken it *bona fide*, before maturity, and without notice of any fraud or other equity, which would vitiate it. It is entirely immaterial that such purchaser was cognizant of the fact that the bill or note was founded on an accommodation transaction, and was, therefore, to this extent, without consideration as between the indorser and the maker." *Marks v. First National Bank*, 79 Ala. 550, 58 Am. Rep. 620, per *Somerville, J.*

⁹⁸ *Alpena National Bank v. Greenbaum*, 80 Mich. 1, 44 N. W. 1123.

⁹⁹ *Shaw v. Stein*, 79 Mich. 77, 44 N. W. 419; *Deaderick v. Mitchell*, 65 Tenn. (6 Baxt.) 35; *Wilcox v. Tennent*, 13 Tex. Civ. App. 220, 35 S. W. 865.

tween the original parties to a note that, by reason of fraudulent conduct to which the plaintiff was a party or privy, the instrument called for the payment of a larger amount than had been agreed upon.¹⁰⁰ Where, however, a person voluntarily gives his note in settlement of an account rendered after the account had been submitted to him and he has had an opportunity to examine the same, it has been decided that proof of fraud will not operate as a complete defense to any recovery upon the note.¹⁰¹ And though a person is induced by fraudulent representations to execute a note for a sum much larger than is due to the payee, such fraud will only operate to defeat recovery on the note for such amount as is in excess of that which is actually due.¹⁰²

§ 128. **Fraud as to surety.**—That a surety was induced by false and fraudulent representations to affix his signature to the instrument may be a good defense to an action thereon.¹⁰³ Where a misrepresentation, however, is relied on by a surety it must be an assertion of a fact and not a mere expression of opinion in order that he may defeat a recovery on such ground.¹⁰⁴ And if a surety, with knowledge of all the facts in reference to the fraud, waives such a defense he cannot subsequently avail himself of the same to defeat a recovery on the instrument, though he acted without knowledge that the fraud was a defense at law.¹⁰⁵ Such a defense is available as against one who has taken the paper without giving a consideration therefor.¹⁰⁶ And a surety may defeat a recovery on a bill or note on the ground of fraudulent concealment or misrepresentation of facts, even though the contract is still binding on his principal.¹⁰⁷ A mere failure, however, to communicate facts to a surety which may be material for him to know

¹⁰⁰ Union Central Insurance Co. v. Huyck, 5 Ind. App. 474, 32 N. E. 580. See Galloway v. Merchants' Bank, 42 Neb. 259, 60 N. W. 569, holding that relief may be obtained in equity in such a case. But on this latter point see Dickinson v. Lewis, 34 Ala. 638.

¹⁰¹ Haycock v. Rand, 59 Mass. (5 Cush.) 26.

¹⁰² Brown v. North, 21 Mo. 528. See Griffiths v. Parry, 16 Wis. 218.

¹⁰³ Easter v. Minard, 26 Ill. 494; Melick v. Bank, 52 Iowa 94, 2 N. W. 1021; Selser v. Brock, 3 Ohio St.

302; Warren v. Branch, 15 W. Va. 21. See Wilson's Adm'rs v. Green, 25 Vt. 450.

¹⁰⁴ Evans v. Kneeland, 9 Ala. 42.

¹⁰⁵ Rindskopf v. Dornan, 28 Ohio St. 516, so holding where a surety, after maturity of a note and with full knowledge of all the facts which constituted the fraud, requested an extension of time which was given.

¹⁰⁶ Stewart v. Small, 2 Barb. (N. Y.) 559.

¹⁰⁷ Evans v. Kneeland, 9 Ala. 42.

will be no defense to an action against him by the payee in the absence of fraud.¹⁰⁸ So in an action on a note signed by a surety for a part of a debt, it was decided that failure to inform him of the fact that the maker had given his note to the payee for the balance of such debt was no defense, unless an inquiry had been made by the surety in respect thereto.¹⁰⁹ And failure of a payee, before accepting a note, to inform the surety that the maker's property was about to be sold under attachment, has been held no defense to an action thereon where the payee was not present when the note was signed by the surety and had never made any representation to him on the subject.¹¹⁰ But where a note was, in fraud of the surety, made to cover another debt in addition to that for which the surety affixed his signature, it has been held in Mississippi to be voidable as to the amount so added.¹¹¹

§ 129. **Same subject—Bona fide holders.**—The defense of fraud in inducing a surety to affix his signature to negotiable paper is not available in an action against him by a *bona fide* holder.¹¹² So fraud-

¹⁰⁸ Oregon National Bank v. Gardner, 13 Wash. 154, 42 Pac. 545, so holding in case of failure of obligee to inform surety of existence of a judgment which he held against the principal. The court said in this case: "The plaintiff was under no obligation to give the sureties a history of the financial standing of defendant Wright. If there was a judgment against him it was a matter of public record, and it would have been but the exercise of common prudence on the part of the sureties to have made such slight inquiry concerning the financial standing of their principal, and the slightest inquiry would have revealed the existence of the judgment." Per Dunbar, J. Warren v. Branch, 15 W. Va. 21, in which it is said: "Though the simple failure of a creditor to communicate to a surety a fact material for the surety to know, though connected with the contract of suretyship, will not generally vitiate the contract, unless

the concealment on the part of the creditor was fraudulent, even though the principal in procuring the security acted fraudulently, either in suppressing such material fact, or in misstating facts, yet if the dealings are such as fairly to lead the creditor, if a reasonable man, to believe that the principal must have used fraud in procuring the surety to enter into the contract, the creditor is bound to inquire of the surety how his signing the contract has been procured; and his failure to do so will, if fraud has been practiced by the principal on the surety, vitiate the contract as to him, though no fraud has been traced to the creditor." Per Green, President.

¹⁰⁹ Booth v. Storrs, 75 Ill. 438.

¹¹⁰ Smith v. First National Bank, 21 Ky. Law Rep. 953, 53 S. W. 648.

¹¹¹ Clopton v. Elkin, 49 Miss. 95.

¹¹² Fitzgerald v. Barker, 96 Mo. 661, 10 S. W. 45; Riley v. Relfert (Tex. Civ. App.), 32 S. W. 185.

ulent representations by the principal to the surety will be no defense to an action against the latter by the payee who was not privy to the fraud, but is an innocent holder with no knowledge of the facts. This is founded on the principle that where one of two innocent persons must suffer a loss, he who has made the loss possible must bear it.¹¹³

§ 130. **Fraudulent transfer.**—In an action on a note against the maker by a *bona fide* holder, it is no defense that the instrument was transferred in fraud of the rightful owner by an agent or holder of the paper for such party.¹¹⁴ Nor can the maker of a note defeat recovery by the transferee on the ground that the transfer was made by the payee in fraud of his creditors, as in such a case only the creditors or some one acting for them can assail such transfer.¹¹⁵ And the maker or acceptor of a bill of exchange cannot avail himself of the defense that the instrument was pledged to the plaintiff as security for a loan by one who had no authority to so act.¹¹⁶

§ 131. **Same subject—By partner.**—Where paper belonging to partnership is transferred by one of the partners, it is no defense to an action against the maker, that such transfer was fraudulent as to the firm.¹¹⁷ The firm is bound in such cases, unless the person taking

¹¹³ *Anderson v. Warne*, 71 Ill. 20, 22 Am. Rep. 83; *Hunter v. Fitzmaurice*, 102 Ind. 449, 2 N. E. 127; *Wayne Agricultural Co. v. Cardwell*, 73 Ind. 555; *Farmers' & T. Bank v. Lucas*, 26 Ohio St. 385; *Rothermal v. Hughes*, 134 Pa. St. 510, 19 Atl. 677.

¹¹⁴ *Ogden v. Marchand*, 29 La. Ann. 61; *Kinney v. Kruse*, 28 Wis. 183.

¹¹⁵ *Sullivan v. Bonesteel*, 79 N. Y. 631; *Newsom v. Russell*, 77 N. C. 277; *Holden v. Kirby*, 21 Wis. 149.

¹¹⁶ "It is a question which in no way concerns the defendant, and upon which he cannot be allowed to defend and escape the payment of his obligations. It is enough that the plaintiffs make out a title free from *mala fides* on their part, and which is every way sufficient for his protection. The issue beyond that between the parties before the court is wholly immaterial; and if estab-

lished against the plaintiffs, would constitute no defense to this action. The title is good as against the defendant, and that is sufficient; if there are any others who claim a title to the instruments superior to that of the plaintiffs, it can be determined whenever they come before the court to assert it." *City Bank v. Perkins*, 29 N. Y. 554, 570, 86 Am. Dec. 322, per Johnson, J.

¹¹⁷ *Kansas*.—*Barber v. Van Horn*, 54 Kan. 33, 36 Pac. 1070.

Maine.—*Redlon v. Churchill*, 73 Me. 146.

Maryland.—*Hopkins v. Boyd*, 11 Md. 107.

Michigan.—*Nichols v. Sober*, 38 Mich. 678.

New York.—*First National Bank v. Morgan*, 73 N. Y. 593.

Rhode Island.—*Windham County Bank v. Kendall*, 7 R. I. 77; *Parker v. Burgess*, 5 R. I. 277.

the paper knew or had reason to believe that it was executed or transferred in fraud of the partnership.¹¹⁸ If, however, the circumstances under which such paper is given or transferred are such as to naturally arouse suspicion so that the transferee will not be regarded as a *bona fide* holder, it may be shown that the partner acted in fraud of the firm and that the paper was given for accommodation without the firm's consent.¹¹⁹ And where the holder of the paper is a party to the fraud of the partner upon his firm, such fraud will be available as a defense to an action against the firm.¹²⁰ In case of fraud by a member of a firm in procuring the execution of a note to the firm, such fraud will be a defense to an action by the latter on the instrument.¹²¹

§ 132. **Same subject—By administrator.**—It is a good defense to an action on a note that it belonged to an estate and was transferred to the plaintiff by one who was acting as administrator in payment of his individual obligation and that the plaintiff took the instrument with full knowledge of all the facts.¹²²

§ 133. **Availability of defense—Maker.**—The maker of a note may avail himself, as a defense to an action by the payee, of the fact that there was a fraudulent agreement between his co-maker and such payee in connection with the giving of the note,¹²³ or that there was fraud of the agent of the payee upon the maker.¹²⁴ And where the maker of a note was subsequently appointed administrator of the payee's estate, it was decided that in an action against him in that capacity by the indorsee he might set up as a defense that the indorsement was invalid as against the payee's creditors and that he needed the avails of such note to pay the debts of the payee.¹²⁵ But it is no defense to an action by the payee against a maker of a note that fraud

South Carolina.—Duncan v. Clark, 2 Rich. (S. C.) 587.

Federal.—Winship v. Bank, 5 Pet. (U. S.) 529; Drexler v. Smith, 30 Fed. 754; Many, In re, Fed. Cas. No. 9054.

English.—Ridley v. Taylor, 13 East 175; Sutton v. Gregory, 2 Peake Ad. Cas. 150. See:

Mississippi.—Hibernian Bank v. Everman, 52 Miss. 500.

¹¹⁸ Cotton v. Van Bokkelen, 21 N. C. 284.

¹¹⁹ Roth v. Colvin, 32 Vt. 125.

¹²⁰ Wells v. Masterman, 2 Esp. 731.

¹²¹ Kilgore v. Bruce, 166 Mass. 136, 44 N. E. 108.

¹²² Prosser v. Leatherman, 5 Miss. (4 How.) 237, 34 Am. Dec. 121.

¹²³ Mitchell v. Donahey, 62 Iowa 376, 17 N. W. 641.

¹²⁴ Aultman v. Olson, 34 Minn. 450, 26 N. W. 451. See Tagg v. Bank, 56 Tenn. (9 Heisk.) 479.

¹²⁵ Cross v. Brown, 51 N. H. 486.

was practiced upon the latter by his co-maker, where the payee was innocent of the fraud.¹²⁶ And the right of an acceptor who has paid the bill to recover cannot be defeated by the fraud of one drawer upon another.¹²⁷ And in an action by an indorser against the maker of a note which both signed for the accommodation of the payee, it has been decided that the maker cannot set up the defense that his signature was obtained by fraud of the payee.¹²⁸ Nor is fraud of an indorsee upon his indorser any defense to an action by the former against the maker,¹²⁹ or of the indorser upon his creditors.¹³⁰ And a maker cannot avail himself of fraud against the surety as a defense.¹³¹ And where a party who has received stolen property makes a loan from the proceeds thereof for the amount of which a note is given payable to bearer, it has been decided that the maker of such note cannot in an action against him avail himself of the fact that the loan was made from the proceeds of stolen property.¹³²

§ 134. **Same subject—Other parties.**—In an action by the payee against the acceptor of a bill, fraud on the part of the drawer in the use of the proceeds of such bill, which was accepted for his accommodation, is no defense.¹³³ And in an action against an accommodation acceptor by one who is an innocent holder for a valuable consideration the fact is not available as a defense that the bill was put in circulation in fraud of an agreement between the payee and drawer to which the acceptor was not a party.¹³⁴ Nor can a guarantor in action against him by a payee without notice defeat recovery on the grounds of fraud upon him by the maker.¹³⁵ And an indorser who has affixed his signature to an instrument for a new and valuable consideration cannot avoid liability by setting up fraud between the original parties.¹³⁶

¹²⁶ *Anderson v. Warne*, 71 Ill. 20, 22 Am. Rep. 23; *Fulford v. Block*, 8 Ill. App. 284; *Vass v. Riddick*, 89 N. C. 6.

¹²⁷ *Kimbro v. Bullitt*, 22 How. (U. S.) 256.

¹²⁸ *Laubach v. Pinsell*, 35 N. J. L. 434.

¹²⁹ *Carrier v. Sears*, 86 Mass. (4 Allen) 336, 81 Am. Dec. 707; *Prouty v. Roberts*, 60 Mass. (6 Cush.) 19, 52 Am. Dec. 761.

¹³⁰ *Wood v. Steele*, 65 Ala. 436; *Mack v. Clark*, 42 Mass. (1 Metc.) 423.

¹³¹ *Mead v. Merrill*, 10 Fost. (N. H.) 472.

¹³² *Warren v. Haight*, 65 N. Y. 171.

¹³³ *Gray v. Bank*, 29 Pa. St. 365.

¹³⁴ *Winn v. Wilkins*, 35 Miss. 186.

¹³⁵ *Davis Co. v. Buckles*, 89 Ill. 237.

Compare *Putnam v. Schuyler*, 4 Hun (N. Y.) 166, holding that a guarantor may set up the defense that the note was obtained from his principal by fraud.

¹³⁶ *Hart v. Livermore Foundry & Machine Co.*, 72 Miss. 809, 17 So. 769. See *Thayer v. Jewett*, 9 Shep. (Me.) 19.

CHAPTER VII.

ALTERATIONS OF PAPER.

Subdivision I.	General rules	§§ 135-150
Subdivision II.	Particular alterations	§§ 151-182

Subdivision I.

GENERAL RULES.

Sec.	Sec.
135. Availability of alterations as a defense generally.	144. Filling in blanks—Instrument incomplete—Rule as to.
136. Rule as to <i>bona fide</i> holders.	145. Same subject—Application of rule.
137. Immaterial alterations.	146. Same subject—Where instrument complete.
138. Alteration by co-maker or drawer.	147. Defense to action on original consideration or debt.
139. Alteration by maker without surety's consent.	148. Alteration not fraudulent—To make paper conform to original agreement—May recover on original consideration.
140. Alteration by payee or subsequent holder—Effect on rights of surety.	149. Effect of consent or ratification.
141. Alteration by agent of holder.	150. Same subject—What constitutes.
142. Alteration by third party.	
143. Alteration by mistake or accident.	

§ 135. **Availability of alterations as a defense generally.**—An instrument will not be avoided by alterations therein which are made with the consent of the parties.¹ Where, however, one has entered into a contract he has a right to stand upon the terms of the original agreement, and, in the case of a bill or note, if there has been any alteration of the instrument which changes its operation and effect and the liability of the parties, it will be regarded as material and will be a good defense to an action on the paper against a party not consenting thereto.² And it is essential, for an alteration to have this

¹ *Camden Bank v. Hall*, 14 N. J. L. 583; *Whitehead v. Emmerich* (Cal.), 87 Pac. 790. *Delaware*.—*Bank of Newark v. Crawford*, 2 Houst. (Del.) 282.

² *Alabama*.—*Davis v. Carlisle*, 6 Ala. 707; *Mackey v. Dodge*, 5 Ala. 388. *Georgia*.—*Ohowason v. Wilson* (Ga.). 56 S. E. 302; *Simons & Co. v. McDowell*, 125 Ga. 203, 53 S. E. 1031.

Connecticut.—*Ætna National Bank v. Winchester*, 43 Conn. 391. *Illinois*.—*Pankey v. Mitchell*, 1 Ill. 383.

Indiana.—*Young v. Baker*, 29 Ind.

result, that it be such as to effect some change in the meaning or legal operation of the instrument.³ Where such a change is effected it operates to create a new contract, one which is different from that into which the parties originally entered, and to which the consent of one is necessary in order to bind him.⁴ As is said in a case in Georgia in regard to a party who has not consented to such an alteration: "He is not bound by the old contract, for that has been abrogated; neither is he bound by the new contract, because he is no party to it."⁵ Not only will an alteration of this kind in negotiable

App. 130, 64 N. E. 54; *Bowman v. Mitchell*, 79 Ind. 84; *Johnston v. May*, 76 Ind. 293; *Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15.

Indian Territory.—*Hampton v. Mayes*, 3 Ind. Ter. 65, 53 S. W. 483.

Iowa.—*Bell v. Mahin*, 69 Iowa 408, 29 N. W. 331.

Kansas.—*New York Life Ins. Co. v. Martindale* (Kan. 1907), 88 Pac. 559; *Fraker v. Cullum*, 21 Kan. 555.

Maine.—*Lee v. Starbird*, 55 Me. 491; *Waterman v. Vose*, 43 Me. 504.

Massachusetts.—*Stoddard v. Penningman*, 108 Mass. 366, 11 Am. Rep. 363.

Michigan.—*Aldrich v. Smith*, 37 Mich. 468.

Minnesota.—*Board of Commissioners v. Greenleaf*, 80 Minn. 242, 83 N. W. 157.

Missouri.—*First National Bank v. Fricke*, 75 Mo. 178; *Presbury v. Michael*, 33 Mo. 542. *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 263.

Montana.—*McMillan v. Hefferlin*, 18 Mont. 385, 45 Pac. 548.

New Jersey.—*Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Vananken v. Hornbeck*, 14 N. J. L. 178, 25 Am. Dec. 509.

New York.—*Reeves v. Pierson*, 23 Hun (N. Y.) 185; *Woodworth v. Bank*, 19 Johns. (N. Y.) 391.

North Dakota.—*First National Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473.

Ohio.—*Sturges v. Williams*, 9 Ohio St. 443, 75 Am. Dec. 473.

Pennsylvania.—*Craighead v. McLoney*, 99 Pa. St. 211; *Hepler v. Bank*, 97 Pa. St. 420, 39 Am. Rep. 813.

Tennessee.—*Stephens v. Davis*, 85 Tenn. 271, 2 S. W. 382.

Texas.—*Farmers' & Merchants' Nat. Bank v. Novich*, 89 Tex. 381, 34 S. W. 914; *Adams v. Faircloth* (Tex. Civ. App. 1906), 97 S. W. 507.

Virginia.—*Batchelder v. White*, 80 Va. 103.

West Virginia.—*Bank of Ohio Valley v. Lockwood*, 13 W. Va. 392.

English.—*Bathe v. Taylor*, 15 East 412; *Paton v. Winter*, 1 Taunt. 420; *Outhwaite v. Luntley*, 4 Camp. 179; *Walton v. Hastings*, 4 Camp. 223; *Halcrow v. Kelly*, 28 Up. Can. C. P. 551. See:

Iowa.—*Sawyers v. Campbell*, 107 Iowa 397, 78 N. W. 56.

New York.—*Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274.

³ *Huntington v. Finch*, 3 Ohio St. 445.

⁴ *Mackay v. Dodge*, 5 Ala. 388. See *Chism v. Toomer*, 27 Ark. 108, in which it is declared that the test is whether the alteration made creates a new contract.

⁵ *Bethune v. Dozier*, 10 Ga. 235, per Lumpkin, J.

paper be a good defense to an action against one not consenting thereto, but it is also decided that a bill or note may be avoided by an alteration in a contract to secure which the paper is given as collateral;⁶ and likewise that a material alteration in a collateral mortgage given to secure a note will be a good defense to an action on the note.⁷ That the instrument has been materially altered without the defendant's consent is sufficient to defeat recovery, no allegation or proof of fraud being necessary.⁸ It has, however, been decided that a maker cannot avail himself of this defense unless he rescinds the whole contract.⁹ And the fact that a note has been altered is not a defense to an action by a *bona fide* holder where it appears that the note was restored to its original form prior to its passing into his hands.¹⁰ A general plea of *non est factum* will entitle the party interposing it to prove that after the execution of the instrument in question it was altered without his consent.¹¹ And an affidavit of defense, however, which sets up an alteration of the instrument should, it is held, be specific and certain enough to show a valid defense that would answer the declaration and defeat the entire right to recover thereon, if the case were put to trial on the pleadings.¹² The question whether an alteration is material is one of law for the court to determine and not one for the jury.¹³

§ 136. Rule as to *bona fide* holders.—The rule that a material alteration of a bill or note will be a good defense to an action against a party not consenting thereto extends to those cases where the in-

⁶ *Brigham v. Wentworth*, 65 Mass. (11 Cush.) 123.

⁷ *Williams v. Barrett*, 52 Iowa 637, 3 N. W. 690. But see *Kime v. Jesse*, 52 Neb. 606, 72 N. W. 1050.

⁸ *Eckert v. Pickel*, 59 Iowa 545. Compare *Burch v. Pope*, 114 Ga. 334, 40 S. E. 227, holding that under a provision of the code in Georgia it must appear that an alteration relied on as a defense was made with intent to defraud, the fact that it was material not being sufficient.

⁹ *Glover v. Green*, 96 Ga. 127, 22 S. E. 664.

¹⁰ *Shepard v. Whetstone*, 51 Iowa 457, 1 N. W. 753, 33 Am. Rep. 143.

¹¹ *Fudge v. Marquell*, 164 Ind. 447, 72 N. E. 565.

¹² *Bryan v. Harr*, 21 App. D. C. 190, 201, decided under Act of Congress January 12, 1899, §§ 58, 59, 124.

¹³ *Arkansas*.—*Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9.

Georgia.—*Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527; *Pritchard v. Smith*, 77 Ga. 463.

Mississippi.—*Hill v. Calvin*, 15 Miss. (4 How.) 231.

Nebraska.—*Fisherdict v. Hutton*, 44 Neb. 122, 62 N. W. 488.

New Hampshire.—*Bowers v. Jewell*, 2 N. H. 543.

strument has come into the hands of a *bona fide* holder.¹⁴ And the application of this rule will not be affected by the fact that the altera-

¹⁴ *Arkansas*.—Fordyce v. Kosminski, 49 Ark. 40, 3 S. W. 892; Overton v. Matthews, 35 Ark. 146, 37 Am. Rep. 9.

Delaware.—Sudler v. Collins, 2 Houst. (Del.) 538.

Georgia.—Max Simons & Co. v. McDowell, 125 Ga. 203, 53 S. E. 1031; Hill v. O'Neill, 101 Ga. 832, 28 S. E. 996.

Illinois.—Burwell v. Orr, 84 Ill. 465; Havorka v. Hemmer, 108 Ill. App. 443.

Indiana.—Cronkhite v. Nebeker, 81 Ind. 319, 42 Am. Rep. 127; Hert v. Oehler, 80 Ind. 83.

Iowa.—Derr v. Keough, 96 Iowa 397, 65 N. W. 339; Charlton v. Reed, 61 Iowa 166, 16 N. W. 64, 47 Am. Rep. 808; Knoxville National Bank v. Clark, 51 Iowa 264; Laub v. Paine, 46 Iowa 550, 26 Am. Rep. 163.

Kansas.—Horn v. Newton City Bank, 32 Kan. 518, 4 Pac. 1022.

Kentucky.—Lisle v. Rogers, 18 B. Mon. (Ky.) 528.

Maryland.—Schwartz v. Wilmer, 90 Md. 136, 44 Atl. 1059; Burrows v. Klunk, 70 Md. 451, 17 Atl. 378, 14 Am. St. R. 371, 3 L. R. A. 576.

Massachusetts.—Belknap v. Bank, 100 Mass. 376, 97 Am. Dec. 105.

Michigan.—Bradley v. Mann, 37 Mich. 1; Holmes v. Trumper, 22 Mich. 427, 7 Am. Rep. 661; Wait v. Pomeroy, 20 Mich. 425, 4 Am. Rep. 395.

Missouri.—Washington Savings Bank v. Ecky, 51 Mo. 272; Midgaugh v. Elliott, 61 Mo. App. 601.

Nebraska.—Davis v. Henry, 13 Neb. 497, 14 N. W. 523.

New York.—Bruce v. Westcott, 3 Barb. (N. Y.) 374; Mount Morris Bank v. Lawson, 10 Misc. R. (N. Y.) 359, 63 N. Y. St. R. 432, 31 N. Y. Supp. 18.

Pennsylvania.—Gettysburg National Bank v. Chisolm, 169 Pa. St. 564, 32 Atl. 730, 47 Am. St. R. 929; United States Bank v. Russell, 3 Yeates (Pa.) 391.

Tennessee.—Stephens v. Davis, 85 Tenn. 271, 2 S. W. 382.

Texas.—Farmers' & Merchants' Nat. Bank v. Sovich, 89 Tex. 381, 34 S. W. 914.

Federal.—Exchange National Bank v. Bank of Little Rock, 50 Fed. 140, 7 C. C. A. 111.

English.—Burchfield v. Moore, 3 El. & Bl. 683; Vance v. Lowther, 1 Exch. Div. 176; Master v. Miller, 4 Term R. 320; Outhwaite v. Luntley, 4 Camp. 179.

Indiana.—"The material and unauthorized alteration of a promissory note renders it invalid in the hands of the *bona fide* holder as well as in the hands of the payee." Per Roby, J., in Young v. Baker, 29 Ind. App. 130, 64 N. E. 54.

Missouri.—"It is a general rule that any alteration in a material part of a bill of exchange or promissory note as in the date, sum, or time when payable or consideration or place of payment will render the bill or note invalid as against any party thereto not consenting to such alteration, even in the hands of an innocent party." Per Richardson, J., in Trigg v. Taylor, 27 Mo. 245, 72 Am. Dec. 263.

Nebraska.—"It is well settled that material alterations of an instrument invalidate it as to the maker, who has not assented to or ratified the change, even in the hands of a *bona fide* holder for value." Per Norval, J., in Erickson v. Bank, 44 Neb. 622, 62 N. W. 1078, 28 L. R. A. 77, 48 Am. St. R. 753.

tion was of such a character that it could not have been detected.¹⁶ In an action, however, by a *bona fide* holder of a bill of exchange against the acceptor it has been decided that the latter cannot defeat recovery on the ground of a material alteration made before the acceptance.¹⁷ Again, where it is apparent upon the face of an instrument that it has been altered a *prima facie* presumption arises that the alteration was made after the instrument was executed, and the burden is held to be on the holder to show the contrary. If, however, the alteration is not apparent upon the face of the instrument, the burden then rests on the one who sets up such alteration as a defense.¹⁸ So where a bill of exchange appears on its face to have been altered, the burden is then held to rest on the one asserting a right thereunder to show that such alteration was made before the bill was executed or that the parties assented thereto.¹⁹ The general rule above stated, as to the availability of a material alteration as a defense to an action by a *bona fide* holder, has been changed in many states by the adoption of the provision of the negotiable-instruments law to the effect that when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its original tenor.²⁰ Under such a provision in New York²¹ it has been decided that an innocent holder of a check which has been altered to a later date may recover thereon, though it appears that the original payee represented to drawer that the check was lost and obtained another, which he cashed and then negotiated the first check.²² And under Massachusetts laws, to the same effect,²³ it is decided that where a person indorsed a note and delivered it to the maker, who altered it before delivery to the payee, who took without notice thereof, he could recover from the indorser.²⁴

§ 137. **Immaterial alterations.**—Where an alteration is not in a material part of the instrument, and the identity of the paper is not

¹⁶ Wade v. Withington, 83 Mass. (1 Allen) 561.

¹⁷ Ward v. Allen, 44 Mass. (2 Metc.) 53, 35 Am. Dec. 387.

¹⁸ Dewey v. Merritt, 106 Ill. App. 156. See Towles v. Banner, 21 App. D. C. 530; Galloway v. Bartholomew, 44 Oreg. 75, 74 Pac. 467.

¹⁹ Fontaine v. Gunter, 31 Ala. 258.

²⁰ See appendix.

²¹ New York Laws 1897, p. 745, c. 612.

²² Moskowitz v. Deutsch (N. Y. App. Div. 1905), 92 N. Y. Supp. 721.

²³ Mass. Rev. Laws, c. 73, §§ 141, 69.

²⁴ Thorpe v. White (Mass. 1905), 74 N. E. 592; see also, Massachusetts National Bank v. Snow, 187 Mass. 159, 72 N. E. 959.

destroyed, or the liability thereunder in any way affected, it will not be of such a material character as will constitute it a defense.²⁵ If an alteration is in fact immaterial, so far as the effect produced thereby is concerned, it will not be rendered material simply by reason of the intent with which it was made.²⁶ So the fact that an erasure appears upon the note sued upon which does not vary or alter its tenor as set out in the complaint, is held not to render the note inadmissible in evidence.²⁷ The right to recover on an instrument will not be affected by an alteration which is considered as a mere spoliation,²⁸ or by the insertion of some word which the law necessarily implies.²⁹ Nor is there a material alteration by the re-tracing in ink of a writing which was originally in pencil.³⁰ So where a note contained a description of land merely to identify it as the note which was given for the balance due on the land, and the word "west" was inserted after the word "south," it was decided that the alteration, admitting it was one, was not material.³¹ And where a promissory

Indiana.—Toner v. Wagner, 158 Ind. 447, 63 N. E. 859; Bucklen v. Huff, 53 Ind. 174.

Iowa.—Laub v. Rudd, 37 Iowa 617.

Kansas.—Reed v. Culp, 63 Kan. 595, 66 Pac. 616.

Kentucky.—Keene's Adm'r v. Miller, 103 Ky. 628, 45 S. W. 1041; Smith v. Lockbridge, 8 Bush (Ky.) 423.

North Carolina.—Dunn v. Clements, 52 N. C. 58.

English.—Walter v. Cubley, 2 Cromp. & M. 151; Butt v. Picard, Ryan & M. 37.

Canadian.—Cunningham v. Peterson, 29 Ont. R. 346. Compare:

Missouri.—Kingston Savings Bank v. Bosserman, 52 Mo. App. 269.

California.—"It is well settled that an alteration which does not vary the meaning, the nature, or subject-matter of the contract is immaterial." Per Murray, C. J., in *Humphreys v. Crane*, 5 Cal. 173.

²⁵ "An immaterial alteration is not made material simply by the intent; and if the intent to give a different effect to the instrument

was not and could not be effectuated by the act done, the intent simply would not avoid it." *Robinson v. Insurance Co.*, 25 Iowa 430, Per Cole, J.

"If there be fraud at all in such a case it can only be such as a bad motive can affix to an immaterial act, and if the act itself is incapable of working an injury, to wit: of changing the obligations or rights of the parties to the contract, it cannot in a legal sense be said to be fraudulent, for the obvious reason that courts of justice only regard that as fraudulent which is capable of producing an injury or loss to the other party to the controversy." *Moye v. Herndon*, 30 Miss. 110, per Fisher, J. But see *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298.

²⁷ *Brown v. Feldwert* (Oreg. 1905), 80 Pac. 414.

²⁸ *Bucklen v. Huff*, 53 Ind. 474.

²⁹ *Hunt v. Adams*, 6 Mass. 519.

³⁰ *Reed v. Roark*, 14 Tex. 329, 65 Am. Dec. 127.

³¹ *Nance v. Gray* (Ala. 1905), 38 So. 916.

note is made payable at a place different from the place at which it is executed the insertion therein of the words "with exchange" does not constitute a material alteration which will avoid the note, it being held not to in any way alter the legal effect of the instrument or change the contract obligation of the parties. It is only an expression of what the contract itself implies.³² And where an alteration, which is not material, is made in a note which is subsequently restored to its original form, a recovery on the instrument will not be thereby prevented.³³ And an alteration will not be considered material so as to defeat recovery on the instrument where it is made merely for the purpose of correcting a mistake so as to express the actual intention of the parties.³⁴ A party, however, has no right to make an alteration in an instrument to correct a mistake unless it is made to make it conform to what all the parties agreed or intended it should have expressed.³⁵

§ 138. **Alteration by co-maker or drawer.**—A maker will not be bound by a material alteration of a bill or note made by a co-maker or under his direction, and to which the former has not consented. Such an alteration will be a good defense to an action against the maker not consenting thereto,³⁶ even though it was made without

³² *First National Bank v. Nordstrom* (Kan. 1904), 78 Pac. 804.

³³ *Kountz v. Kennedy*, 63 Pa. St. 187, 13 Am. Rep. 541. See *Whitmore v. Nickerson*, 125 Mass. 496.

³⁴ *Iowa*.—*Shepard v. Whetstone*, 51 Iowa 457, 1 N. W. 753, 33 Am. Rep. 143.

Massachusetts.—*Ames v. Colburn*, 77 Mass. (11 Gray) 390, 71 Am. Dec. 723n.

Mississippi.—*McRaven v. Crisler*, 53 Miss. 542; *Conner v. Routh*, 8 Miss. (7 How.) 176, 40 Am. Dec. 59.

New Hampshire.—*Cole v. Hills*, 44 N. H. 227.

Ohio.—*Jessup v. Dennison*, 2 Disney (Ohio) 150.

Oregon.—*Wallace v. Tice*, 32 Oreg. 283, 51 Pac. 773.

Vermont.—*Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389.

English.—*Webber v. Maddocks*, 3

Camp. 1; *Cariss v. Tattersal*, 2 Man. & G. 890; *Butt v. Picard*, Ryan & M.

37. See *Gardner v. Walsh*, 5 El. & Bl. 63; *Bathe v. Taylor*, 15 East 416.

³⁵ *Dyker v. Franz*, 7 Bush (Ky.) 273.

³⁶ *Indiana*.—*Schwind v. Hacket*, 54 Ind. 248.

Kansas.—*Horn v. Bank*, 32 Kan. 518, 4 Pac. 1022.

Massachusetts.—*Fay v. Smith*, 83 Mass. (1 Allen) 477, 79 Am. Dec. 752.

Minnesota.—*Flanigan v. Phelps*, 42 Minn. 186, 43 N. W. 1113.

New Hampshire.—*Goodman v. Eastman*, 4 N. H. 455.

Pennsylvania.—*Brown v. Reef*, 79 Pa. St. 370; *Neff v. Hornér*, 63 Pa. St. 327, 3 Am. Rep. 555; *Biery v. Haines*, 5 Whart. (Pa.) 563.

Tennessee.—*McVey v. Ely*, 73 Tenn. (5 Lea) 438.

fraudulent intent or the knowledge of the payee.³⁷ And an acceptor will not be bound by the consent of the drawer to an alteration of the paper which was made without the knowledge or consent of the former.³⁸

§ 139. **Alteration by maker without surety's consent.**—A surety may, in an action against him on a bill or note, defend on the ground that there has been a material alteration of the instrument by the maker or principal debtor without the consent of the surety.³⁹ A surety, however, will not be relieved from liability on a note where he stands by and by his silence induces another to part with his money on the faith of the former's approval of an alteration by the principal of some part of the instrument.⁴⁰

§ 140. **Alteration by payee or subsequent holder—Effect on rights of surety.**—A material alteration in a bill or note by one of several joint payees will be a good defense to an action against the surety where made without his consent.⁴¹ So an alteration by one who subsequently becomes a holder of the instrument will be a good defense to an action against the surety.⁴²

Vermont.—*Broughton v. Fuller*, 9 Vt. 373.

English.—*Perring v. Hone*, 2 Car. & P. 401. See *Hirschfield v. Smith*, L. R. 1 C. P. 340.

Tennessee.—*Taylor v. Taylor*, 80 Tenn. (12 Lea) 714. But see:

Georgia.—*Daniel v. Daniel*, Dud. (Ga.) 239.

³⁷ *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92 n.

³⁸ *Cardwell v. Martin*, 9 East 190; *Calvert v. Roberts*, 3 Camp. 343. See *Abrams v. Bank*, 31 La. Ann. 61. But see *Johnson v. Gibb*, 2 Chit. 123.

³⁹ *Alabama.*—*Glover v. Robbins*, 49 Ala. 219.

Georgia.—*Hill v. O'Neill*, 101 Ga. 832, 28 S. E. 996.

Illinois.—*Benedict v. Miner*, 58 Ill. 19.

Indiana.—*Franklin Life Ins. Co. v. Courteney*, 60 Ind. 134.

Iowa.—*Marsh v. Griffin*, 42 Iowa 403.

Nebraska.—*Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369.

Ohio.—*Thompson v. Massie*, 41 Ohio St. 307.

South Carolina.—*Sanders v. Bagwell*, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 3.

Federal.—*Wood v. Steele*, 6 Wall. (U. S.) 80.

⁴⁰ *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. 714.

⁴¹ *Thompson v. Massie*, 41 Ohio St. 307, holding that in the case of a material alteration in the terms of such an instrument made without the assent of the surety he may well say that the note, thus altered, he did not sign. *Adams v. Faircloth* (Tex. Civ. App.), 97 S. W. 507.

⁴² *Brooks v. Allen*, 62 Ind. 401. See also, *McDonald v. Nalle* (Tex. Civ. App. 1906), 91 S. W. 632.

§ 141. **Alteration by agent of holder.**—Where a bill or note is altered by an agent of the holder without the authority, consent or knowledge of his principal, it has been decided that the right of the holder to recover on the instrument is not thereby affected, such alteration being regarded as a mere spoliation by a stranger.⁴³

§ 142. **Alteration by a third party.**—It is a generally accepted doctrine that an alteration of a bill or note made by a stranger to the instrument, without the authority or consent of the principal who claims under it, will be regarded as a mere spoliation which does not affect the rights of the parties, and is therefore no defense to an action on the paper.⁴⁴ This rule has been applied in the case of an

⁴³ *Indiana*.—Ballard v. Insurance Company, 81 Ind. 239; Brooks v. Allen, 62 Ind. 401.

South Dakota.—Port Huron Engine & Thresher Co. v. Sherman, 14 S. D. 461, 85 N. W. 1008.

Vermont.—Bigelow v. Stilphen, 35 Vt. 521. Compare:

Iowa.—Hamilton v. Hooper, 46 Iowa 515, 26 Am. Rep. 161.

New York.—Van Brunt v. Eoff, 35 Barb. (N. Y.) 501.

⁴⁴ *Arkansas*.—Andrews v. Callo-way, 50 Ark. 358, 7 S. W. 449.

California.—Langenberger v. Kroeger, 48 Cal. 147.

Illinois.—Patterson v. Higgins, 58 Ill. App. 268.

Indiana.—Toner v. Wagner, 158 Ind. 447, 63 N. E. 859; Brooks v. Allen, 62 Ind. 401; Piersol v. Grimes, 30 Ind. 129, 95 Am. Dec. 673.

Kentucky.—Lee v. Alexander, 9 B. Mon. (Ky.) 25, 48 Am. Dec. 412.

Massachusetts.—Drum v. Drum, 133 Mass. 566.

Missouri.—Lubbering v. Kohlbrecher, 22 Mo. 596.

Ohio.—Thompson v. Massie, 41 Ohio St. 307.

South Carolina.—White v. Harris, 69 S. C. 65, 48 S. E. 41.

South Dakota.—Port Huron En-

gine & Thresher Co. v. Sherman, 14 S. D. 461, 85 N. W. 1008.

Tennessee.—Boyd v. McConnell 29 Tenn. (10 Humph.) 68.

Vermont.—Bigelow v. Stilphen, 35 Vt. 521.

Wisconsin.—Union National Bank v. Roberts, 45 Wis. 373.

Federal.—United States v. Spalding, 2 Mason (C. C.) 478, Fed. Cas. No. 16365. But see:

English.—Master v. Miller, 4 Term R. 320. The doctrine of the very old cases as to the effect of an alteration by a stranger was early repudiated in the United States, the rule stated in the text being favored by the courts. "The old cases proceed upon a very narrow ground. It seems to have been held that a material alteration of a deed by a stranger, without the privacy of either obligor or obligee, avoided the deed; and by parity of reasoning the destruction or tearing off the seal either by a stranger or by accident, * * * a doctrine so repugnant to common sense and justice, which inflicts on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven, ought

alteration by a stranger with the intent to extinguish the obligation,⁴⁵ to a change of the provision as to attorney's fees,⁴⁶ and to alterations of particular parts or clauses of a bill or note.⁴⁷ Where, however, a holder with notice of an alteration by a stranger sues on the note as altered, he thereby ratifies the change and is held to lose his remedy on the original instrument.⁴⁸ Where the evidence is conflicting upon the question whether an alteration is one by a party to the instrument or by a stranger, and therefore a mere spoliation, is one which should be submitted to the jury under proper instructions as to the law.⁴⁹

§ 143. Alteration by mistake or accident.—Recovery on a bill or note cannot be defeated on the ground of an alteration which is shown to have been the result of accident or mistake.⁵⁰ So where the cashier of a bank by mistake cancelled a note belonging to the bank, it was held not to affect the right to recover thereon.⁵¹ And where the payee of a note in ignorance of the proper manner to transfer it erased his own name and inserted that of the transferee, but afterwards restored it to its original form, it was held not to avoid the note.⁵² So the accidental stamping of a waiver of demand and protest by a holder over two indorsements instead of one has been held not to affect the liability of the maker.⁵³ And where the tearing off of a signature, afterwards pasted on, is set up as a defense to an action, it is proper to show that it was accidentally torn off.⁵⁴ Nor will an erasure, which is accidental, of one of two signatures or seals to an obligation for the payment be a defense to an action thereon,⁵⁵

to have the unequivocal support of unbroken authority, before a court of law is bound to surrender its judgment to what deserves no better name than a technical quibble. It appears to me to be shaken to its very foundation in modern times." *United States v. Spalding*, 2 Mason (C. C.) 478, Fed. Cas. No. 16365.

⁴⁵ *Whitlock v. Manciet*, 10 Ore. 166.

⁴⁶ *Murray v. Peterson*, 6 Wash. 418, 33 Pac. 969.

⁴⁷ As to such alterations see subdivision II of this chapter.

⁴⁸ *Perkins Windmill & A. Co. v. Tillman*, 55 Neb. 652, 75 N. W. 1098.

⁴⁹ *White v. Harris*, 69 S. C. 65, 48 S. E. 41.

⁵⁰ *Brett v. Maiston*, 45 Me. 401. See *Nevins v. De Grand*, 15 Mass. 436; *Abbe v. Rood*, 6 McLean (U. S.) 106, Fed. Cas. No. 6.

⁵¹ *Boulware v. Bank*, 12 Mo. 542.

⁵² *Horst v. Wagner*, 43 Iowa 373, 22 Am. Rep. 250.

⁵³ *Gordon v. Bank*, 144 U. S. 97, 12 Sup. Ct. 657.

⁵⁴ *Frazer v. Boss*, 66 Ind. 1, holding in such a case that it might be shown to have been the innocent act of a child.

⁵⁵ *Rhoades v. Frederick*, 8 Watts (Pa.) 448.

or an alteration made by an agent under a mistaken belief as to his authority.⁵⁶

§ 144. **Filling in blanks.—Instrument incomplete—Rule as to.** One who has signed and put into circulation negotiable paper containing an implied blank or blanks, which makes the paper imperfect, thus rendering easy of execution an addition of words to the instrument, increasing his liability or altering the terms of the contract, which alteration is not discernible in the appearance of the paper, and having by his negligence put it in the power of another to impose upon an innocent third party and to obtain money from him upon the faith of the signature affixed to the instrument, which is honest in its appearance, will not be permitted to defeat an action by such third party by setting up the defense of an alteration in the terms of the instrument.⁵⁷ So in such a case it is declared: "Since the defendant, by executing a note, and delivering it with a blank in it, for the insertion of the interest, and thereby placed it in the power of the payee to do the wrong, as between him and the plaintiff, a *bona fide* purchaser for value, he ought to suffer any loss resulting therefrom, especially as he fails to show directly any notice to plaintiff of the alteration."⁵⁸ So it is said in a recent case: "It seems to be well supported by the authorities that the alteration of a promissory note, after delivery, by filling the blanks left therein, where there is nothing on the face of the note to suggest an alteration, will not invalidate the note in the hands of a *bona fide* indorsee for value before maturity, and without notice of such alteration. The reason of this rule is that, where the maker of a note signs it and delivers it to the payee, with blank spaces in the note for the rate of interest, the time of ma-

⁵⁶ *Van Brunt v. Eoff*, 35 Barb. (N. Y.) 501. See *Brooks v. Allen*, 62 Ind. 401. *Slifford Banking Co. v. Donovan*, 195 Mo. 262, 94 S. W. 527.

⁵⁷ *Colorado*.—*Stratton v. Stone*, 15 Colo. App. 237, 61 Pac. 481. *New York*.—*People v. Bank*, 75 N. Y. 547; *Van Duzer v. Howe*, 21 N. Y. 531.

Indiana.—*Bowen v. Laird* (Ind. App. 1906), 77 N. E. 295. *Pennsylvania*.—*Wessell v. Glenn*, 108 Pa. St. 105; *Brown v. Reed*, 79 Pa. St. 370, 21 Am. Rep. 75; *Garrard v. Hadden*, 67 Pa. St. 82, 5 Am. Rep. 412.

Kentucky.—*Blakely v. Johnson*, 13 Bush (Ky.) 197, 26 Am. Rep. 254. *Federal*.—*Angle v. Insurance Co.*, 92 U. S. 330; 23 L. Ed. 556. See *Davidson v. Lanier*, 4 Wall. (U. S.) 447, 18 L. Ed. 380.

Maine.—*Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427. ⁵⁸ *Rainbolt v. Eddy*, 34 Iowa 440, 442, 11 Am. Rep. 152, per Cole, J.

Michigan.—*Weidman v. Symes*, 120 Mich. 657, 79 N. W. 894.

Missouri.—*Scotland County Bank v. O'Connel*, 23 Mo. App. 165. See

turity or the place of payment, he will, in a contest with an innocent purchaser of the paper before maturity and for value, be held to have authorized the payee to fill in the blank spaces, unless the paper on its face bears evidence of mutilation or alteration.^{58*} The execution and delivery of an instrument in such a form confers upon the holder the authority, as against the one so signing the paper, to fill up the blank space.⁵⁹ So one who has executed a note of such a character is held to have the burden of proof in an action against which he set up the defense of an alteration, to show that the holder had notice of the facts at the time of the receipt of the note.⁶⁰

§ 145. Same subject—Application of rule.—The general rule stated in the preceding section has been applied where a blank has been left in a note for the name of the payee,⁶¹ as to the place of payment,⁶² time of payment,⁶³ or for the amount.⁶⁴ And where the space for the date of a note is left blank a filling in of the time will not constitute an alteration of the instrument which will be available as a defense.⁶⁵

§ 146. Same subject—Where instrument complete.—Where a bill or note, as delivered, is a complete and perfect legal instrument, it has been determined that the fact that it contains a space which will

^{58*} *Humphrey Hardware Co. v. Herrick* (Neb. 1904), 101 N. W. 1016, per Oldham, J.

⁵⁹ See § 22 herein as to execution or indorsement in blank.

⁶⁰ *Rainbolt v. Eddy*, 34 Iowa 440, 11 Am. Rep. 152.

⁶¹ *Thompson v. Rathbun*, 18 Oreg. 202, 22 Pac. 837, in which it is held that a *bona fide* holder may fill such a blank with his own name.

⁶² *Alabama*.—*Winter v. Pool*, 104 Ala. 580, 16 So. 543.

Illinois.—*Canon v. Grigsby*, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769.

Kentucky.—*Cason v. Bank*, 97 Ky. 487, 31 S. W. 40, 53 Am. St. Rep. 418; *Rogers v. Poston*, 1 Metc. (Ky.) 643.

New York.—*Kitchen v. Place*, 41 Barb. (N. Y.) 465. But see:

Georgia.—*Gwin v. Anderson*, 91 Ga. 827, 18 S. E. 43, holding that filling blank space with place of payment is a material alteration.

⁶³ *Lowden v. Bank*, 38 Kan. 553, 16 Pac. 748; *Wilson v. Henderson*, 9 Sm. & M. (Miss.) 375, 48 Am. Dec. 716. Compare *Farmers' National Bank v. Thomas*, 79 Hun (N. Y.) 595, 29 N. Y. Supp. 837.

⁶⁴ *Prim v. Hammel*, 134 Ala. 652, 32 So. 1006; *Yocum v. Smith*, 63 Ill. 321; *Bank of Commerce v. Halde-man*, 22 Ky. Law Rep. 717, 58 S. W. 587; *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427.

⁶⁵ *Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9. Compare *Inglish v. Breneman*, 5 Pike (Ark.) 377, 41 Am. Dec. 96, holding the filling in of a false date to be an alteration which is a defense.

permit of the insertion of other words will not, as a matter of law, confer authority upon the holder to fill such space, and where other words are inserted which materially alter the paper it will be a defense to an action thereon.⁶⁶ So it has been decided that the maker of a non-negotiable promissory note, perfect in its terms, does not, by leaving a blank space in the body of the note wherein words of negotiability may be inserted, give an implied authority to fill such space which he may not deny as against a *bona fide* purchaser.⁶⁷ And where a bill or note is complete in all its parts the weight of authority supports the rule that if the blank for the amount is filled so as to express a larger amount than is stated therein, such fact will be a good defense even as against a *bona fide* holder.⁶⁸ There are, however, some decisions which do not adopt this rule, it being held that if the maker has left a space in such a manner as to admit of its being filled so as to increase the amount, he is guilty of negligence and is precluded from setting up this defense against such a holder.⁶⁹

§ 147. As defense to action on original consideration or debt.

The material alteration of a bill or note will not only be a defense to filled so as to increase the amount, he is guilty of negligence and is precluded from setting up this defense against such a holder.⁶⁹

⁶⁶ *Arkansas*.—*Fordyce v. Kosminski*, 49 Ark. 40, 3 S. W. 892, 4 Am. St. R. 18.

Maryland.—*Burrows v. Klunk*, 70 Md. 451, 17 Atl. 378.

Massachusetts.—*Belknap v. Bank*, 100 Mass. 376, 97 Am. Dec. 105.

Mississippi.—*Simmons v. Atkinson*, 69 Miss. 862, 12 So. 263, 23 L. R. A. 599.

New York.—*McGrath v. Clark*, 56 N. Y. 34; *Bruce v. Westcott*, 3 Barb. (N. Y.) 374.

Pennsylvania.—*Leas v. Walls*, 101 Pa. St. 57, 47 Am. Rep. 699. See:

England.—*Hirschfield v. Smith*, L. R. 1 C. P. 340.

⁶⁷ *Cronkhite v. Nebeker*, 81 Ind. 319, 42 Am. Rep. 127.

⁶⁸ *Arkansas*.—*Fordyce v. Kosminski*, 49 Ark. 30, 3 S. W. 892, 4 Am. St. R. 18.

Iowa.—*Knoxville National Bank*

v. Clark, 51 Iowa 264, 1 N. W. 491, 33 Am. Rep. 129.

Kansas.—*Bank of Herington v. Wangerin*, 65 Kan. 423, 70 Pac. 330.

Massachusetts.—*Bank v. Stowell*, 123 Mass. 196, 24 Am. Rep. 67.

South Dakota.—*Searles v. Seipp*, 6 S. D. 472, 61 N. W. 804.

Federal.—*Exchange National Bank v. Bank of Little Rock*, 58 Fed. 140, 7 C. C. A. 111.

⁶⁹ *Isnard v. Tones*, 10 La. Ann. 103; *Garrard v. Haddan*, 67 Pa. St. 82; *Young v. Grote*, 4 Bing. 253. See *Franklin Life Ins. Co. v. Courtney*, 60 Ind. 134.

⁷⁰ *Alabama*.—*White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548.

Illinois.—*Black v. Bowman*, 15 Ill. App. 166; *Wallace v. Wallace*, 8 Ill. App. 69.

Indiana.—*Ballard v. Insurance Co.*, 81 Ind. 239.

rule also applies to an indorsee after maturity, as he stands in the same position as his indorser in respect to such alteration.⁷¹ As to the availability of an alteration as a defense in such a case the following words of the court in an early New York decision are pertinent: "To allow parties to take the chances of success in fraudulently raising the amount of the written obligations of their debtors, without risk of loss in case of detection, would be an encouragement to this description of fraud which the law should not afford. It is said, on the other hand, that the debtor has sustained no injury by the fraud and that he should not be permitted to profit by the unsuccessful attempt of his creditor to defraud him. It is true that where the fraud is detected in season the debtor sustains no pecuniary loss; but he has been intentionally exposed to injury. The alteration may have been so skilfully made as to render detection difficult, or the debtor might have become infirm or died, and the altered instrument successfully imposed upon his representatives. It is for the purpose of discouraging such attempts that the law denies relief to a plaintiff who comes into court with his hands soiled with a fraud so inexcusable. That the effect of such denial will be to benefit the other party is not a sufficient ground for overlooking the fraud. It is a consequence for which the plaintiff is alone responsible, and which always ensues when the action is founded upon a special contract which has been fraudulently altered. It is conceded that in such a case the plaintiff has deprived himself of all remedy either upon the contract or the consideration. So, in the case of an altered deed the grantee loses the land, and the grantor is benefitted. If the argument now referred to was sound, the plaintiff should be permitted in those cases

Iowa.—Woodworth v. Anderson, 63 Iowa 503, 19 N. W. 296.

Massachusetts.—Wheelock v. Freeman, 30 Mass. (13 Pick.) 165, 23 Am. Dec. 674.

Missouri.—Whitmer v. Frye, 10 Mo. 348.

Nebraska.—Walton Plow Co. v. Campbell, 35 Neb. 174, 52 N. W. 883.

New Hampshire.—Smith v. Mace, 44 N. H. 553; Martendale v. Follet, 1 N. H. 95.

North Carolina.—Sharpe v. Bagwell, 16 N. C. 115.

North Dakota.—First National Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473.

South Carolina.—Mills v. Starr, 2 Bailey (S. C.) 359.

England.—Alderson v. Langdale, 3 Barn. & Ad. 660.

Canada.—Gladstone v. Dew, 9 Up. Can. C. P. 439. See:

Tennessee.—Taylor v. Taylor, 12 Lea (Tenn.) 714. But see:

England.—Atkinson v. Hawdon, 2 Adol. & E. 628.

⁷¹ Kennedy v. Crandell, 3 Lans. (N. Y.) 1.

to recall the alteration and avail himself of the contract or deed in its original and true form, which it is well settled he cannot do."⁷²

§ 148. **Alteration not fraudulent—To make paper conform to original agreement—May recover on original consideration.**—A material alteration of a bill or note where it is not fraudulent, though it will be a defense to an action on the instrument itself, will not be a bar to a recovery on the original consideration or debt.⁷³ And a party cannot alter such a paper though for the purpose of making it conform to the original agreement and recover on the note, for to permit this would be in effect to render all written instruments oral ones, subject to change at will of one of the parties, to accord with his remembrance of the contract. The holder is not, however, in such a case precluded from a recovery on the original consideration.⁷⁴

§ 149. **Effect of consent or ratification.**—A party to an instrument who has authorized, or consented to, a material alteration of the paper cannot subsequently, in an action thereon against him, avail himself of such alteration as a defense thereto.⁷⁵ This rule has been applied

⁷² *Meyer v. Huneke*, 55 N. Y. 412, 419, per Rapallo, J.

⁷³ *Iowa*.—*Sullivan v. Rudisill*, 63 Iowa 158, 18 N. W. 856; *Morrison v. Huggins*, 53 Iowa 76, 4 N. W. 854; *Clough v. Seay*, 49 Iowa 111.

Maryland.—*Morrison v. Welty*, 18 Md. 169.

Nebraska.—*State Savings Bank v. Shaffer*, 9 Neb. 1, 1 N. W. 980, 31 Am. Rep. 394.

New York.—*Gillette v. Smith*, 18 Hun (N. Y.) 10.

Ohio.—*Merrick v. Boury*, 4 Ohio St. 60.

Pennsylvania.—*Miller v. Stark*, 148 Pa. St. 164, 23 Atl. 1058.

Rhode Island.—*Keene v. Weeks*, 19 R. I. 309, 33 Atl. 446.

England.—*Sloman v. Cox*, 1 Cromp. M. & R. 471. See:

Illinois.—*Wallace v. Wallace*, 8 Ill. App. 69.

⁷⁴ *Iowa*.—*Murray v. Graham*, 29 Iowa 520.

New Jersey.—*Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232.

Utah.—*McClure v. Little*, 15 Utah 379, 49 Pac. 298. See:

Delaware.—*Warren v. Layton*, 3 Harr. (Del.) 404.

Wisconsin.—*Matteson v. Ellsworth*, 33 Wis. 488, 14 Am. Rep. 766.

⁷⁵ *Colorado*.—*Whitehead v. Emerich* (Colo. 1906), 87 Pac. 790.

Delaware.—*Hollis v. Vandergrift*, 5 Houst. (Del.) 521.

Indiana.—*Prather v. Zulauf*, 38 Ind. 155.

Massachusetts.—*Stoddard v. Peniman*, 113 Mass. 386.

Missouri.—*King v. Hunt*, 13 Mo. 97.

South Carolina.—*Jacobs v. Gilreath*, 45 S. C. 46, 22 S. E. 757.

Tennessee.—*Ratcliff v. Planters' Bank*, 2 Sneed (Tenn.) 424.

Virginia.—*Schmelz v. Rix*, 95 Va. 509, 28 S. E. 890.

Wisconsin.—*Marks v. Schram*, 109 Wis. 452, 84 N. W. 830.

in the case of the erasure of the name of a released guarantor,⁷⁶ where words have been added changing a joint contract to a joint and several one,⁷⁷ where there was inserted at the end of a note the clause, "attest, this 9th day of October,"⁷⁸ and where other parts of the instrument have been similarly changed.⁷⁹

§ 150. Same subject—What constitutes.—A consent or ratification which will preclude a party from availing himself of the defense of a material alteration of the instrument may be either in express terms or may be implied from acts of his in connection with the paper.⁸⁰ So a consent or ratification may arise from a recognition of liability on the paper,⁸¹ as by requesting and obtaining an extension of time,⁸² by a subsequent promise to pay,⁸³ by making partial payments,⁸⁴ by giving collateral security,⁸⁵ or by payment of interest.⁸⁶ And the obligors upon a bond may be precluded from setting up an alteration as a defense where it was done by a co-obligor acting as their agent.⁸⁷ A new consideration is not essential to render a consent binding upon a party.⁸⁸

Federal.—Crum v. Abbott, 2 McLean (U. S.) 233, Fed. Cas. No. 3454.

England.—Sherrington v. Jermyn, 3 Car. & P. 374; Kershaw v. Cox, 3 Esp. 246; Catton v. Sampson, 8 Adol. & E. 136; Stevens v. Lloyd, Moody & M. 292; Walter v. Cubley, 2 Crompt. & M. 151. See:

Kentucky.—Pulliam v. Withers, 8 Dana (Ky.) 98, 33 Am. Dec. 479.

England.—Johnson v. Garnett, 2 Chit. 122.

Iowa.—"This assent would make it his instrument as fully and entirely as if the words had been inserted at the time of its execution." Per Wright, C. J., in Grimsted v. Briggs, 4 Iowa 559.

⁷⁶ Kane v. Kerman, 109 Wis. 33, 85 N. W. 140.

⁷⁷ Landauer v. Improvement Co., 10 S. D. 205, 72 N. W. 467.

⁷⁸ Wilson v. Jamieson, 7 Pa. St. 126.

⁷⁹ See Subdivision II of this chap-

ter as to such alterations of other parts of a note or bill.

⁸⁰ *Connecticut.*—Union Bank v. Middlebrook, 33 Conn. 95.

Kentucky.—Mattingly v. Riley, 20 Ky. Law. Rep. 1621, 49 S. W. 799.

Maine.—Powers v. Nash, 37 Me. 322.

New York.—Weed v. Carpenter, 10 Wend. (N. Y.) 403. See:

Michigan.—Swift v. Barber, 28 Mich. 503.

⁸¹ Stewart v. Bank, 40 Mich. 348.

⁸² Bell v. Mahin, 69 Iowa 408, 29 N. W. 331.

⁸³ National State Bank v. Rising, 4 Hun (N. Y.) 793.

⁸⁴ Evans v. Foreman, 60 Mo. 449.

⁸⁵ Humphrey v. Guillo, 13 N. H. 385, 38 Am. Dec. 449.

⁸⁶ Caries v. Tattersall, 2 Man. & G. 890. See also, Prouty v. Wilson, 123 Mass. 297.

⁸⁷ Wilmington v. Kitchin, 91 N. C. 39.

⁸⁸ Pelton v. Prescott, 13 Iowa 567.

Subdivision II.

PARTICULAR ALTERATIONS.

Sec.	Sec.
151. Alteration of number.	167. Alteration in medium of payment.
152. Alteration of date.	168. Alteration of interest clause.
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156. Alteration in statement as to consideration.	172. Erasure or alteration of maker's signature.
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160. Alteration as to negotiable words.	176. Alteration or destruction of seal.
161. Substitution or addition of words "or order"—"Or bearer."	177. Alteration, erasure or addition of names of witnesses.
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164. Designation of place of payment where none specified.	180. Alteration of indorsement.
165. Alteration of amount.	181. Erasure or alteration of name of surety.
166. Same subject—Where there are marginal figures.	182. Addition of name as surety or guarantor.

§ 151. **Alteration of number.**—Recovery by a *bona fide* holder on a negotiable bond will not be prevented by an alteration of the number, such an alteration being held to be immaterial.⁸⁹ So where bonds of a commonwealth which are payable to bearer, and not required by law to be numbered, are stolen, and the numbers altered, it has been decided that a *bona fide* holder is not affected by the alteration, though it was done in bad faith.⁹⁰ In this class of cases it has

⁸⁹ *Morgan v. United States*, 113 U. S. 476, 5 Sup. Ct. 588; *Wylie v. Railway Co.*, 41 Fed. 623. See *Birdsall v. Russell*, 29 N. Y. 220; *Leeds v. County Bank*, 11 Q. B. 84. But see

Suffell v. Bank, 9 Q. B. 555, reversing 7 Q. B. 270.

⁹⁰ *Commonwealth v. Emigrant Industrial Sav. Bank*, 98 Mass. 12, 93 Am. Dec. 126.

been declared that the numbers are placed on bonds for the convenience of the maker and his protection, showing it is one of a series and does not enter into or affect the agreement.⁹¹

§ 152. **Alteration of date.**—The date of a note is a material part of the contract, and any alteration thereof affects the identity of the contract and will be a good defense to an action on the instrument without regard to whether it may hasten or delay the date of payment,⁹² it being the change in the contract which the law regards and

⁹¹ *City of Elizabeth v. Force*, 29 N. J. Eq. 587.

⁹² *Delaware*.—*Warren v. Layton*, 3 Harr. (Del.) 404.

Illinois.—*Wyman v. Yeomans*, 84 Ill. 403.

Kentucky.—*Lisle v. Rogers*, 18 B. Mon. (Ky.) 528.

Mississippi.—*Henderson v. Wilson*, 7 Miss. (6 How.) 65.

Missouri.—*Britton v. Dierker*, 46 Mo. 591, 2 Am. Rep. 553; *Owings v. Arnot*, 33 Mo. 406; *Aubuchon v. McKnight*, 1 Mo. 312, 13 Am. Dec. 502.

Montana.—*McMillan v. Hefferlin*, 18 Mont. 385, 45 Pac. 548.

New York.—*Crawford v. Bank*, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152; *Rogers v. Vosburg*, 87 N. Y. 228.

North Carolina.—*Bland v. O'Hagan*, 64 N. C. 471.

Ohio.—*Newman v. King*, 54 Ohio St. 273, 43 N. E. 683.

Pennsylvania.—*Bowers v. Rineard*, 209 Pa. St. 545, 58 Atl. 912; *Miller v. Stark*, 148 Pa. St. 164, 23 Atl. 1058; *Heffner v. Wenrich*, 32 Pa. St. 423; *Kennedy v. Bank*, 18 Pa. St. 347.

Wisconsin.—*Low v. Merrill*, 1 Pinn. (Wis.) 340.

England.—*Hirschman v. Budd*, L. R. 8 Exch. 171; *Master v. Miller*, 4 Term R. 320; *Walton v. Hastings*, 4 Camp. 223; *Outhwaite v. Luntley*, 4 Camp. 179; *Vance v. Lowther*, L. R. 1 Exch. Div. 176; *Bathe v. Taylor*, 15 East 412.

Canada.—*Gladstone v. Dew*, 9 Up. Can. C. P. 439. But see:

Federal.—*Union Bank v. Cook*, 2 Cranch C. C. 218, Fed. Cas. No. 14349.

Pennsylvania.—"It does not depend on the accelerating or extending the day of payment, but upon the identity; to insure the identity and prevent the substitution of one instrument for another is the foundation of the rule, and it is a wise rule, as it prevents all tampering with written instruments." *Stephens v. Graham*, 7 Serg. & R. (Pa.) 505, 506, 10 Am. Dec. 485, per Duncan, J.

Pennsylvania.—"If the day of payment be accelerated by it, the debtor loses a part of the time for which he stipulated, and the computation of interest is affected by it; if it be retarded, the starting of the statute of limitations or the presumption of payment from lapse of time is also retarded by it." *Miller v. Gilleland*, 19 Pa. St. 119, 124, per Gibson, J.

Nebraska.—"The alteration of the date, whether it hasten or delay the time of payment, is a material alteration, and if made without the consent of the party sought to be charged extinguishes his liability." *Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369, per Maxwell, J. *Alteration of the date of a bill of lading*. *Merchants' Nat. Bank v. Baltimore C. & R. S. Co.*, 102 Md. 573, 63 Alt. 108.

not the surrounding circumstances.⁹³ So where a note is executed by an accommodation maker and is afterwards, without his consent or knowledge, materially altered by an indorsee or holder thereof, such note is thereby rendered invalid.⁹⁴ And an acceptor of a bill is released by an alteration of date of the accepted bill by the holder, thereby shortening the time of payment.⁹⁵ And likewise where one gives authority to draw upon him for ninety days after a certain date, and the date is altered to a later time than that specified, he will be released.⁹⁶ So a change of a demand note to a later date is material and avoids the note, though it may be a benefit to the maker by reducing the amount of interest chargeable against him.⁹⁷ So a surety will be discharged by an alteration which would have the effect of causing the interest to run for a longer period of time.⁹⁸ A maker or surety will not, however, be relieved from liability by an alteration of the date of a note by the maker where it was authorized by the surety.⁹⁹ And such an alteration by the acceptor before he accepts the instrument, and which is acquiesced in by the other parties to the paper, will be binding on them.¹⁰⁰ And an act of a stranger which is a mere spoliation will be no defense.¹⁰¹ Again, the alteration of the date of an indorsement has been held to be an immaterial one which will not affect the right of an indorsee to recover.¹⁰²

§ 153. Same subject—To conform to actual date.—A change, by a party to an instrument, of the date thereof, even though made for the purpose of having it conform to the actual date of execution, if made without the consent of the party sought to be charged will release him from liability on the instrument.¹⁰³ In this connection it is said in one case: "In an action between the original parties the court has ample power to correct mistakes and to enforce the original contract; but the law does not permit the payee of a note to change its terms and

⁹³ *Boulton v. Langmuir*, 24 Ont. App. R. 618.

⁹⁴ *Fraker v. Cullum*, 21 Kan. 555.

⁹⁵ *Hervey v. Hervey*, 15 Me. 357.

⁹⁶ *Lewis v. Kramer*, 3 Md. 265.

⁹⁷ *Boulton v. Langmuir*, 24 Ont. App. R. 618.

⁹⁸ *Benedict v. Miner*, 58 Ill. 6.

⁹⁹ *Prather v. Zulauf*, 38 Ind. 155.

¹⁰⁰ *Ratcliff v. Planters' Bank*, 34 Tenn. (2 Sneed) 424.

¹⁰¹ *Lee v. Alexander*, 9 B. Mon.

(Ky.) 25, 48 Am. Dec. 412; *Boyd v. McConnell*, 29 Tenn. (10 Humph.) 68.

¹⁰² *Griffith v. Cox*, 1 Overt. (Tenn.) 210.

¹⁰³ *Hamilton v. Wood*, 70 Ind. 306; *Henderson v. Wilson*, 7 Miss. (6 How.) 65; *Bowers v. Jewell*, 2 N. H. 543. But see *Jessup v. Dennison*, 2 Disney (Ohio) 150; *Brutt v. Picard*, Ryan & M. 37.

conditions without the assent of the maker, even if the alteration is in his favor or to correct a mistake."¹⁰⁴ Where, however, the original date was altered by the draftsman to conform to the intention of the parties but, upon the maker's objection, the original date was restored with which date the maker expressed himself as satisfied, it was decided that the note was good as against him.¹⁰⁵

§ 154. Alteration of time of payment.—Where the time of payment of a bill or note is changed it constitutes a material alteration which a party not consenting thereto may show in defense to an action against him even by a *bona fide* holder.¹⁰⁶ This rule applies where the time of payment is extended by such alteration,¹⁰⁷ and likewise where it is shortened. So where a note was altered so as to become payable after the maker's death instead of one year after its date, it was held to be a material alteration which would justify the direction of a verdict in favor of the defendants in an action against his executors.¹⁰⁸ Where, however, the parties have consented to such an alteration they will be precluded from setting up the same as defense.¹⁰⁹

§ 155. Same subject—Application of rule.—An alteration which is material and may be shown in defense has been held to exist where a clause was inserted "Privilege of extension for thirty days given."¹¹⁰

¹⁰⁴ *Brown v. Straw*, 6 Neb. 536, 538, 29 Am. Rep. 369, per Maxwell, J.

¹⁰⁵ *Collins v. Makepeace*, 13 Ind. 448.

¹⁰⁶ *Georgia*.—*Steinau v. Moody*, 100 Ga. 136, 28 S. E. 30.

Kentucky.—*Lisle v. Rogers*, 18 B. Mon. (Ky.) 537.

Maine.—*Hervey v. Harvey*, 15 Me. 357.

Massachusetts.—*Ives v. Bank*, 84 Mass. (2 Allen) 236.

Missouri.—*King v. Hunt*, 13 Mo. 97.

Pennsylvania.—*Bank of United States v. Russell*, 3 Yeates (Pa.) 391.

Federal.—*Norwalk Bank v. Adams Express Co.*, 4 Blatchf. (U. S.) 455, Fed. Cas. No. 10354.

England.—*Walton v. Hastings*, 4

Camp. 223; *Outhwaite v. Luntley*, 4 Camp. 179; *Paton v. Winter*, 1 Taunt. 420.

Canada.—*Westloh v. Brown*, 43 Up. Can. Q. B. 402.

¹⁰⁷ *Stayner v. Joice*, 82 Ind. 35; *Flanigan v. Phelps*, 42 Minn. 186, 43 N. W. 1113; *Desbrow v. Weatherly*, 6 Car. & P. 758. But see *Douglass v. Scott*, 8 Leigh (Va.) 43.

¹⁰⁸ *Bowers v. Rineard*, 209 Pa. St. 545, 58 Atl. 912; *Taylor v. Taylor*, 80 Tenn. (12 Lea) 714; *Alderson v. Langdale*, 3 Barn. & Ald. 660; *Clifford v. Parker*, 2 Man. & G. 909.

¹⁰⁹ *Ward v. Allen*, 43 Mass. (2 Metc.) 53, 35 Am. Dec. 387; *King v. Hunt*, 13 Mo. 97.

¹¹⁰ *Flanigan v. Phelps*, 42 Minn. 186, 43 N. W. 1113.

And an alteration of the phrase "after sight" to "after date" or vice versa will be a material one.¹¹¹ So a shortening of the time by changing from a specified date of payment to thirty days after date is material.¹¹² And recovery may be defeated by showing that the word "fixed" was inserted, having the effect of excluding the three days of grace allowed by law.¹¹³ And changing a time note to a demand note, which is repugnant to the expressed intention of the parties, is material and will be a defense.¹¹⁴ The insertion of such words, however, has been held to be immaterial where they only express the effect of the instrument as it originally stood.¹¹⁵ Again the erasure of a contemporaneous memorandum, which is a part of the contract and controls the time of payment, will avoid an instrument.¹¹⁶

§ 156. Alteration in statement as to consideration.—If the statement in a note in respect to the consideration thereof is altered it is held to be of such a material character as to be available as a defense to an action on the instrument.¹¹⁷ And if no consideration is expressed in such an instrument it is decided that recovery may be defeated by showing that it was subsequently altered by the insertion of words showing a consideration.¹¹⁸

§ 157. Alteration of form of promise.—The form of the promise of a note is a material part thereof affecting the liability of the parties, and the alteration of a joint note into a joint and several one will be a good defense to an action thereon,¹¹⁹ as will likewise the alteration

¹¹¹ Long v. Moore, 3 Esp. 155 n, holding an acceptor discharged in such a case where the alteration was made after acceptance.

¹¹² Seebold v. Tatlie, 76 Minn. 131, 78 N. W. 967.

¹¹³ Steinau v. Moody, 100 Ga. 136, 28 S. E. 30.

¹¹⁴ Benjamin v. Delahy, 9 Ill. 536, 46 Am. Dec. 474; Farmers' National Bank v. Thomas, 79 Hun (N. Y.) 595, 29 N. Y. Supp. 837.

¹¹⁵ Aldous v. Cornwall, L. R. 3 Q. B. 573. See Gist v. Gans, 30 Ark. 285.

¹¹⁶ Bay v. Shrader, 50 Miss. 326, so holding where a note for \$500 had

indorsed on it a memorandum that \$250 was to be paid on January 1, 1872 and \$250 on January 1, 1873.

¹¹⁷ Knill v. Williams, 10 East 431.

¹¹⁸ Low v. Argrove, 30 Ga. 129, holding in such a case that the insertion of words expressing a certain tract of land as the consideration was material.

¹¹⁹ Perring v. Hone, 4 Bing. 28; Samson v. Yager, 4 Up. Can. Q. B. O. S. 3. But see Miller v. Reed, 27 Pa. St. 244, 67 Am. Dec. 459, holding that under the laws of Pennsylvania such an alteration was not material and would not avoid the note.

of a joint and several obligation into a joint one.¹²⁰ So changing the words "I promise" to "we promise" is a material alteration which will be a good defense.¹²¹

§ 158. **Alteration of name of payee.**—It will be a good defense to an action on a bill or note that there has been a material alteration of the name of the payee¹²² such as that it has been erased and another name inserted in its place without the consent of the defendant.¹²³ An alteration of this character will be a good defense to an action against an indorser,¹²⁴ surety,¹²⁵ or maker.¹²⁶ And it may be available, though there was no fraud in making the change.¹²⁷ In applying this rule it has been decided that there is an alteration which defeats recovery where there is added to the name of the payee the word "collector,"¹²⁸ "cashier,"¹²⁹ "junior"¹³⁰ and "guardian."¹³¹ And there is a material alteration where there is an indorsement to a special person

¹²⁰ *Eckert v. Louis*, 84 Ind. 99, holding that such an alteration by the agent of the principal without the knowledge or consent of the surety is material and releases the surety from all liability thereunder.

¹²¹ *Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 499, in which the court said: "It is true that the alteration is of such a nature as to be apparently against the interest of the holder of the note. This, however, cannot make any difference in the result; for the note as altered does not contain the contract as the parties saw fit to make it." Per *Gilchrist, J. Heath v. Blake*, 28 S. C. 406, 5 S. E. 842. But see *Eddy v. Bond*, 19 Me. 461, 36 Am. Dec. 767.

¹²² *Robinson v. Berryman*, 22 Mo. App. 509; *Erickson v. First Nat. Bank*, 44 Neb. 622, 62 N. W. 1078, 48 Am. St. R. 753, 28 L. R. A. 577; *Davis v. Bauer*, 41 Ohio St. 257; *Sneed v. Milling Co.*, 73 Fed. 925, 20 C. C. A. 230, affg. 71 Fed. 493, 18 C. C. A. 213.

¹²³ *Stoddard v. Penniman*, 108 Mass. 366, 11 Am. Rep. 363; *Erickson v. First National Bank*, 44 Neb. 622, 62 N. W. 1078, 48 Am. St. R.

753, 28 L. R. A. 577; *Hoffman v. Planters' National Bank*, 99 Va. 480, 39 S. E. 134. *First Nat. Bank v. Gridley*, 112 App. Div. (N. Y.) 398, 98 N. Y. Supp. 445.

¹²⁴ *Aldrich v. Smith*, 37 Mich. 468, 26 Am. Rep. 536.

¹²⁵ *Bell v. Mahin*, 69 Iowa 408, 29 N. W. 331.

¹²⁶ *Horn v. Bank*, 32 Kan. 518, 4 Pac. 1022, holding that an alteration with consent of one maker will release a co-maker.

¹²⁷ *German Bank v. Dunn*, 62 Mo. 79.

¹²⁸ *York v. Jones*, 43 N. J. L. 332, holding that where such an alteration was shown to have been made by the payee, the admission of the note in evidence was properly refused on the ground that it was an altered instrument.

¹²⁹ *Hodge v. Bank*, 7 Ind. App. 94, 34 N. E. 123, holding that by such change the instrument was rendered payable to the bank of which payee was cashier. See also, *Birmingham Trust and Sav. Co. v. Whitney*, 183 N. Y. 522, 76 N. E. 1089.

¹³⁰ *Broughton v. Fuller*, 9 Vt. 373.

¹³¹ *Jackson v. Cooper*, 19 Ky. Law Rep. 9, 39 S. W. 39.

and the name of such person is erased and another inserted.¹³² If, however, the alteration is an immaterial one it will not defeat recovery as where the surname of the payee, to whom the note was originally given, is inserted.¹³³ And where a note is made payable to a firm it has been decided that it is no defense to an action against a surety that it was subsequently altered by inserting a different firm name where it was merely another designation of the same partnership.¹³⁴ Again it has been held immaterial where the words "and Co." have in good faith been added to the name of the payee.¹³⁵

§ 159. **Same subject—To correct mistake.**—An alteration which is made for the mere purpose of correcting a mistake in the name of the payee and to make that name conform to the intention of the parties, as where it is spelled incorrectly or an initial is left out or a wrong initial is inserted will not avoid a bill or note.¹³⁶

§ 160. **Alteration as to negotiable words.**—The existence in a note of words which affect its negotiability is an important element of the contract which may be determinative of the liability of the parties to the instrument. Therefore the alteration of a non-negotiable note so as to give it the form and appearance of negotiable paper will be material and constitute a good defense in behalf of one not consenting thereto even as against a *bona fide* holder.¹³⁷

¹³² Piersol v. Grimes, 30 Ind. 129, 95 Am. Dec. 673; Grimes v. Piersol, 25 Ind. 246.

¹³³ Mouchet v. Cason, 1 Brev. (S. C.) 307.

¹³⁴ Arnold v. Jones, 2 R. I. 345 holding that the maker by giving the note to a firm intended to become liable to whoever might compose the firm and that the defendant's liability as surety did not depend upon the evidence which this note afforded, but upon evidence *alibunde* of proof of names of the individuals who composed the firm.

¹³⁵ Elliott v. Blair, 47 Ill. 342.

¹³⁶ Cole v. Hills, 44 N. H. 227 holding that where a note intended to be made payable to Benjamin Cole was made to Benjamin R. Cole, the

erasure of the letter R was immaterial. Derby v. Thrall, 44 Vt. 413, 8 Am. Rep. 389 holding that it was no defense that a note payable to Franklin Derby was altered to Francis E. Derby, which was the correct name of the payee.

¹³⁷ Winter v. Loeb, 100 Ala. 503, 14 So. 411; Hardy v. Norton, 66 Barb. (N. Y.) 527, 534; Morehead v. Parkersburg National Bank, 5 W. Va. 74, 13 Am. Rep. 636.

"That the insertion of words making a note negotiable, which before was not so, is a material alteration, cannot, I think, be doubted. It is a different instrument and may materially change the rights and liability of the maker." Bruce v. Westcott, 3 Barb. (N. Y.) 374, per Hand,

§ 161. Substitution or addition of words "or order," "or bearer."

The addition of the words "or bearer" or the substitution of such words for the words "or order," which have been erased, will be a material alteration of an instrument of which a party not consenting thereto may avail himself as a defense.¹³⁸ And it has also been so held where the word "order" was changed to "holder."¹³⁹ And the insertion of the words "or order" is a material alteration which will be a defense.¹⁴⁰ In such a case the burden is held to be on the plaintiff to show that the alteration was made with the knowledge or consent of the defendant.¹⁴¹ And if made with the consent of the defendant, as for the purpose of correcting a mistake, and to have the instrument accord with the intent of the parties, it will be no defense.¹⁴² Nor can recovery be defeated by showing that such words have been inserted, where done by a stranger, the act in such case being regarded as a mere spoliation.¹⁴³ And where a note was payable only on a certain contingency and was not negotiable, and the alteration by the insertion of such words did not make it so, it was decided that it was no defense.¹⁴⁴

§ 162. Alteration of place of payment.—An alteration of the place specified in a bill or note for payment is material and in an action

J. Striking out the words in a note, "agreeing to pay all expenses incurred by suit or otherwise in attempting the collection of this note, including reasonable attorney's fees," which words rendered the note non-negotiable, is a material alteration. *First National Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473.

¹³⁸ *Iowa*.—*Needles v. Shaffer*, 60 Iowa 65, 14 N. W. 129.

Maine.—*Crosswell v. Lebreer*, 81 Me. 44, 16 Atl. 331, 10 Am. St. R. 238.

Mississippi.—*Simmons v. Atkinson*, 69 Miss. 862, 12 So. 263, 23 L. R. A. 599.

Nebraska.—*Walton Plow Co. v. Campbell*, 35 Neb. 174, 52 N. W. 883 16 L. R. A. 468.

New York.—*Booth v. Powers*, 56 N. Y. 22.

Wisconsin.—*Union National Bank v. Roberts*, 45 Wis. 373. But see:

Michigan.—*Weaver v. Bromley*, 65 Mich. 212, 31 N. W. 839.

¹³⁹ *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567.

¹⁴⁰ *Johnson v. Bank*, 2 B. Mon. (Ky.) 310; *Haines v. Dennett*, 11 N. H. 180; *Bruce v. Westcott*, 3 Barb. (N. Y.) 374; *Pepoon v. Stagg*, 1 Nott & McC. (S. C.) 102.

¹⁴¹ *Schroeder v. Webster*, 88 Iowa 627, 55 N. W. 569.

¹⁴² *Kershaw v. Cox*, 3 Esp. 246; *Bryon v. Thompson*, 11 Adol. & E. 31; *Cariss v. Tattersall*, 2 Man. & G. 890.

¹⁴³ *Andrews v. Calloway*, 50 Ark. 358, 7 S. W. 449; *Union National Bank v. Roberts*, 45 Wis. 373.

¹⁴⁴ *Goodenow v. Curtis*, 33 Mich. 505.

against one not consenting thereto will be a good defense even as against a *bona fide* holder.¹⁴⁵ So an alteration by a drawer of the place named in an acceptance will be a good defense to an action against the acceptor who has not consented thereto.¹⁴⁶ A party, however, who has consented to such an alteration cannot avail himself of this defense.¹⁴⁷ And an alteration, erasure, or addition of a place of payment by a stranger will be regarded merely as an act of spoliation which will not prevent a recovery on the instrument.¹⁴⁸

§ 163. Same subject—By agent before delivery.—Where an authorized agent of a corporation having power to negotiate a loan and secure it by the corporate note alters the place of payment of such note as expressed therein prior to delivery of the instrument to the payee, such alteration will be no defense to an action thereon against the corporation.¹⁴⁹ And where the payee's clerk makes an unauthorized alteration of a note as to the place of payment, which is subsequently erased, and the note restored to its original form, such alteration is held to be no defense.¹⁵⁰

§ 164. Designation of place of payment where none specified. Where no place of payment is specified in a bill or note the rule seems to be that the designation of a place will constitute a material alteration which will be a good defense.¹⁵¹ And it has been declared that

¹⁴⁵ *Sudler v. Collins*, 2 *Houst.* (Del.) 538; *Charlton v. Reed*, 61 *Iowa* 166, 16 *N. W.* 64, 47 *Am. Rep.* 808; *Adair v. England*, 58 *Iowa* 314, 12 *N. W.* 277; *Bank of Ohio Valley v. Lockwood*, 13 *W. Va.* 392, 31 *Am. Rep.* 768; *McQueen v. McIntyre*, 30 *Up. Can. C. P.* 426.

¹⁴⁶ *Tidmarsh v. Grover*, 1 *Maule & S.* 735.

¹⁴⁷ *Walter v. Cubley*, 2 *Crompt. & M.* 151.

¹⁴⁸ *Port Huron Engine & Thresher Co. v. Sherman*, 14 *S. D.* 461, 85 *N. W.* 1008; *Major v. Hansen*, 2 *Biss.* (U. S.) 195, *Fed. Cas. No.* 8982.

¹⁴⁹ *Pelton v. Lumber Co.*, 113 *Cal.* 21, 45 *Pac.* 12.

¹⁵⁰ *Acme Harvester Co. v. Butterfield*, 12 *S. Dak.* 91, 80 *N. W.* 170.

¹⁵¹ *Alabama*.—*Winter v. Pool*, 100 *Ala.* 503, 14 *So.* 411.

Delaware.—*Sudler v. Collins*, 2 *Houst.* (Del.) 538.

Indiana.—*Cronkhite v. Nebeker*, 81 *Ind.* 319, 42 *Am. Rep.* 127.

Mississippi.—*Simmons v. Atkinson & Lampton Co.*, 69 *Miss.* 862, 12 *So.* 263, 23 *L. R. A.* 599.

New York.—*Nazro v. Fuller*, 24 *Wend.* (N. Y.) 374.

Ohio.—*Sturges v. Williams*, 9 *Ohio St.* 443, 75 *Am. Dec.* 473.

Pennsylvania.—*Southwark Bank v. Gross*, 35 *Pa. St.* 80. See:

California.—*Pelton v. Lumber Co.*, 113 *Cal.* 21, 45 *Pac.* 12, holding that a note in such a case is only payable in the state where executed, and the naming of a place out of

the rule is especially applicable where the note is rendered negotiable by such alteration.¹⁵² So where by statute a place of payment is required in a note to render it negotiable the insertion, in a note which contains no such designation, of a place of payment is a material alteration which will avoid the instrument as to all parties who do not consent thereto.¹⁵³ So, in such a case, in an action against an indorser, it has been decided that where no place is specified, an indorser's contract is that, if the same be duly presented to the maker at maturity either to him personally, at his residence or place of business and the same is not paid, the indorser will pay it, and that an alteration to another place is material and will release him.¹⁵⁴ The rule has been applied in the case of an acceptance where no place of payment is specified and one is inserted, it being held that it is a material alteration which will defeat recovery except as to such parties who may have consented thereto or have ratified the same.¹⁵⁵ And where words as to the place payable are inserted with the consent of the makers of a note it will operate to release the guarantors.¹⁵⁶

§ 165. **Alteration of amount.**—An alteration of the amount for which a bill or note is given is a material one which may be shown in

the state is a material alteration and releases indorsers having no knowledge or not consenting.

See further, *Bowen v. Laird* (Ind. App. 1906), 77 N. E. 295.

¹⁵² *Cronkhite v. Nebeker*, 81 Ind. 319, 42 Am. Rep. 127; *Ballard v. Insurance Co.*, 81 Ind. 239; *McCoy v. Lockwood*, 71 Ind. 319; *Morehead v. Bank*, 5 W. Va. 74.

¹⁵³ "The words so said to have been added made the note import negotiability, whereas under our statute, without words designating a place of payment, the instrument would not have been negotiable. An alteration which makes a note speak a language different in legal effect from that which it originally spoke is material, and when made by one not a stranger to the paper is ordinarily sufficient to avoid the contract as to all parties not consenting thereto." Per Sharpe, J., in *Carroll v. Warren* (Ala. 1904), 37 So. 687, 688.

¹⁵⁴ *Townsend v. Wagon Co.*, 10 Neb. 615, 7 N. W. 274; *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391. But see *Schuler v. Gillette*, 12 Hun (N. Y.) 278, holding that where merely a place is designated in the same town in which plaintiff resides and the bill is payable there is not a material alteration, which will release an indorser. *Etz v. Place*, 81 Hun (N. Y.) 203, 30 N. Y. Supp. 765.

¹⁵⁵ *Whitesides v. Bank*, 10 Bush (Ky.) 501, 19 Am. Rep. 74; *Cowie v. Halsall*, 4 Barn. & Ald. 197; *Calvert v. Baker*, 4 Mees. & W. 417; *Crotty v. Hodges*, 4 Man. & G. 561; *Burchfield v. Moore*, 3 El. & Bl. 683; *Desbrow v. Weatherly*, 6 Car. & P. 758; *Hanbury v. Lovett*, 18 Law T. N. S. 366. But see *Trapp v. Spearman*, 3 Esp. 57.

¹⁵⁶ *Pahlman v. Taylor*, 75 Ill. 629.

defense to an action, even though the instrument is in the hands of a *bona fide* holder.¹⁵⁷ And, though the alteration is not disadvantageous to the one responsible, as where the instrument is changed to express a smaller amount, yet it will defeat recovery on the principle that it makes another and different contract.¹⁵⁸ If, however, the alteration is made by a stranger to the instrument it is then held to be no defense.¹⁵⁹

§ 166. Same subject.—Where there are marginal figures.—Marginal figures are held to form no part of the instrument, being merely in the nature of memorandum for convenience, and the fact that the same have been altered in order to have them conform to the amount expressed in the body of the paper will not defeat a recovery thereon.¹⁶⁰ And where a blank space has been left in the body of such an instrument where the amount is to be inserted, the fact that it has been filled to express a different amount than is indicated by marginal figures and that such figures have been erased or cut off will be no defense as

¹⁵⁷ *Arkansas*.—*Fordyce v. Kosminski*, 49 Ark. 40, 3 S. W. 892, 4 Am. St. R. 18.

Connecticut.—*Ætna National Bank v. Winchester*, 43 Conn. 391.

Indiana.—*Fudge v. Marquell*, 164 Ind. 447, 72 N. E. 565.

Iowa.—*Knoxville National Bank v. Clark*, 51 Iowa 264, 1 N. W. 491, 33 Am. Rep. 129.

Kansas.—*Bank of Herington v. Wangerin*, 65 Kan. 423, 70 Pac. 330.

Maine.—*Dodge v. Haskell*, 69 Me. 429.

Maryland.—*Burrows v. Klunk*, 70 Md. 451, 17 Atl. 378, 3 L. R. A. 576, 14 Am. St. R. 371.

Massachusetts.—*Greenfield Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Citizens' National Bank v. Richmond*, 121 Mass. 110; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92 n; *Wade v. Withington*. 83 Mass. (1 Allen) 561.

New Hampshire.—*Goodman v. Eastman*, 4 N. H. 455.

New York.—*Flannagan v. Na-*

tional Union Bank, 2 N. Y. Supp. 488.

Pennsylvania.—*Leas v. Walls*, 101 Pa. St. 57, 47 Am. Rep. 699.

South Carolina.—*Mills v. Starr*, 2 Bailey (S. C.) 359.

Virginia.—*Batchelder v. White*, 80 Va. 103. See:

England.—*Hall v. Fuller*, 5 Barn. & C. 750. But see:

Pennsylvania.—*Worrall v. Green*, 39 Pa. St. 388.

Illinois.—An alteration of the provision as to the amount to be paid for attorney's fees is material. *Burwell v. Orr*, 84 Ill. 465.

¹⁵⁸ *Hewins v. Cargill*, 67 Me. 554; *State Savings Bank v. Shaffer*, 9 Neb. 1, 1 N. W. 980, 31 Am. Rep. 394; *Adams v. Faircloth* (Tex. Civ. App. 1906), 97 S. W. 507.

¹⁵⁹ *Drum v. Drum*, 133 Mass. 566.

¹⁶⁰ *Horton v. Horton's Estate*, 71 Iowa 448, 32 N. W. 452; *Woolfolk v. Bank*, 10 Bush (Ky.) 504; *Smith v. Smith*, 1 R. I. 398, 53 Am. Dec. 652.

against a *bona fide* holder.¹⁶¹ As against the payee, however, such a defense may be available,¹⁶² or as against one who takes the paper with notice or knowledge of such facts.¹⁶³

§ 167. **Alteration in medium of payment.**—That there has been a material alteration in the medium in which a bill or note is payable will be a good defense to an action thereon.¹⁶⁴ So the insertion of the words “in gold” or “in gold coin” will be a material alteration which will defeat recovery.¹⁶⁵ But the writing across the face of a draft the words “payable in United States gold coin” has been held immaterial and no defense where it was the act of a stranger.¹⁶⁶

§ 168. **Alteration of interest clause.**—A party may show in an action against him on a bill or note that the interest clause therein has been altered without his knowledge or consent, and this defense is available even where the action is brought by a *bona fide* holder.¹⁶⁷

¹⁶¹ *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39; *Garrard v. Lewis*, L. R. 10 Q. B. Div. 30.

“Without the figures the blank signature was an authority to fill up with any sum, and the office of the figures was merely to limit the authority and to convey notice to parties interested of the fact of limitation. They were no part of the note, for there was no note of which they could form any part. The paper was a mere power of attorney, with private instructions given in such form as to be conspicuous and not easily suppressed. It is the business of the principal to give notice to parties dealing with the agent of the fact of private instructions or limitations upon his authority. He must do so at his own risk, and if he adopts means to that end, which prove ineffectual through the fault of his agent, the principal, and not the stranger who has dealt with the agent in good faith, must suffer the

loss.” *Schryver v. Hawkes*, 22 Ohio St. 308, 315, per Welch, C. J.

¹⁶² *Hall v. Bank*, 5 Dana (Ky.) 258.

¹⁶³ *Woolfolk v. Bank*, 10 Bush (Ky.) 504.

¹⁶⁴ *Martendale v. Follett*, 1 N. H. 95, holding that recovery on a note payable in merchantable meat stock may be defeated by showing that the word “young” was inserted after word merchantable. *Darwin v. Rippey*, 63 N. C. 318 so hold where words “in specie” were added after word “dollars.” See *Church v. Howard*, 17 Hun (N. Y.) 5, reversed in 79 N. Y. 415, but not on this point.

¹⁶⁵ *Wills v. Wilson*, 3 Oreg. 308; *Bogarath v. Breedlove*, 39 Tex. 561. Compare *Bridges v. Winters*, 42 Miss. 135, 2 Am. Rep. 595, 97 Am. Dec. 443.

¹⁶⁶ *Langenberger v. Kroeger*, 48 Cal. 147.

¹⁶⁷ *Illinois*.—*Canon v. Grigsby*, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769; *Benedict v. Miner*, 58 Ill. 19; *Black v. Bowman*, 15 Ill. App. 166.

This rule has been applied where words have been struck out, as in the case of an acknowledgment that interest has been paid to maturity,¹⁶⁸ and where the words "after maturity" or "after due" have been struck out so as to make the paper bear interest from its date.¹⁶⁹ And likewise recovery may be defeated by the addition of such words as "with interest,"¹⁷⁰ "after maturity" after the interest clause,¹⁷¹ by changing the words "after maturity" to "after date,"¹⁷² or by changing the instrument from a simple interest obligation to a semi-annual or an annual obligation.¹⁷³ And though such an alteration is made by one for the purpose of having it conform to the intention of the parties it will nevertheless be a defense to an action on the instrument,¹⁷⁴ though it will not defeat recovery on the original consideration.¹⁷⁵ And the addition of words to, or alteration of, the interest clause, where the act of a stranger, will be no defense.¹⁷⁶

Indiana.—Dietz v. Harder, 72 Ind. 208.

Iowa.—Woodworth v. Anderson, 63 Iowa 503, 19 N. W. 296; Marsh v. Griffin, 42 Iowa 403.

Ohio.—Patterson v. McNeely, 16 Ohio St. 348.

Pennsylvania.—Gettysburg National Bank v. Chisolm, 169 Pa. St. 564, 32 Atl. 730.

South Carolina.—Edwards v. Sarter, 69 S. C. 540, 48 S. E. 537.

Texas.—Otto v. Halff, 89 Tex. 384, 34 S. W. 910, 59 Am. St. R. 56.

¹⁶⁸ Hert v. Oehler, 80 Ind. 83.

¹⁶⁹ Brooks v. Allen, 62 Ind. 401; Page v. Danaher, 43 Wis. 221.

¹⁷⁰ Waterman v. Vose, 43 Me. 504; Mount Morris Bank v. Lawson, 10 Misc. R. (N. Y.) 359, 31 N. Y. Supp. 18.

¹⁷¹ Franklin Life Ins. Co. v. Courtney, 60 Ind. 134; Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15.

¹⁷² Fraker v. Collum, 21 Kan. 555.

¹⁷³ *Iowa*.—Marsh v. Griffin, 42 Iowa 403.

Kentucky.—Blakely v. Johnson, 13 Bush (Ky.) 197.

New York.—Dewey v. Reed, 40 Barb. (N. Y.) 16.

Ohio.—Boalt v. Brown, 13 Ohio St. 364.

South Carolina.—Kennedy v. Moore, 17 S. C. 464. But see:

Michigan.—Leonard v. Phillips, 39 Mich. 182, 33 Am. Rep. 370.

¹⁷⁴ "It is designed distinctly to assert that if mistakes do arise in the preparation of written instruments that aside from consent of all parties interested in the needed correction, the courts of the country alone can furnish adequate redress; and that we will not give sanction or countenance to the attempts of an interested party to effect by his own hand the desired reformation, as an honest blunder of this sort, if upheld in one instance, might necessitate sanctioning an alteration having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise." Evans v. Foreman, 60 Mo. 449, 452, per Sherwood, J.

¹⁷⁵ Otto v. Halff, 89 Tex. 384, 34 S. W. 910, 59 Am. St. R. 56.

¹⁷⁶ Brooks v. Allen, 62 Ind. 401; Lubbering v. Kohlbrecher, 22 Mo. 596.

§ 169. **Same subject—Rate of interest.**—An alteration as to the rate of interest is a material one which will defeat recovery on the instrument in an action by a *bona fide* holder.¹⁷⁷ And this rule applies alike to cases where the rate has been increased,¹⁷⁸ or where it has been reduced.¹⁷⁹ Such an alteration, however, is not available to a party as a defense where made with his consent or ratified by him.¹⁸⁰ And the insertion in a note of a rate of interest which does not increase or reduce the rate in the note as originally drawn has been held immaterial.¹⁸¹ Again in an action against a surety it has been decided that a memorandum on the back of the note of a reduction in the rate of interest after a certain date is not a material alteration but simply evidence of an independent collateral agreement, having no more effect than if written on a separate paper.¹⁸² Nor will an offer indorsed by the payee on the back of a note to accept less interest than is stipulated on the face of the instrument constitute a material alteration which will defeat recovery.¹⁸³ In the case of an alteration by a party to the paper which is against his interest and to the advantage of the parties liable, as where the rate of interest has been reduced, the presumption of fraud is rebutted in the absence of other facts and recovery on the original consideration is not precluded.¹⁸⁴

§ 170. **Addition of an interest clause.**—Where there is no interest clause in an instrument as originally drawn it may be shown in defense to an action thereon that it has been altered by the addition of such a clause.¹⁸⁵ So it may be shown in defense to an action on such

¹⁷⁷ *Shank v. Albert*, 47 Ind. 461;
Sanders v. Bagwell, 37 S. C. 145, 15
S. E. 714; *Halcrow v. Kelly*, 28 Up.
Can. Q. B. 551.

¹⁷⁸ *Bowman v. Mitchell*, 79 Ind. 84;
Harsh v. Klepper, 28 Ohio St. 200.

¹⁷⁹ *Indiana*.—*Post v. Losey*, 111
Ind. 74, 12 N. E. 121, 60 Am. St. R.
677. *Kansas*.—*New York Life Ins.*
Co. v. Martindale (Kan. 1907), 88
Pac. 559. *Minnesota*.—*Board of Com-*
missioners v. Greenleaf, 80 Minn.
242, 83 N. W. 157. *Missouri*.—*Moore*
v. Hutchinson, 69 Mo. 429; *Whitmer*
v. Frye, 10 Mo. 348. *England*.—*Sut-*
ton v. Toomer, 7 Barn. & C. 416.

¹⁸⁰ *Jacobs v. Gilreath*, 45 S. C. 46,
22 S. E. 757.

¹⁸¹ *First National Bank v. Carson*,
60 Mich. 432, 27 N. W. 589.

¹⁸² *Cambridge Savings Bank v.*
Hyde, 131 Mass. 77, 41 Am. Rep.
193.

¹⁸³ *Reed v. Culp*, 63 Kan. 595, 66
Pac. 616.

¹⁸⁴ *Keene v. Weeks*, 19 R. I. 446, 3
Atl. 446.

¹⁸⁵ *Alabama*.—*Lamar v. Brown*, 56
Ala. 157; *Glover v. Robbins*, 49 Ala.
219, 20 Am. Rep. 272; *Brown v.*
Jones, 3 Port. (Ala.) 420.

Delaware.—*Warpole v. Ellison*, 4
Houst. (Del.) 322.

District of Columbia.—*Lewis v.*
Shepherd, 1 Mackey (D. C.) 46.

Indiana.—*Hart v. Clouser*, 30 Ind.
210; *Kountz v. Hart*, 17 Ind. 329.

Iowa.—*Derr v. Keaough*, 96 Iowa
397, 65 N. W. 339.

an instrument that figures have been inserted indicating a rate of interest to which the parties had not agreed.¹⁸⁶ And the rule is held to apply where a rate higher than that which is allowed by law is inserted.¹⁸⁷ And an accommodation indorser will be discharged by the insertion of a rate of interest without his consent which is the maximum rate which the law allows in cases of special agreement.¹⁸⁸ If, however, the rate is the legal rate and one which the instrument would draw any way it will be no defense, there being no material alteration.¹⁸⁹ And it has been determined that an innocent holder will not be precluded from a recovery in such a case where the clause added

Maine.—*Waterman v. Vose*, 43 Me. 504.

Maryland.—*Owen v. Hall*, 70 Md. 97, 16 Atl. 376.

Massachusetts.—*Draper v. Wood*, 112 Mass. 315.

Michigan.—*Bradley v. Mann*, 37 Mich. 1; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 61.

Missouri.—*Iron Mountain Bank v. Murdock*, 62 Mo. 70; *Capital Bank v. Armstrong*, 62 Mo. 59; *Evans v. Foreman*, 60 Mo. 449.

Nebraska.—*Hurlbut v. Hall*, 39 Neb. 889, 58 N. W. 538.

New York.—*Schwartz v. Oppold*, 74 N. Y. 307; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372; *Meyer v. Huneke*, 55 N. Y. 412; *Meise v. Doscher*, 83 Hun (N. Y.) 580, 31 N. Y. Supp. 1072.

North Carolina.—*Long v. Mason*, 84 N. C. 15.

Ohio.—*Jones v. Banks*, 40 Ohio St. 139.

Pennsylvania.—*Gettysburg National Bank v. Chisolm*, 169 Pa. St. 564, 32 Atl. 730, 47 Am. St. R. 929; *Boustead v. Cuyler*, 116 Pa. St. 551, 8 Atl. 848; *Craighead v. McLoney*, 99 Pa. St. 211.

South Carolina.—*Sanders v. Bagwell*, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743.

Tennessee.—*McVey v. Ely*, 73 Tenn. (5 Lea.) 438.

Texas.—*Farmers' & Merchants' Nat. Bank v. Novich*, 89 Tex. 381, 34 S. W. 914.

Wisconsin.—*Kilkelly v. Martin*, 34 Wis. 525.

Canada.—*Halcrow v. Kelly*, 28 Up. Can. C. P. 551. But see:

Iowa.—*Rainbolt v. Eddy*, 34 Iowa 440, 11 Am. Rep. 152.

¹⁸⁶ *Little Rock Trust Co. v. Martin*, 57 Ark. 277, 21 S. W. 468; *Derr v. Keaough*, 96 Iowa 396, 65 N. W. 339; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Hurlbut v. Hall*, 39 Neb. 889, 58 N. W. 538; *Davis v. Henry*, 13 Neb. 497, 14 N. W. 523.

¹⁸⁷ *Hoopess v. Collingwood*, 10 Colo. 107, 13 Pac. 909, 3 Am. St. R. 565; *Lee v. Starbird*, 55 Me. 491; *Warrington v. Early*, 2 El. & Bl. 763. But see *Keene's Adm'r v. Miller*, 103 Ky. 628, 45 S. W. 1041, holding that the insertion by the maker of a rate of interest which is illegal and unenforceable does not vary the legal obligation of a surety.

¹⁸⁸ *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274.

¹⁸⁹ *James v. Dalbey*, 107 Iowa 463, 78 N. W. 51; *First National Bank v. Carlson*, 60 Mich. 432, 22 N. W. 589.

has been subsequently erased,¹⁰⁰ though it has been held that where

¹⁰⁰ *Shepherd v. Whetstone*, 51 Iowa 457, 1 N. W. 753, 33 Am. Rep. 143. It appeared in this case that the words "ten per cent. interest from date" had been added in blank space, after word "at," which was evidently for the insertion of the name of the place where the note should be payable, and was subsequently erased before coming into the hands of the plaintiff, who was a purchaser for value. That there had been an erasure was manifest from the face of the instrument. The court said: "This alteration, if it had been allowed to remain, was certainly sufficient to invalidate the note in the hands of the payee. The question presented is as to whether the fact that the words constituting the alteration were erased, and the note transferred to the plaintiff, is sufficient to enable him to recover notwithstanding the alteration. Where the note is restored, as in this case, to its original form it expresses the precise contract which the parties entered into, and the objection, if any, to enforcing such contract must rest upon grounds of public policy, and not upon the necessity of protecting the maker in the individual case. * * * Conceding the importance of discouraging the alteration of instruments is such that a court is justified in declaring invalid an instrument which has been altered, and which remains in the hands of the person who made the alteration, notwithstanding the restoration of the instrument, it is evident that it should not be held invalid in the hands of an innocent purchaser for value. The punishment of an innocent person for an act done by another has no tenden-

cy to subserve the public interest or promote the public security. That the plaintiff is a purchaser for value is not denied. Whether he purchased with notice that the instrument had been altered admits of some question. He had notice, of course, of what appears upon the face of the instrument, and it is insisted by the defendant that the instrument reveals an erasure, in proof of which the instrument itself has been submitted to our inspection. There does manifestly appear an erasure. But an erasure is not necessarily an alteration. It is so only when made subsequent to delivery. * * * This blank was filled with certain words which were afterward erased. This was all that the plaintiff could see. The reasonable inference was that the note, as first drawn, was made payable at a particular place, and afterward, by erasure, was made payable generally. We see nothing in this to indicate that the erasure was not made before delivery. But the defendant insists that, conceding that such was the reasonable inference there was enough in the mere fact of erasure to put the plaintiff upon inquiry. But this doctrine, in our opinion, has no application. A person is put upon inquiry only when he has reason to apprehend that the claim which he is about to acquire will conflict with another person's substantial rights. But the instrument in this case cannot, as we have seen, be declared invalid upon the ground that the defendant's just protection requires it, the contract expressed by it being precisely the contract which he entered into." Per Adams, J.

such a clause is added by the payee to a sealed note it will be a good defense to an action by him, though he subsequently erases the same.¹⁹¹

§ 171. **Alteration of conditions or stipulations.**—Where a note is materially altered by the erasure of some condition or stipulation which forms a part of the instrument or by the addition thereto of a condition or stipulation such fact may be set up in defense to an action thereon.¹⁹² And, though the instrument is in the hands of a *bona fide* holder he will be subject to this defense.¹⁹³ So where a condition was annexed to a note and was an essential part thereof, the fact that it has been detached from the instrument may be shown in defense.¹⁹⁴ And a stipulation in a note as to attorney's fees while not material as affecting the negotiability of the paper is material so far as the contract liabilities of the parties are concerned and in case the indorsers of a note strike out such a clause the maker will be relieved from liability to them.¹⁹⁵ It has been declared, however, that a duty rests upon a maker to protect himself from executing paper in such a form as to easily permit of fraudulent practices,¹⁹⁶ and that he may be precluded from setting up this defense against a *bona fide* holder where it appears that he so negligently executed the note as to enable one to easily remove a condition affixed thereto without in any way defacing

¹⁹¹ Plyler v. Elliott, 19 S. C. 257.

¹⁹² Tate v. Fletcher, 77 Ind. 102, so holding where the provision as to the payment of attorney's fees was altered by striking out the words "if suit be instituted," thus rendering a conditional promise to pay such fees into an absolute one; Hemming v. Trenery, 9 Adol. & El. 926, so holding where a condition was inserted. Compare Jackson v. Boyles, 64 Iowa 428, 20 N. W. 746, holding that, where a note is conditioned for payment on the performance of a written agreement, an endorsement after delivery and without the surety's consent that such condition had been performed, was not so material as to discharge the surety.

¹⁹³ Schofield v. Ford, 56 Iowa 370, 9 N. W. 309; Davis v. Henry, 13 Neb. 497, 14 N. W. 523; Palmer v. Sargent, 5 Neb. 223, 25 Am. Rep. 479;

Gerrish v. Glines, 56 N. H. 9; Benedict v. Cowden, 49 N. Y. 396, 10 Am. Rep. 382. But see Elliott v. Levinge, 54 Ill. 213.

¹⁹⁴ Indiana.—Cochran v. Nebeker, 48 Ind. 459.

Maine.—Johnson v. Heagan, 23 Me. 329.

Massachusetts.—Wheelock v. Freeman, 30 Mass. (13 Pick.) 165, 23 Am. Dec. 674.

Michigan.—Wait v. Pomeroy, 20 Mich. 425, 4 Am. Rep. 395.

Nebraska.—Davis v. Henry, 13 Neb. 497, 14 N. W. 523.

New Hampshire.—Benedict v. Cowden, 49 N. H. 396.

Tennessee.—Stephens v. Davis, 85 Tenn. 271, 2 S. W. 382.

¹⁹⁵ White v. Harris, 69 S. C. 65, 48 S. E. 41.

¹⁹⁶ Zimmerman v. Rote, 75 Pa. St. 188.

the note.¹⁹⁷ And the erasure of the words "upon condition" where no condition is specified is held not to affect the liability of the parties, these words by themselves being declared to be immaterial.^{197*}

§ 172. **Erasure or alteration of maker's signature.**—In an action against one of the parties to a bill or note he may show, in defense thereto, that there has been a material alteration of the paper by the erasure or cutting off of one of the signatures of one or more of the makers.¹⁹⁸ And the rule is held to be applicable, though the note is a joint and several one.¹⁹⁹ So where the signature of a maker was cut off and the name of another added as co-maker in his place it was held to avoid the note.²⁰⁰ And where the signature of a signer of a note was erased before delivery of the same, without the knowledge of the sureties, it was held that they were released from any liability thereon, though the one to whom it was delivered procured such person to again sign the same as such subsequent signing could not restore the note to its former position.²⁰¹ This rule has also been held to apply in the case of an instrument of guaranty.²⁰² Where, however, the signature of an infant co-maker is erased after his contract has been repudiated, it is decided that such erasure is no defense.²⁰³ And one whose name as co-maker is erased upon part payment of the amount called for by the obligation cannot defeat an action for the unpaid balance by setting up such erasure.²⁰⁴ Again, though a signature has not been erased yet recovery may be defeated by showing that such signature has been materially altered.²⁰⁵ So there has been held to be a material altera-

¹⁹⁷ *Noll v. Smith*, 64 Ind. 511, 31 Am. Rep. 131; *Gornell v. Nebeker*, 58 Ind. 425. See *Scofield v. Ford*, 56 Iowa 370, 9 N. W. 309, holding that in such a case the burden of proof rests on the one claiming under the instrument to show negligence.

^{197*} *Palmer v. Sargent*, 5 Neb. 223.

¹⁹⁸ *Gillett v. Sweat*, 6 Ill. 475; *Morrison v. Garth*, 78 Mo. 434; *People v. Call*, 1 Denio (N. Y.) 120; *Barrington v. Bank of Washington*, 14 Serg. & R. (Pa.) 405; *Piercy's Heir v. Piercy*, 5 W. Va. 199. Compare *Dunn v. Clements*, 52 N. C. 58.

¹⁹⁹ *Mason v. Bradley*, 11 Mees & W. 590; *Nicholson v. Revill*, 4 Adol.

& E. 675, holding that a maker was discharged in such a case where the payee received from a co-maker his proportionate share of the note, released him from liability, and cut his name off the note.

²⁰⁰ *Davis v. Coleman*, 29 N. C. 424; *Smith v. Weld*, 2 Pa. St. 54.

²⁰¹ *Connor v. Thornton* (Tex.), 51 S. W. 354.

²⁰² *Hindostan v. Smith*, 36 Law J. C. P. 241.

²⁰³ *Young v. Currier*, 63 N. H. 419.

²⁰⁴ *Eldred v. Peterson*, 80 Iowa 264, 45 N. W. 755, 20 Am. St. R. 416.

²⁰⁵ *Sheridan v. Carpenter*, 61 Me. 83.

tion which may be set up as a defense where to the maker's signature there have been added the words "and Co.,"²⁰⁶ "President A. B. Association,"²⁰⁷ and the maker's address, by which the note is rendered negotiable.²⁰⁸

§ 173. **Same subject—When alteration not a defense.**—Though words used in connection with signatures of parties to commercial paper may be erased or words of such a character may be added, yet if by such act the rights or liabilities of the parties is in no way affected or where such words are added they are those which the law would necessarily imply, the alteration will be regarded as immaterial and will be no defense to an action on the instrument.²⁰⁹ And a retouching with ink of a signature is not a material alteration.²¹⁰

§ 174. **Rule where signatures are added.**—It is a general rule that the addition of the name of another person to a note as maker, subsequent to its execution, is a material alteration of the instrument which may be shown in defense to an action against the original parties to the instrument who have not consented thereto.²¹¹ And this is declared

²⁰⁶ *Haskell v. Champion*, 30 Mo. 136.

²⁰⁷ *First National Bank v. Fricke*, 75 Mo. 178, 42 Am. Rep. 197.

²⁰⁸ *Commercial & Farmers' Bank v. Patterson*, 2 Cranch C. C. 346, Fed. Cas. No. 3056.

²⁰⁹ In the following cases are noted the particular alterations which were held immaterial.

Colorado.—*King v. Rea*, 13 Colo. 69, 21 Pac. 1084 (making of cross after signature).

Illinois.—*Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177 (cutting off the words "as Trustee of the First Universalist Soc.").

Indiana.—*Hayes v. Matthews*, 63 Ind. 412, 30 Am. Rep. 226 (erasure of words "Trustees of the First Universalist Church").

Pennsylvania.—*Barclay v. Pursley*, 110 Pa. St. 13, 20 Atl. 411 (adding "Fr." to signature); *Strauthers v. Kendall*, 41 Pa. St. 214, 80 Am. Dec. 610 (addition of indorser's address).

Rhode Island.—*Manufacturers' & Merchants' Bank v. Follett*, 11 R. I. 92, 23 Am. Rep. 418 (addition of word "agent").

Tennessee.—*Blair v. Bank*, 30 Tenn. (11 Humph.) 84 (addition of individual signatures under joint signature).

England.—*Parston v. Petit*, 1 Camp. 82, note (writing address below signature).

²¹⁰ *United States Nat. Bank v. National Park Bank*, 59 Hun (N. Y.) 495, 13 N. Y. Supp. 411.

²¹¹ *Alabama*.—*Brown v. Johnson*, 127 Ala. 292, 28 So. 579.

Indiana.—*Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229; *Bower's Adm'r v. Briggs*, 20 Ind. 139; *Henry v. Coats*, 17 Ind. 161.

Iowa.—*Hamilton v. Hooper*, 46 Iowa 515, 26 Am. Rep. 161.

Kentucky.—*Rumley Co. v. Wilcher*, 23 Ky. Law R. 1745, 66 S. W. 7; *Singleton v. McQuerry*, 85 Ky. 41, 2 S. W. 652; *Bank of Limestone*

to be the rule regardless of the question of benefit or injury to the maker.²¹² And it has been held applicable in the case of a joint note,²¹³ and of a joint and several one.²¹⁴

§ 175. **Same subject—When not a defense.**—Though the fact that the affixing by a party of his signature to a note as maker, subsequent to its execution, will release other original makers not consenting thereto, yet recovery may be had against the one so signing it, for as to him it will be regarded as a new instrument.²¹⁵ And where a note in blank is signed by one and entrusted by him to another to be negotiated for the latter's accommodation and he adds the name of another as maker it has been decided that the accommodation maker will not be discharged, as by so signing it he gives authority to fill the blanks.²¹⁶ Again it has been decided that the adding of the name of a third party to a bill as acceptor after it was accepted by the parties to whom it was addressed and was discounted with the indorser's consent will not avoid the paper.²¹⁷ And where the object of a person's affixing his signature is to guaranty payment or to furnish additional security otherwise than by becoming or assuming to become a joint maker, if in doing so by mistake or inadvertence he signs the note in such a way as to indicate *prima facie* that he was an original promisor, it has been de-

v. Penick, 5 T. B. Mon. (Ky.) 25, 33.

Maine.—Chadwick v. Eastman, 53 Me. 12.

New York.—McVean v. Scott, 46 Barb. (N. Y.) 379; Heath v. Blake, 28 S. C. 406, 5 S. E. 842.

Texas.—Harper v. Stroud, 41 Tex. 367; Ford v. Bank (Tex. Civ. App.), 34 S. W. 684. But see:

Alabama.—Rudolph v. Brewer, 96 Ala. 189, 11 So. 314.

Michigan.—Union Banking Co. v. Martin's Estate, 113 Mich. 521, 71 N. W. 867; Miller v. Finley, 26 Mich. 249, 12 Am. 306.

²¹² Dickerman v. Miner, 43 Iowa 508.

²¹³ Wallace v. Jewell, 26 Ohio St. 163, 8 Am. Rep. 48.

²¹⁴ Shipp's Adm'r v. Suggett's Adm'r, 9 B. Mon. (Ky.) 5; Gardner v. Walsh, 5 El. & Bl. 83.

²¹⁵ Hochmark v. Richler, 16 Colo. 263, 26 Pac. 818; Browning v. Gonnell, 91 Iowa 448, 59 N. W. 340; Hamilton v. Hooper, 46 Iowa 515, 26 Am. Rep. 161; Dickerman v. Miner, 43 Iowa 508. Compare Howe v. Taggart, 133 Mass. 284.

²¹⁶ Geddes v. Blackmore, 132 Ind. 551, 32 N. E. 567; Snyder v. Van Doren, 46 Wis. 602, 1 N. W. 285, 23 Am. Rep. 739. See Whitmore v. Nickerson, 125 Mass. 496, 28 Am. Dec. 257; Babcock v. Murray, 58 Minn. 386, 59 N. W. 1038.

²¹⁷ Smith v. Lockridge, 8 Bush (Ky.) 423.

cided that a maker will not be released.²¹⁸ Nor will the fact that the payee of a note by inadvertence places his signature under that of the maker release the latter from liability.²¹⁹ And it has been determined that if no liability is imposed on the signer by the added signature, as in the case of a married woman, the liability of the original parties to the instrument will not be affected.²²⁰ Again it has been held that, where a note does not conform to the intention of the parties by reason of the accidental omission of the name of a corporation maker and it was intended to be a corporation note by the officers thereof who signed it, the note is not avoided by inserting the name of the corporation so as to correct the mistake.²²¹

§ 176. **Addition or destruction of seal.**—Where a seal affixed to a note at the time of its execution is subsequently destroyed, a party may, in the absence of any controlling statute, avail himself of such fact as a defense.²²² And a similar rule prevails where a seal is added, there being none affixed to the instrument originally. By such an act the character of the instrument is changed from a simple note of hand to that of a specialty which in point of law is of a much higher grade than a simple promissory note,²²³ against which no plea of want of consideration can be made.²²⁴ But where private seals have been

²¹⁸ *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48. See, also, *Bowser v. Rendell*, 31 Ind. 128; *Cason v. Wallace*, 4 Bush (Ky.) 388; *Denick v. Hubbard*, 27 Hun (N. Y.) 347.

²¹⁹ *Muir v. Demaree*, 12 Wend. (N. Y.) 468. See *Brownell v. Winnie*, 29 N. Y. 400, 86 Am. Dec. 314.

The signature of the payee in such a case is to be construed as a mere indorsement. *Ex p. Yates*, 2 DeGex & J. 191.

²²⁰ If all the original parties to the note had consented to the addition of her name, it would not in the slightest degree have altered their relations to the note or to each other. As the consent of the parties could add nothing to the validity of her signature, neither can the absence of consent constitute her signature an alteration of the note.

When written, it was in the eye of the law, and still is, nothing, and the defendant remains liable just as he was before it was appended. It is unnecessary to cite authority to a case like this. The general rule is well understood; we have found no case in all respects like the present, and no light is to be drawn from analogous cases." *Williams v. Jenson*, 75 Mo. 681, 684. Per Hough, J.

²²¹ *Produce Exchange Trust Co. v. Bieberbach*, 176 Mass. 577, 58 N. E. 162.

²²² *Morrison v. Welty*, 18 Md. 169; *Porter v. Doby*, 2 Rich. Eq. (S. C.) 49; *Piercy's Heirs v. Piercy*, 5 W. Va. 199.

²²³ *Biery v. Haines*, 5 Whart. (Pa.) 563.

²²⁴ *Vaughan v. Fowler*, 14 S. C. 355.

abolished by a statute providing that the addition of a private seal to an instrument will not affect its character in any respect, it will be no defense.²²⁵ And where a seal was affixed to an instrument by an agent of the maker, who had no authority to so act, it was held that the note was not avoided thereby.²²⁶

§ 177. **Alteration, erasure, or addition of names of witnesses.**—To erase or cut off the name of an attesting witness to a note has been held to be a material alteration which will be a good defense to an action on the instrument,²²⁷ as has also the subsequent addition of names of persons as witnesses.²²⁸ Where, however, a name of a witness is, by mistake, omitted it is held that the right to recover will not be affected by the subsequent addition of such name in good faith.²²⁹ And where by law it is immaterial whether an instrument has or has not an attesting witness, an attestation has no legal effect and the addition of a name as witness will be an immaterial alteration.²³⁰

§ 178. **Stamping of note.**—Under the laws in force at various times the affixing of a stamp to commercial paper has been required and in such a case it has been decided that the fact that a bill or note is stamped subsequent to its execution will be no defense to an action by a *bona fide* holder.²³¹

§ 179. **Addition or erasure of memoranda.**—The addition of a mere memorandum to a bill or note which in no way affects the rights or liabilities of the parties, which was not intended to be considered as a part of the contract, and which does not change the terms or

²²⁵ *Jordan v. Jordan*, 78 Tenn. (10 Lea) 124, 43 Am. Rep. 294.

²²⁶ *Fullerton v. Sturges*, 4 Ohio St. 530.

²²⁷ *Sharpe v. Bagwell*, 16 N. C. 115.

²²⁸ *Brackett v. Mountfort*, 11 Me. 115; *Homer v. Wallis*, 11 Mass. 309. Compare *Church v. Fowle*, 142 Mass. 52, 6 N. E. 764; *Marshall v. Gouger*, 10 Serg. & R. (Pa.) 164.

In several cases in Maine, however, it has been decided that if the act of adding such names was not fraudulent, the right to recover will not be affected. *Milberry v. Storer*, 75 Me. 69, 46 Am. Rep. 361; *Thorn-*

ton v. Appleton, 29 Me. 298; *Rollins v. Bartlett*, 20 Me. 319; *Eddy v. Bond*, 19 Me. 461, 36 Am. Rep. 767.

²²⁹ *Smith v. Dunham*, 8 Pick. (Mass.) 246.

²³⁰ *Fuller v. Green*, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600.

²³¹ *Anderson v. Starkweather*, 28 Iowa 409; *Crews v. Bank*, 31 Great. (Va.) 348. See, also, *Blackwell v. Denie*, 23 Iowa 63, in which it is declared that this is also the English rule, and citing *Wright v. Riley*, Peake 173; *Green v. Davis*, 4 B. & C. 235.

effect thereof is not available as a defense to an action thereon.²³² Where, however, such memorandum tends to affect the operation of the instrument, or to change its terms and conditions or to affect the liability of the parties it will constitute such an alteration as a party not consenting thereto may set up in defense to an action against him.²³³ And where a memorandum which is a material part of the contract is erased or cut off such fact is available as a defense.²³⁴ But if the memorandum is one which does not in any way form a part of the contract, an erasure thereof will be immaterial.²³⁵

§ 180. Alteration of indorsement.—A party has no right to change the contract of indorsement, and it will be a good defense to an action against an indorser to show that the indorsement has been altered in a material part.²³⁶ So recovery may be defeated by showing that a guaranty has been written over the indorsement.²³⁷ Thus, writing over the names of the indorsers in blank of a note the words, "For value received we hereby guarantee the payment of the within note and waive presentment for payment, demand, and notice of protest," changes the liability assumed by the parties as indorsers and constitutes a material alteration which they may set up in defense to an

²³² *Alabama*.—*Maness v. Henry*, 96 Ala. 454, 11 So. 410.

Indiana.—*Bucklen v. Huff*, 53 Ind. 474.

Maine.—*Howe v. Thompson*, 11 Me. 152.

Massachusetts.—*Batchellor v. Priest*, 12 Pick. (Mass.) 399.

Minnesota.—*Herrick v. Baldwin*, 17 Minn. 209, 10 Am. Rep. 161.

Missouri.—*American National Bank v. Banks*, 42 Mo. 450, 97 Am. Dec. 349.

West Virginia.—*Merchants' and Mechanics' Bank v. Evans*, 9 W. Va. 373.

Wisconsin.—*Krouskop v. Shoutz*, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817. See:

Mississippi.—*Bay v. Shrader*, 50 Miss. 326.

²³³ *Johnston v. May*, 76 Ind. 293; *Warren v. Fant*, 79 Ky. 1; *Wood-*

worth v. Bank, 19 Johns. (N. Y.) 391; *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. 714, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743; *Warrington v. Early*, 23 Law J. Q. B. 47.

²³⁴ *Benjamin v. McConnel*, 9 Ill. 536, 46 Am. Dec. 474.

²³⁵ *Littlefield v. Coombs*, 71 Me. 110; *Theopold Mercantile Co. v. Deike*, 76 Minn. 121, 78 N. W. 977; *Lau v. Blomberg*, 3 Neb. (unoffic.) 124, 91 N. W. 206; *Hubbard v. Williamson*, 27 N. C. 397. *Examine Hall v. Hale*, 8 Conn. 336; *Cushing v. Field*, 70 Me. 50, 35 Am. Rep. 293.

²³⁶ *Kennon v. McRea*, 7 Port. (Ala.) 175; *Andrews v. Simms*, 33 Ark. 771; *Buck v. Appleton*, 14 Me. 284; *Farmer v. Rand*, 14 Me. 225; *Clauson v. Gustin*, 5 N. J. L. 821.

²³⁷ *Belden v. Hann*, 61 Iowa 42, 15 N. W. 591.

action against them.²³⁸ And a holder of a note severally indorsed in blank has no right to alter the indorsement so as to make the assignment to him the joint act of all the indorsers.²³⁹ So a writing which seeks to render a guarantor a surety is material and will avoid the instrument.²⁴⁰ And in an action against an indorser he may show that an indorsement prior to his own has been erased.²⁴¹ Where, however, it appears that the erasure of an indorsement was accidental it is held not to relieve the indorser.²⁴² And an indorsement for collection is not a material part of an instrument, the striking out of which will defeat recovery.²⁴³ So the right to recover will not be affected by the erasure of an indorsement made by an unauthorized third person.²⁴⁴ And the addition of a word of description to the name of an indorsee is not a material alteration of a note or draft, when it is intended by the parties that the paper shall go to the indorsee in the exact capacity or relationship indicated by the descriptive word so added.²⁴⁵ Again the changing of an indorsement "pay the bearer" to a formal assignment to the indorsee has been held immaterial, as they are both in effect the same.²⁴⁶ And where the striking out of the name of an indorsee is the act of a stranger it will be no defense to an action on the paper.²⁴⁷ And where, below the indorsement of a party's name upon a note, the words "Glens Falls, N. Y.," were written in pencil, by the manager of the bank at which it was payable, as a mere memorandum, pursuant to the custom of the bank to do so where the address of the indorser was not known, and it was done for the purpose of direction to the clerks in the bank in keeping their records, it was held to be an addition which in no way changed the obligation of the indorser and neither changed in the slightest nor assumed to change his contract, was immaterial and did not discharge him.²⁴⁸ Nor will the

²³⁸ *Harnett v. Holdredge* (Neb., 1903), 97 N. W. 443.

²³⁹ *Morrison v. Smith*, 13 Mo. 234, 53 Am. Dec. 145.

²⁴⁰ *Robinson v. Reed*, 46 Iowa 219.

²⁴¹ *Curry v. Bank*, 8 Port. (Ala.) 360.

²⁴² *Brett v. Marston*, 45 Me. 401.

²⁴³ *Cessel v. Dows*, 1 Blatchf. (U. S.) 335, Fed. Cas. No. 2502.

²⁴⁴ *Waldorf v. Simpson*, 15 App. Div. (N. Y.) 297, 44 N. Y. Supp. 921.

²⁴⁵ *Birmingham Trust & Sav. Co. v. Whitney*, 95 App. Div. (N. Y.) 280, 88 N. Y. Supp. 578, so holding where the word cashier was under

such circumstances added to the name of the one to whom a draft was indorsed by the payee. See also, *Birmingham Trust & Sav. Co. v. Whitney*, 183 N. Y. 522, 76 N. E. 1089, aff'g 95 App. Div. 280, 88 N. Y. Supp. 578; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309.

²⁴⁶ *Foote v. Bragg*, 5 Blackf. (Ind.) 363.

²⁴⁷ *Piersol v. Grimes*, 30 Ind. 129, 95 Am. Dec. 673.

²⁴⁸ *Merchants' Bank of Canada v. Brown*, 86 App. Div. (N. Y.) 599, 83 N. Y. Supp. 1037.

release of an indorser on the ground of a material alteration operate as a discharge of prior indorsers.²⁴⁹

§ 181. **Erasure or alteration of signature of surety.**—It will be a good defense to an action against a surety that the name of a co-surety has been erased without the former's consent.²⁵⁰ The principal debtor, however, is held not released by the alteration or erasure of the signature of a surety.²⁵¹ So in a recent case in Oregon it is held that the erasure of the word "surety" after the name of one of the makers of a note is not a material alteration and does not affect the liability of the parties.^{251*} And where the name of a surety in the body of a note, signed by the defendant in blank, was erased and the name of another inserted to conform to the signatures it was held not to be a material alteration, as the instrument would have been as valid and binding if no name had been inserted.²⁵² And where the signature of a surety is misplaced by mistake and an alteration is made for the purpose of correcting the error it will not constitute a defense.²⁵³ So where a person signed a note as guarantor below the signatures of the makers and subsequently had his name erased as a maker and inserted on the back with a guaranty of payment it was held not a material alteration.²⁵⁴

§ 182. **Addition of name as surety or guarantor.**—The fact that the name of another is affixed to an instrument as surety subsequent to the signing of the same by the maker, a principal debtor, will not, it is

²⁴⁹ "Every indorsement of a paper is a new and substantive contract and the liability of each indorser as it respects the holder is separate and distinct from the others." Per Collier, C. J., in *Kennon v. McRea*, 7 Port. (Ala.) 175.

²⁵⁰ *McCramer v. Thompson*, 21 Iowa 244; *Hall's Adm'x v. McHenry*, 19 Iowa 521, 87 Am. Dec. 451.

²⁵¹ *Broughton v. West*, 3 Ga. 248.

^{251*} *Galloway v. Bartholomew*, 44 Ore. 75, 74 Pac. 467, in which it is said: "The fact, if it is a fact, that the word 'surety' was written after the name of one of the signers did not render them any less joint and several obligors. (*Bowen v. Clarke*,

25 Ore. 592, 37 Pac. 74; *Williams v. Island City M. Co.*, 25 Ore. 573, 591, 37 Pac. 49.) It would only show that as between themselves, one was principal and the other surety, and would perhaps charge the payee or holder with knowledge of that fact, but it would not affect their liability to the payee." Per Mr. Justice Bean. Compare *Lamb v. Paine*, 46 Iowa 550, 26 Am. Rep. 163; *Huntington v. Finch*, 3 Ohio St. 445.

²⁵² *Jones v. Insurance Co.*, 1 Metc. (Ky.) 58.

²⁵³ *Lynch v. Hicks*, 80 Ga. 200, 4 S. E. 255.

²⁵⁴ *Ryan v. Bank*, 148 Ill. 349, 35 N. E. 1120.

held, release the latter from liability,²⁵⁵ as it does not increase or diminish his liability, he being liable for the whole debt in any event.²⁵⁶ So where the name of a guarantor is added it has been declared that it "is not a material alteration and does not release those primarily bound. It does not in any way change or affect their rights. It is an independent contract made with a third party, to which the consent of the obligors is unnecessary. Their liability is neither increased nor diminished by the addition of the name of the guarantor, and he has no right of contribution or exoneration. The rights of the obligors are no more affected by the guaranty placed on the note than they would be by a guaranty placed on a separate instrument."²⁵⁷ And the addition of a name as surety, subsequent to the signing by the original surety, has been construed as an immaterial alteration, so far as the liability of the latter is affected.²⁵⁸ So it has been said that such a signing for a new consideration constitutes a new and independent contract to which the consent of the original promisor is not required.²⁵⁹

²⁵⁵ *Montgomery Railroad Co. v. Hurst*, 9 Ala. 518; *Stone v. White*, 8 Gray (Mass.) 589; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306; *Royse v. Bank*, 50 Neb. 16, 69 N. W. 301; *Brownell v. Winne*, 29 N. Y. 400. See *Cotton v. Simpson*, 8 Ad. & E. 136. But see *Sullivan v. Rudisill*, 63 Iowa 158, 18 N. W. 856; *Chappell v. Spencer*, 23 Barb. (N. Y.) 584; *Gardner v. Walsh*, 5 El. & Bl. 83.

²⁵⁶ *Barnes v. Van Keuren*, 31 Neb. 165, 47 N. W. 848; *Mersman v. Werges*, 112 U. S. 139, 5 Sup. Ct. 65.

²⁵⁷ *First National Bank v. Weiden-*

beck, 97 Fed. 896, 3 C. C. A. 131, per Caldwell, C. J.

²⁵⁸ *Crandall v. Bank*, 61 Ind. 349; *Graham v. Rush*, 73 Iowa 451, 35 N. W. 518; *Brey v. Hagan*, 23 Ky. Law R. 18, 62 S. W. 1; *Ward v. Hackett*, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187; *McCaughey v. Smith*, 27 N. Y. 9. Compare *Berryman v. Manker*, 56 Iowa 150, 9 N. W. 103, holding that such a change after delivery to the payee will operate as a discharge.

²⁵⁹ *Stone v. White*, 74 Mass. (8 Gray) 589.

CHAPTER VIII

CONSIDERATION GENERALLY.

- | Sec. | Sec. |
|--|--|
| 183. Presumption as to consideration—Rules. | 186. "Value received" — Consideration not expressed — Rebutting presumption. |
| 184. Showing real consideration—Rebutting presumption as to consideration. | 187. Showing real consideration—To what parties rule applies. |
| 185. Same subject—Matters <i>dehors</i> contract. | |

§ 183. **Presumption as to consideration—Rules.**—Although a paper which is not good as a bill of exchange does not import a valid consideration;¹ and although, notwithstanding decisions to the contrary, this rule as to consideration has, under many adjudications, been held to govern in case of non-negotiable paper generally,² yet, ordina-

¹ *Averett v. Booker*, 15 Gratt. (Va.) 163, 76 Am. Dec. 203. In this case the court said: "I think it clear that this paper cannot be regarded as a bill of exchange nor as carrying with it the exemption pertaining to that class of securities from the necessity of both averring and proving a sufficient consideration as the condition of recovering upon it." See, also, *Summers v. Sanders* (Tex. Civ. App.), 28 S. W. 1038.

² *Connecticut*.—*National Sav. Bk. v. Cable*, 73 Conn. 568, 572, 48 Atl. 428 (a non-negotiable order drawn on particular fund, Neg. Inst. Law, §§ 1, 3; Pub. Acts 1897, ch. 74); *Bristol v. Warner*, 19 Conn. 7, 16. (The court said that it was, after some doubt, the settled law of the state).

Illinois.—*Wickersham v. Beers*, 20 Ill. App. 243, 249.

Kentucky.—*Prior v. Lindsay*, 3

Bibb (Ky.) 76 (a case of an order drawn on a particular fund).

Maine.—*Bourne v. Ward*, 51 Me. 191 (holding that notes non-negotiable and notes negotiable while in the hands of the original promisee import consideration).

Massachusetts.—*Hemenway v. Hickes*, 21 Mass. (4 Pick.) 497 (want of averment of consideration was held fatal); *Courtney v. Doyle*, 92 Mass. (10 Allen) 122, 123.

Mississippi.—*Hardin v. Pelan*, 41 Miss. 112, 115.

New Jersey.—*Conover v. Stillwell*, 34 N. J. L. 54 (a case of a written promise to pay money on a contingency).

North Carolina.—*Stronach v. Bledsoe*, 85 N. C. 473, 476.

Pennsylvania.—*Sidle v. Anderson*, 45 Pa. St. 464 (a case of an order under seal on one person to pay money to another).

South Carolina.—*Wingo v. Mc-*

rily a paper which constitutes a valid bill of exchange forms a written contract carrying with it evidence of the consideration on which it is based and it is scarcely ever necessary that a plaintiff in an action on it should prove that he gave a consideration.³ This rule also applies to negotiable paper in general.⁴

Dowell, 8 Rich. (S. C.) 446 (holding it necessary to aver and prove consideration).

Tennessee.—Reed v. Wheeler, 10 Tenn. (2 Yerg.) 50 (holding that consideration must be averred).

Decisions contra see *California*.—Rogers v. Schulenberg, 111 Cal. 281, 43 Pac. 899 (holding that written instruments are presumptive evidence of consideration under Civ. Code).

Indiana.—Louisville, Evansville & St. L. R. Co. v. Caldwell, 98 Ind. 245, 252.

Missouri.—Taylor v. Newman, 77 Mo. 257, 263 (a case of a draft or order to pay a certain sum and charge same to drawee. It had all the essentials of an inland bill of exchange. By the statute also an instrument in writing for the payment of money imported a consideration).

New York.—Cartwright v. Gray, 127 N. Y. 92, 38 N. Y. St. Rep. 56, 12 L. R. A. 845, 27 N. E. 835, 24 Am. St. Rep. 424 (the instrument being a promissory note under the statute—1 Rev. Stat. 768, 3 & 4 Anne, c. 9—it was held to import a consideration whether non-negotiable or not, case affirms 57 Hun 518, 33 N. Y. St. Rep. 98, 11 N. Y. Supp. 278). See Dean v. Carruth, 108 Mass. 242, 244; First Nat. Bk. v. Spear, 12 S. D. 108, 80 N. W. 166.

³ Krumbarr v. Ludeling, 3 Mart. O. S. (La.) 641, 642; Averett v. Booker, 15 Gratt. (Va.) 163, 76 Am. Dec. 205, where the court says: "If the order in question were good as a bill of exchange it cannot be ques-

tioned that the party might have recovered upon it without averring in his declaration or proving at the trial that any value had been received for it, as such a bill is presumed to stand upon a valuable consideration and *prima facie* to import it."

⁴ *Alabama*.—Brown v. Johnson Bros., 135 Ala. 608, 33 So. 683, 685 (a note is *prima facie* evidence of consideration. There was no plea setting up want or failure of consideration); Cunyus v. Guenther, 96 Ala. 564, 566, 11 So. 649 (offering note in evidence makes out *prima facie* case); Martin v. Foster, 83 Ala. 213, 214, 3 So. 422 (a note); Thompson v. Armstrong, 5 Ala. 383, 387.

Arkansas.—Richardson v. Comstock, 21 Ark. 69, 76 (a note). Byrd v. Bertrand, 7 Ark. 32 (a bill of exchange).

California.—Pastene v. Pardein, 135 Cal. 431, 434, 67 Pac. 681 (a note); Scribner v. Hanke, 116 Cal. 613, 48 Pac. 714 (holding that indorsement on note imports valuable consideration); Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746 (holding that presumption is that a check was given for a valid consideration).

Colorado.—Reed v. First Nat. Bk. of Pueblo, 23 Colo. 380, 48 Pac. 507 (holding that presumption is that note was founded upon sufficient consideration); Perot v. Cooper, 17 Colo. 80, 83, 31 Am. St. Rep. 258, 28 Pac. 391 (note presumed to be founded on sufficient consideration); Travellers' Ins. Co. v. Denver, 11 Colo. 434, 18 Pac. 556 (holding city

warrant a negotiable instrument under statute and an averment of consideration unnecessary).

Connecticut.—Bristol v. Warmer, 19 Conn. 7 (a note).

District of Columbia.—Johnson v. Wright, 2 App. Cas. D. C. 216 (negotiable check).

Florida.—McCallum v. Driggs, 35 Fla. 277, 284, 17 So. 407 (holding that where consideration of note is not denied it is unnecessary to prove the consideration).

Georgia.—Rowland v. Harris, 55 Ga. 141; Scattergood v. Findlay, 20 Ga. 423, 425.

Illinois.—McMickey v. Safford, 197 Ill. 540, 64 N. E. 540 (holding that offering a note in evidence and proving signatures made out a *prima facie* case); Wrightman v. Hart, 37 Ill. 123 (holding that the presumption is that a promissory note was assigned for value); Board v. O'Donovan, 82 Ill. App. 163 (indorsement on note imports consideration).

Indiana.—Smith v. Scott, 106 Ind. 245, 6 N. E. 145 (holding that presumption is that indorsement was for value); Du Pont v. Beck, 81 Ind. 271, 273; Woodworth v. Veitch, 29 Ind. App. 529, 64 N. E. 932 (presumption is that note based on sufficient consideration). *Iowa*: Luke v. Koenen, 120 Iowa 103, 94 N. W. 278, Code, § 3069.

Kentucky.—Day v. Long, Ky. Ch. App. 1904, 26 Ky. L. Rep. 123, 80 S. W. 774, 775 (law presumes a consideration for a note, per Hobson, J.); Cox v. Cox, Ky. Ch. App. 1904, 25 Ky. L. Rep. 1934, 79 S. W. 220 (statute imports a consideration into every note); Power v. Hambrick, Ky. Ct. App. 1903, 25 Ky. L. Rep. 30, 74 S. W. 660 (presumption is that note was given for sufficient consideration); Brown v. Hall, 2 A. K.

Marsh. (Ky.) 599 (bill of exchange).

Louisiana.—Landwirth v. Shaphran, 47 La. Ann. 336, 339, 16 So. 839 (holding that every note imports value received).

Maryland.—Ingersoll v. Martin, 58 Md. 67, 42 Am. Rep. 322 (holding that note is *prima facie* evidence of consideration).

Massachusetts.—Huntington v. Shute, 180 Mass. 371, 62 N. E. 380 (holding that production of note with admission or proof of signature makes a *prima facie* case).

Michigan.—Manistee Nat. Br. v. Seymour, 64 Mich. 59, 72, 31 N. W. 140.

Minnesota.—Germania Bk. v. Michaud, 62 Minn. 459, 466, 54 Am. St. Rep. 653, 65 N. W. 70, 30 L. R. A. 286 (under law merchant negotiable promissory note by administrator imports sufficient consideration to bind him personally, but rule qualified).

Mississippi.—Moore v. Michell, 1 Miss. 231.

Missouri.—Eyerman v. Pirou, 151 Mo. 107, 115, 52 S. W. 229 (note imports consideration, citing Rev. Stat. 1889, § 2389); State, Grimm v. Manhattan Rubber Mfg. Co., 149 Mo. 181, 211, 212, 50 S. W. 321, 10 Am. & Eng. Corp. Cas. N. S. 338 (*prima facie* evidence of valid obligation; note to directors by president and stockholders of corporation); Tapley v. Herman, 95 Mo. App. 537, 69 S. W. 482; Lowry v. Danforth, 95 Mo. App. 441, 69 S. W. 39 (under Mo. Rev. Stat. 1899, § 894).

Montana.—Clark v. Marlow, 20 Mont. 249, 255, 50 Pac. 713 (consideration implied at common law as to all commercial paper).

Nebraska.—Search v. Miller, 9 Neb. 26, 30, 1 N. W. 975.

New Hampshire.—Shaw v. Shaw,

60 N. H. 565 (production and proof of note shows *prima facie* a consideration); *Horn v. Fuller*, 6 N. H. 511 (a note).

New York.—*Carnwright v. Gray*, 127 N. Y. 92, 98, 12 L. R. A. 845, 27 N. E. 835, 24 Am. St. Rep. 424, 38 N. Y. St. Rep. 56, aff'g 57 Hun 518, 33 N. Y. St. Rep. 98, 11 N. Y. Supp. 278; 1 Rev. Stat. 768; 3 & 4 Anne, c. 9; *Langley v. Wadsworth*, 99 N. Y. 61, 63, 1 N. E. 106 (possession and proof of genuineness makes out *prima facie* case); *Hickok v. Bunting*, 92 N. Y. App. Div. 167, 86 N. Y. Supp. 1059 (*prima facie* a note is supported by a valid consideration where nothing appears on its face showing the contrary); *Bottum v. Scott*, 11 N. Y. aff'd 120 N. Y. 623 (mem.), 29 N. Y. St. Rep. 997, 23 N. E. 1152; *Underhill v. Phillips*, 10 Hun (N. Y.) 591; *Sawyer v. McLouth*, 46 Barb. (N. Y.) 350, 354.

North Carolina.—*Campbell v. McCormac*, 90 N. C. 491, 492.

Ohio.—*Dalrymple v. Wyker*, 60 Ohio St. 108, 41 Ohio L. J. 310, 53 N. E. 713; *Dugan v. Campbell*, 1 Ohio 115, 119 (declaring that by common consent actions have always been brought and sustained upon such instruments without setting forth or proving the consideration).

Oregon.—*Flint v. Phipps*, 16 Oreg. 437, 448, 19 Pac. 543.

Pennsylvania.—*Ritchie v. Safe Deposit & T. Co.*, 189 Pa. 410, 42 Atl. 20 (consideration of check presumed and not necessary in first instance to prove a consideration); *Hartman v. Shaffer*, 71 Pa. St. 312, 315; *Sidle v. Anderson*, 45 Pa. St. 464, 467 (rule applies to bills of exchange or negotiable instruments).

South Carolina.—*Hubble v. Fogartie*, 3 Rich. (S. C.) 413, 417, 45 Am.

Dec. 775. ("Every parol contract at common law required a consideration to be alleged and proved, but to this rule bills of exchange and promissory notes are exceptions; they furnish in themselves an implied legal consideration," and it is not necessary to allege and prove a consideration for them.)

South Dakota.—*Niblack v. Champeny*, 10 S. D. 165, 166, 72 N. W. 402 (a written indorsement of extension on a note affords presumptive evidence of a consideration).

Tennessee.—*Boyd v. Johnson*, 89 Tenn. 284, 286, 14 S. W. 804 (administrator's note).

Utah.—*Nephi First Nat. Bk. v. Foote*, 12 Utah 157, 167, 42 Pac. 205.

Texas.—See *Henderson v. Glass*, 16 Tex. 559, 560.

Vermont.—*Willard v. Pinard*, 65 Vt. 160, 163, 26 Atl. 67; *Arnold v. Sprague*, 34 Vt. 402 (bills of exchange are presumed to be upon a sufficient consideration); *Terry v. Ragsdale*, 33 Gratt. (Va.) 342, 345 (a check is *prima facie* evidence that the drawer at the time it was drawn was indebted to the payee in the amount of the check on an indebtedness previously existing or incurred at the time the check was drawn).

Virginia.—*Peasley v. Boatwright*, 2 Leigh (Va.) 195 (consideration need not be alleged).

Washington.—*Poncin v. Furth*, 15 Wash. 201, 206, 46 Pac. 241.

West Virginia.—*Cheurout v. Bee*, 44 W. Va. 103, 28 S. E. 751 (plaintiff need not plead or prove consideration in action at law).

Canadian.—*Parsons v. Jones*, 16 Up. Can. Q. B. 274, 276.

Examine California.—*Henke v. Eureka End. Assoc.*, 100 Cal. 429, 432, 34 Pac. 1089, which was a case of an

§ 184. **Showing real consideration—Rebutting presumption as to consideration.**—It is well settled that as between original or immediate parties in an action upon a bill or note the consideration may be inquired into and the real consideration shown.⁵ So where it was

action on an endowment certificate, but Searles, C., said in argument that long before the Civ. Code, § 1614, providing that a written instrument is presumptive evidence of a consideration, the same presumption applied to negotiable paper.

Every negotiable instrument is presumed *prima facie* to have been issued for a valuable consideration. Neg. Inst. Law, § 50. See Appendix herein.

Consideration for a note under seal is presumed. *Wester v. Bailey*, 118 N. C. 183, 24 S. E. 9.

Although there are cases in which the plaintiff may be required in the first instance and in his testimony in chief to go into the question of the consideration of a promissory note, nevertheless "it has been the general law, both in England and America, for two hundred years—that is, since the statute of 3 and 4 Anne, chap. 9, relating to promissory notes—and this general law has been embodied in the Act of Congress of January 12, 1899 (30 Stat. 785), relating to negotiable instruments; and again, in the new code law for the District of Columbia, into which that Act of Congress has been incorporated as sections 1304 to 1493, both inclusive, that every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every party whose signature appears thereon to have become a party thereto for value. * * * Proof of genuineness of signatures and proof of notice of protest would have constituted a sufficient *prima facie* case." *Towles*

v. Tanner, 21 App. D. C. 530, 542, per Morris, J.

⁵ *Connecticut*.—*Lawrence v. Stonington Bk.*, 6 Conn. 521, 525.

Indiana.—*Bush v. Brown*, 49 Ind. 573, 576, 19 Am. Rep. 695 (where it is said: "If there was no legal, valid or valuable consideration for the giving of the notes they are invalid"); *Parker v. Morton*, 29 Ind. 89, 92 (where it is said: "It has been repeatedly held by this court, under the code, in an action on an obligation in writing *prima facie* importing a consideration, that a plea alleging that it was given without any consideration whatever is good," per Elliott, J.).

Louisiana.—*Payne v. Waterston*, 16 La. Ann. 239; *Brown v. Fort*, 1 Mart. O. S. (La.) 34.

Maryland.—*Ingersoll v. Martin*, 58 Md. 67, 73, 42 Am. Rep. 322 (holding that the question of consideration is always open between immediate parties and may be impeached by parol).

Nebraska.—*Wilson v. Ellsworth*, 25 Neb. 246, 41 N. W. 177.

New York.—*Schoonmaker v. Roosa*, 17 Johns. (N. Y.) 301; *Elting v. Brinkeroff*, 2 Hall (N. Y.) 459.

Texas.—*Branch v. Howard*, 4 Tex. Civ. App. 271, 23 S. W. 478.

Federal.—*Bank of British North America v. Ellis*, 6 Sawy. (U. S.) 96, Fed. Cas. No. 859.

See *Alabama*.—*Booth v. Dexter Steam F. E. Co.*, 118 Ala. 369, 24 So. 405, 16 Bk. L. J. 93 (holding that real consideration of note may be shown when not apparent on face).

urged that there was no consideration for certain notes and a mortgage and that they were to be operative only on the consummation of a certain purchase and were not to be presently operative, it was held that such notes and mortgage could not be enforced on the basis of a different consideration than that on which they were given.⁶ And as the consideration of every promissory note is open to inquiry between the parties to it, so the consideration of such a note not under seal, given for a balance of work done, may be inquired into in a suit between the original parties, even though the maker, at the time it was given, expressed himself satisfied with it, there being no evidence that, at the time of the settlement or giving of the note any new consideration passed from the payee to the maker.^{6*}

§ 185. **Same subject—Matters dehors contract.**—Although it is a settled principle, both in the English and American courts, that parol evidence is not admissible to contradict, vary or materially affect, by way of explanation, a contract in writing, upon the ground that written evidence is of a higher grade than the mere verbal declarations of witnesses, and consequently where parties have agreed upon the terms of a contract which is afterward reduced to writing, the verbal agreement is merged in the written contract, yet it has often been held as no violation of these doctrines, or if so, in terms as well settled as these doctrines themselves, even though upon the face of an instrument in writing, the usual expression of consideration, such as for "Value received," may be found, that the maker may show as against the payee or other person standing in the same situation, that the note or bond was given without consideration, or that the consideration has failed, or that fraud in respect to it was practiced upon him by the other party, and under some circumstances that the consideration was illegal.⁷ The above rule does not therefore conflict with the rule

⁶ *Lewter v. Price*, 25 Fla. 574, 6 So. 459, to show real consideration of note, see:

^{6*} *Clement v. Reppard*, 15 Pa. St. 111. *Alabama.*—*Folmar v. Siler*, 132 Ala. 297, 31 So. 719.

⁷ *Arkansas.*—*Cheney v. Higginbotham*, 10 Ark. 273, 276, per Scott, J. *Indiana.*—*Smith v. Boruff*, 75 Ind. 412; *Burns' Rev. Stat. Ind.* 1901, § 6630.

See also *Folmar v. Siler*, 132 Ala. 297, 31 So. 719. *Missouri.*—*Mo. Rev. Stat.* 1899, § 645.

Maine.—*Folsom v. Mussey*, 8 Greenl. (Me.) 400, 23 Am. Dec. 522. *Nebraska.*—*Gifford v. Fox* (Neb. 1901), 95 N. W. 1066.

That parol evidence is admissible *New York.*—*Keuka College v. Ray*,

as to the inadmissibility of oral testimony to vary the terms of a written instrument,^{7*} nor does such a defense affect the terms of the writing;⁸ and parol evidence being admitted to show the absence of any valid or sufficient consideration for the alleged liability of the defendant to the plaintiff its admission violates no principle established for the protection of third persons as *bona fide* holders of negotiable paper.⁹ Again, to establish the defense of want of consideration it is competent to prove the facts and circumstances under which the signature was obtained, but evidence is incompetent to change the effect or limit the character of the paper.¹⁰ Nor can the defense of failure of consideration rest upon a showing by the makers of matters tending to vary the contract expressed by the terms of the note but which in no way relate to the consideration.¹¹

§ 186. "Value received"—Consideration not expressed or expressed—Rebutting presumption.—In the absence of a statute to the contrary, the use of the words "value received" is not essential to a bill of exchange, check, promissory note, or commercial paper generally, and even though a consideration is not expressed by these or other words, the rule that such paper imports a consideration applies.¹²

167 N. Y. 96, 60 N. E. 325, aff'g 58 N. Y. Supp. 745.

Examine *Northwestern Creamery Co. v. Lanning*, 83 Minn. 19, 85 N. W. 823.

Rule applies, even though note expressed to be for "value received." *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369, 24 So. 405.

Oral evidence may be admitted to impeach the acknowledgment of the consideration of a promissory note and to show the real purpose or consideration thereof. *Lippincott v. Lawrie*, 119 Wis. 573, 97 N. W. 179. Oral evidence of consideration for indorsement may always be shown as between indorser and his immediate indorsee. *Peabody v. Munson*, 211 Ill. 324, 71 N. E. 1006, aff'g 113 Ill App. 296.

Where note was void under statute true consideration may be shown. *Burns v. Sparks* (Ky. 1904), 26 Ky.

Law Rep. 688, 82 S. W. 425, Ky. Stat. 1903, § 4223.

^{7*} *Harwood v. Brown*, 23 Mo. App. 69.

⁸ *Simpson College v. Tuttle*, 71 Iowa 596, 599, 33 N. W. 74.

⁹ *Hamburger v. Miller*, 48 Md. 317, 325, 326, per Alvey, J.

¹⁰ *McCulloch v. Hoffman*, 10 Hun (N. Y.) 133. See also *Marness v. Henry*, 96 Ala. 454, 458-460, 11 So. 410.

¹¹ *Easton Packing Co. v. Kennedy*, 131 Cal. 1xviii, 63 Pac. 130, a case of *bona fide* holders. See §§ 202 *et seq.* herein.

¹² *Colorado*.—*Salazar v. Taylor*, 18 Colo. 538, 541, 542, 33 Pac. 369.

Maine.—*Noyes v. Gilman*, 65 Me. 589 (holding that an order operating as an assignment of a note need not contain the words "value received"); *Kendall v. Galvin*, 15 Me. 131, 133.

If the words "value received" are expressed, while it is declared that they add nothing more than the law implies,¹³ yet they raise a presumption of a valuable and legal consideration;¹⁴ for the law attributes

Massachusetts.—Dean v. Carruth, 108 Mass. 242, 244 (note "is evidence under the hand of the promisor of a contract made upon a good consideration, even if the words 'value received' are omitted").

Missouri.—Taylor v. Newman, 77 Mo. 257.

Montana.—Clarke v. Marlow, 20 Mont. 249, 255, 50 Pac. 713 (declaring that all commercial paper at common law imports a consideration, though none is expressed by the words value received or other words, citing Hatch v. Traves, 11 Adol. & E. 702; Edw. Bills & N., § 202; Randolph Com. Paper, § 178, and adding: "Having no statute in Montana requiring the use of the expression 'value received' it is not essential. Story on Prom. Notes, § 51").

New Hampshire.—Martin v. Stone, 67 N. H. 367, 368, 29 Atl. 845. (Citing Story on Prom. Notes, § 51; 1 Daniels Neg. Inst., § 108).

New York.—Carnwright v. Gray, 127 N. Y. 92, 96-99, 12 L. R. A. 845, 27 N. E. 835, 24 Am. St. Rep. 424, 38 N. Y. St. Rep. 56 (holding that an instrument which is a promissory note within the statute—1 Rev. Stat. 768, which is a substantial reenactment of the statute of 3 & 4 Anne, c. 9—imports a consideration and the words "value received" need not appear upon the face of the note; case affirms 57 Hun 518, 33 N. Y. St. Rep. 98, 11 N. Y. Supp. 278); Underhill v. Phillips, 10 Hun (N. Y.) 591, 592; Kramer v. Kramer, 90 N. Y. App. Div. 176, 86 N. Y. Supp. 129 ("value received" in a note imports a consideration); Bruyn v. Russell,

38 N. Y. St. Rep. 50; Kinsman v. Birdsall, 2 E. D. Smith (N. Y.) 395, 397 (declaring that the omission of the words "value received" does not alter the legal effect of a promissory note.

South Carolina.—Hubble v. Fogartie, 3 Rich. (S. C.) 413, 417, 45 Am. Dec. 775. (It is nevertheless a valid instrument importing a consideration. Presumptively it was given for a sufficient consideration.)

Federal.—Moses v. Lawrence County, 149 U. S. 298, 302, 37 L. Ed. 743, 13 Sup. Ct. 900 ("every negotiable promissory note, even if not purporting to be for 'value received,' imports a consideration, and the indorsement of such a note is itself *prima facie* evidence of having been made for value").

English.—Laraway v. Harvey, Rap. Jud. Quebec, 14 C. S. 97 (rule applied to checks and other negotiable instruments, citing Taylor on Ev., No. 178; 2 Daniel on Neg. Inst. 1643, 3 Phillips on Ev., p. 426, Civil Code Arts. 2285, 2351, 2353, and quoting 3 Kent's Com., p. 77).

Examine Hart v. Harrison Wire Co., 91 Mo. 414, 418, 4 S. W. 123, under Rev. Stat., § 547, requiring note to be "expressed to be for value received."

See Negot. Inst. Law N. Y., §§ 330, 331.

¹³ Carnwright v. Gray, 127 N. Y. 92, 96-99, 12 L. R. A. 845, 27 N. E. 835, 24 Am. St. Rep. 424, 38 N. Y. St. Rep. 56.

¹⁴ *Alabama*.—Thompson v. Armstrong, 5 Ala. 383 (the general rule was asserted and the words "value received" were expressed).

so much force to a formal written contract and to the words "value received" as to presume in the absence of proof that there was a

Arkansas.—Richardson v. Comstock, 21 Ark. 69, 76 (note expresses "value received").

California.—Waldrop v. Black, 74 Cal. 409, 16 Pac. 226 (indorsement for value received by payee to surety together with latter's possession of note raises, in absence of evidence to the contrary, the presumption of payment of value).

Connecticut.—Mascolo v. Montesanto, 61 Conn. 50, 53, 29 Am. St. Rep. 170, 23 Atl. 714; Raymond v. Sellick, 10 Conn. 480, 484, per Waite, J.

Hawaiian.—Macfarlane v. Lowell, 9 Hawaiian, 438, 440.

Illinois.—Hoyt v. Jaffray, 29 Ill. 104 (value received is evidence of sufficient consideration to support assumpsit).

Kentucky.—Cotton v. Graham, 84 Ky. 672, 680, 2 S. W. 647 (there was also the expressed consideration of love and affection).

Maine.—Bourne v. Wood, 51 Me. 191 (declaring that where a note contains the words "value received" or words of equivalent import, the note itself will be evidence *prima facie* of the consideration. The note here was non-negotiable and did not contain the words "value received").

Massachusetts.—Huntington v. Shute, 180 Mass. 371, 62 N. E. 371 (holding that the production of a note with the words "value received," with the admission of proof of the signature, makes a *prima facie* case; but the decision is principally as to burden of proof).

Michigan.—Conrad Seipp Brew. Co. v. McKittrich, 86 Mich. 191, 195, 196, 48 N. W. 1086 (note was a judgment note and not a promissory

note, and it was held that the expression "value received" was sufficient *prima facie* to show an adequate consideration).

Minnesota.—Priedman v. Johnson, 21 Minn. 12, 15.

New Hampshire.—Child v. Moore, 6 N. H. 33 (holding that order for the payment of money expressed to be for "value received" is *prima facie* evidence that the drawer has received the amount of money or the money's worth); Odiorne v. Odiorne, 5 N. H. 315, 316.

New York.—Bruyn v. Russell, 60 Hun (N. Y.) 280, 282, 283, 28 N. Y. St. Rep. 50, 14 N. Y. Supp. 591; Bruyn v. Russell, 52 Hun (N. Y.) 17, 22 N. Y. St. Rep. 374, 4 N. Y. Supp. 784 (in this case, however, plaintiff attempted to establish affirmatively the consideration); Jerome v. Whiting, 7 Johns. (N. Y.) 321 (a non-negotiable note).

North Carolina.—Stronach v. Bledsoe, 85 N. C. 473, 476.

Pennsylvania.—Messmore v. Morrison, 172 Pa. St. 300, 34 Atl. 45 (a promissory note, under statute).

Vermont.—Redding v. Redding, 69 Vt. 500, 502, 503, 38 Atl. 230.

Federal.—National Loan & Inv. Co. v. Rockland County, 36 C. C. A. 370, 94 Fed. 335.

English.—Halliday v. Atkinson, 5 Barn. & Cr. 501, 11 Eng. C. L. 558. See Bond v. Stockdale Dow. & Ry. 140, 16 Eng. C. L. 278.

In the following cases the words "value received" were used and the consideration was in question, but the effect of the words was not discussed.

Massachusetts.—Hill v. Buckminster, 22 Mass. (5 Pick.) 391.

valuable consideration for the promise.¹⁵ This presumption may, however, be rebutted by proof.¹⁶

§ 187. Showing real consideration—To what parties rule applies.

The rule permitting an inquiry into the consideration of a bill or note generally, or even though the words "value received" are expressed, applies to original or immediate parties, or to parties between whom there is a privity, but not as to remote parties;¹⁷ that is, inquiry into the consideration of negotiable paper can only be made between privies or immediate parties thereto, as the maker and payee, an indorser and his indorsee. All other parties to negotiable paper are called remote, and, as between them, a consideration for making or indorsing the same is presumed. But the defendant may make the defense of a want of consideration against a remote party, if he could have done so against a nearer party and such remote party took the paper with a knowledge that it was open to this defense.¹⁸

Michigan.—Fink v. Chambers, 95 Mich. 508, 55 N. W. 375.

Missouri.—Harwood v. Brown, 23 Mo. App. 6.

New York.—Schoonmaker v. Roosa, 17 Johns. (N. Y.) 301.

Ohio.—Loffland v. Russell, Wright (Ohio) 438.

¹⁵ Parish v. Stone, 14 Pick. (Mass.) 198, 201.

¹⁶ Halliday v. Atkinson, 5 Barn. & Cr. 501, 11 Eng. C. L. 558.

SEE *New Hampshire.*—Martin v. Stone, 67 N. H. 367, 39 Atl. 845.

New York.—Bruyn v. Russell, 60 Hun (N. Y.) 280, 282, 38 N. Y. St. Rep. 50, 14 N. Y. Supp. 591; Sawyer v. McLouth, 46 Barb. (N. Y.) 350, 353.

North Carolina.—Campbell v. Cormac, 90 N. C. 491.

West Virginia.—Cheurout v. Bee, 44 W. Va. 103, 28 S. E. 751.

Canada.—Laraway v. Harvey, Rap. Jud. Quebec, 14 C. S. 97.

England.—Bond v. Stockdale, 7 Dow. & Ry. 140, 16 Eng. C. L. 278, and examine cases cited under the

sections herein as to want of consideration.

¹⁷ Singleton v. Bremar, Harp. (S. C.) 201; Daniels on Neg. Inst. (5th ed.), § 163.

"As between remote parties, for example, between payee and acceptor, between indorsee and acceptor, between indorsee and remote indorser, two distinct considerations at least must come in question; first that which the defendant received for his liability, and secondly, that which the plaintiff gave for his title. An action between remote parties will not fail unless there be an absence or failure of both these considerations." Byles on Bills (6th Am. Ed.) 206 quoted in Arpin v. Owens, 140 Mass. 144, 145, 3 N. E. 25. See § 191 herein.

¹⁸ Bank of British North America v. Ellis, 6 Sawy. (U. S.) 96, Fed. Cas. No. 859, 8 Am. L. Rec. 460, per Deady, D. J., citing 1 Daniels Neg. Inst., § 174; 1 Parsons Notes & Bills 175, 183. See Neg. Inst. Law, § 96, Appendix herein. See § 191 herein.

CHAPTER IX.

ADEQUACY OR SUFFICIENCY OF CONSIDERATION.

Sec.	Sec.
188. Inadequate or insufficient consideration distinguished from want or failure of consideration.	192. Adequacy in value unnecessary.
189. Sufficient if consideration is a benefit or injury.	193. Inadequacy or insufficiency of consideration—Rule as to inquiry into—Fraud.
190. Distinction between valuable consideration other than money and a money consideration.	194. Sufficient consideration—Illustrations.
191. Slight consideration—Purchasing paper at undervalue.	195. Compromise, settlement or relinquishment note.
	196. Same subject—Unfounded or illegal claim.
	197. Compromise of forgery claim.

§ 188. **Inadequate or insufficient consideration distinguished from want or failure of consideration.**—A distinction is to be observed between inadequacy of consideration which does not in law constitute a defense and a want or failure of consideration, which, as appears elsewhere herein,¹ is a defense, or a defense *pro tanto* in an action between the parties.^{1*} A large number of the decisions, however, fail to make this distinction but use the terms, adequate or inadequate consideration, sufficient or insufficient consideration, and want or failure of consideration, as if they were all synonymous, or at least as if they were much the same.

§ 189. **Sufficient if consideration is a benefit or injury.**—Courts both of law and equity refuse to disturb contracts on grounds of mere inadequacy whether the consideration is of benefit to the promisor or of injury to the promisee.² And it is a general rule that the consideration to support a promise may be either a benefit accruing to the purchaser or a loss or disadvantage to the promisee. A consideration

¹ See Chap. X.

cited in *Earl v. Peck*, 64 N. Y. 596.

^{1*} *Furber v. Fogler*, 97 Me. 585, 598.

588, 55 Atl. 514, per Peabody, J.

² *Caldwell v. Ruddy*, 2 Idaho 5, 1

Johnson v. Titus, 2 Hill (N. Y.) 606, Pac. 339.

emanating from some injury or inconvenience to the one party, or from some benefit to the other party is a valuable consideration. But to give a consideration value sufficient for the support of a promise, it must be either such as deprived the person to whom the promise was made of a right which he before possessed, or else conferred upon the other party a benefit which he could not otherwise have had.³ So in an Alabama case the court says: "Any benefit resulting to the party promising, or detriment to the party to whom the promise is made, is sufficient, however slight or insignificant it may seem to be in point of fact. The adequacy or sufficiency of a consideration to support a contract rests in the judgment of the parties; and if, in contemplation of law, it is of any value, in the absence of fraud or duress, the contract will be enforced."⁴ So a note given by one person to pay another a certain amount at a fixed time for the performance of personal services in the future, is valid and binding upon the maker. The promise to pay and promise to perform the services are sufficient consideration.⁵

§ 190. Distinction between valuable consideration other than money and a money consideration.—A distinction has been made between a valuable consideration, other than money, and a money consideration. While in the former case the slightest consideration will support a promise to pay the larger amount, to the full extent of the promise, in the latter, the consideration will support a promise only to the extent of the money forming the consideration. The law leaves the measure of the value of a valuable consideration other than money, to the parties to the contract; but money being the standard of value, is not subject to be changed by contract, and will support a promise to pay money only to the amount of the consideration.⁶

§ 191. Slight consideration—Purchasing paper at undervalue.⁷ A slight consideration is sufficient to sustain a contract and courts of

³ Conover v. Stillwell, 34 N. J. 54, 57, per Depue, J.

Value is any consideration sufficient to support a written contract. Neg. Inst. Law, § 51; Eng. Bills of Exch. Act., § 27. See appendix herein.

⁴ Bolling v. Munchus, 65 Ala. 558, 561 (per Brickell, C. J., asserting the general principle in a case to foreclose a mortgage and citing 1 Chit. Con. 28-32). Quoted by Haral-

son, J., in Booth v. Dexter Steam Fire Engine Co., 118 Ala. 369, 377, 24 So. 405, a case of a note given to cover a supposed liability.

⁵ Morrison v. Hart, 122 Ga. 660, 50 S. E. 471.

⁶ Sawyer v. McLouth, 46 Barb. (N. Y.) 350, 353. See Twentieth Century Co. v. Quilling (Wis. 1907), 110 N. W. 174.

⁷ See §§ 238, 240 herein.

law will not look closely into the adequacy of the consideration for a promissory note,⁸ nor is the fact that there was no fair consideration for negotiable paper, as between the original parties to it, any defense against it in the hands of *bona fide* indorsee;⁹ for as a general rule the indorsee of a negotiable promissory note, who, for value, purchases it before maturity, without knowledge of facts impeaching its validity, may recover the amount due by the terms of the note, although he paid an amount therefor less than its face, unless the circumstances of its inception were such as to make it absolutely void by statute, or there was no power to issue the note, or it was obtained by the payee of the maker by illegal and fraudulent means.¹⁰ And although the fact of taking a bill at considerable undervalue is not of itself sufficient to affect the title of the holder, yet it is an important element in considering whether such purchaser acted *bona fide*, in ignorance and error, or was assisting in committing a fraud, and avoided making inquiries because they might be injurious to him.¹¹ But the inadequacy of the price paid by an indorsee must be such as to impeach his good faith;¹² the price paid by the purchaser must be so out of proportion, having regard to the solvency of the maker, that the indorsee takes the note at his peril.¹³ If the purchaser pays a grossly inadequate price and trades with a man in embarrassed circumstances, and proper inquiry would have disclosed the real value of the note, the transaction is suspicious, even though there is no evidence of fraud, and the recovery will be limited to the amount actually paid, with interest.¹⁴ Where the statute provides that the holder of a negotiable

⁸ *Austell v. Rice*, 5 Ga. 472. *Martin v. Kercheval*, 4 McLean (U. S. C. C.), 117 Fed. Cas. No. 9163. As between the indorser and indorsee the face of the note is *prima facie* evidence of the consideration paid on its negotiation, but it is only *prima facie*. The defendants (indorser) can show an entire want of consideration or that a small sum only was paid. But where the note in the ordinary course of business has been negotiated for a valuable consideration the maker is bound by the face of the note.

⁹ *Middletown Bank v. Jerome*, 18 Conn. 443.

¹⁰ *Kitchen v. Loudenback*, 48 Ohio

St. 177, 26 N. E. 979, 29 Am. St. Rep. 540.

¹¹ *Jones v. Gordon*, L. R. 2 App. Cas. 616, per Lord Blackburn. *Smith v. Jansen*, 12 Neb. 125, 10 N. E. 537, per Maxwell, Ch. J. (The amount of the consideration may become a material inquiry upon the question of good faith of the purchaser); *Tod v. Wick*, 36 Ohio St. 370 (the amount paid may affect the question of the indorsee's good faith).

¹² *Rooker v. Rooker*, 29 Ohio St. 1.

¹³ *Hunt v. Sandford*, 14 Tenn. (6 Yerg.) 387.

¹⁴ *Colliger v. Francis*, 61 Tenn. (2 Baxt.) 422.

instrument may enforce payment for its full amount against all parties liable, recovery by the purchaser of such paper is not limited to the amount paid therefor. And bad faith on the part of the purchaser of a note against which the maker had a valid defense is not shown by the fact that it was purchased at a heavy discount without inquiry of the maker whom the purchaser knew was perfectly solvent when inquiry was made of the payee as to the consideration and the latter was in need of money, and the note, though held at the time in the state where the suit was brought, was payable in a foreign jurisdiction, the inaccessibility of which for half the year the court would take judicial notice, and the purchase was made some time before maturity and without notice of any infirmity in the paper.¹⁵ But one who purchases a note for one-sixteenth of its face value is not a *bona fide* holder where he knew defendant was in fair credit and able to respond.¹⁶ And where the amount paid was very much less than that of the note and it was purchased of a stranger, the question, whether or not reasonable inquiry would have shown the circumstances, was held to be one for the jury.¹⁷ If one purchases a note from a person in whose possession it is and to whose order it is payable, for a certain sum of money, one-half of which is received in cash, and the other half is not paid and the note is collected, he is in no different position than if he had purchased the note on credit for one-half its value, and he is liable to the actual owner of the one-half interest in the note, even though at the time of purchase he had no notice of the actual owner's interest, although he knew that the note belonged to some other person than his assignor, as in such case he is not a *bona fide* holder.¹⁸

§ 192. **Adequacy in value unnecessary.**—It is not necessary that the consideration of a note shall equal in pecuniary value the face of the obligation given.¹⁹ If no part of the consideration is wanting at the time and no part of it subsequently fails, although inadequate in amount, the note is a valid obligation.²⁰ And if notes are somewhat

¹⁵ *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903; *Laws* 1899, p. 350, § 57. See N. Y. Neg. Inst. Law, § 96, appendix herein.

¹⁶ *DeWitt v. Perkins*, 22 Wis. 451.

¹⁷ *Gould v. Stevens*, 43 Vt. 125, 5 Am. Rep. 265.

¹⁸ *Kersey v. Fuaqua* (Tex. Civ. App. 1903), 75 S. W. 56.

¹⁹ *Yarwood v. Trusts & Guarantee Co., Ltd.*, 87 N. Y. Supp. 947, 950, 94 App. Div. 47, per Hiscock, J.; *Earl v. Peck*, 64 N. Y. 596, 598, per Church, Ch. J.; *Twentieth Century Co. v. Quilling* (Wis. 1907), 110 N. W. 174.

²⁰ *Earl v. Peck*, 64 N. Y. 596, 598; per Church, Ch. J.

larger than the sum exigible, their valid consideration will not be impaired.²¹ So if a note is given for a larger sum than the amount of gold borrowed but it is for a sum equal to the worth of the gold in paper currency there is a valid obligation.²² And if a draft is accepted solely for honor, and by means of the acceptance an assignment and possession of a bill of lading is obtained, the fact that the bill of lading which is taken as collateral security is not of as great value as was supposed affects the adequacy of the consideration, but not its sufficiency in point of law, and, it not being necessary that the consideration be adequate in value to support a contract, and there being no pretense of fraud, the receipt of such collateral, though of little value, constitutes a legal consideration.²³ So the amount of a note may be for a sum in excess of the value of the property purchased or right granted^{23*} much larger than the value of services agreed to be rendered.²⁴ While mere gratuitous services are an insufficient consideration for any executory agreement or promise, the performance of services and furnishing of valuable things, not as a gratuity, but in expectation of being compensated therefor, is sufficient to sustain a promissory note for an amount in excess of the real value of the services performed or things furnished. In the absence of fraud an existing legal obligation will sustain a promise to pay an amount for the excess of its real value.²⁵ Again, it is well settled that courts will not overturn such an obligation because too liberal an amount has been paid for services rendered and to compensate which the note is given; and if no part of the consideration was wanting at the time and no part of it subsequently failed, the note is a valid contract, although inadequate in amount.²⁶ And the maker of a note, given to the payee for surveys made by the latter at his instance, cannot resist payment on the ground that the amount was out of proportion

²¹ *Lanati v. Bayhi*, 31 La. Ann. 229.

²² *Cox v. Smith*, 1 Nev. 161, 90 Am. Dec. 476. See *Southern Ins. Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448.

²³ *Kelly v. Lynch*, 22 Cal. 661.

^{23*} *Twentieth Century Co. v. Quilling* (Wis. 1907), 110 N. W. 174.

²⁴ *Miller v. McKenzie*, 95 N. Y. 575, 47 Am. Rep. 85. See *Weed v. Bond*, 21 Ga. 195, Stat. 1831, Cobbs, Dig., p. 91, as to equities of note given attorney for services, *Whett v. Blount* (Ga.), 53 S. E. 205.

²⁵ *In re Bradbury*, 93 N. Y. Supp. 418, 422. The court per Chase, J., cites *Gallagher v. Brewster*, 153 N. Y. 364, 47 N. E. 450; *Cowee v. Cornell*, 75 N. Y. 98, 31 Am. Rep. 428; *Earl v. Peck*, 64 N. Y. 597; *Yarwood v. Trust & Guarantee Co., Ltd.*, 94 App. Div. 47, 87 N. Y. Supp. 947; *Bush v. Whitaker*, 45 Misc. 75, 91 N. Y. Supp. 616. See also "Illustrations" of services, § 194, herein.

²⁶ *Yarwood v. Trusts & Guarantee Co., Ltd.*, 87 N. Y. Supp. 947, 950, 94 App. Div. 47, per Hiscock, J.

to the value of the services rendered.²⁷ So in an action upon a note given for the price of trees, it was held that there being neither warranty or fraud the maker could not insist upon inadequacy of consideration as a ground for reducing the damages.²⁸

§ 193. Inadequacy or insufficiency of consideration—Rule as to inquiry into—Fraud.—In an action upon a note mere inadequacy of consideration, there being no warranty, misrepresentation, fraud, or undue influence, cannot be given as a defense,²⁹ where the parties have dealt on equal terms.³⁰ So, as between the original parties, and where the adverse rights of creditors are not in question, the law will not inquire into the adequacy or sufficiency of the consideration.³¹ And it is also declared that equity will not grant relief unless the inadequacy is so gross as to shock the conscience and lead to the irresistible conclusion of fraud;³² and that the fraud must also extend to the entire

²⁷ *Rightor v. Aleman*, 4 Rob. (La.) 45; Civ. Code Arts. 1854–1857.

²⁸ *Johnson v. Titus*, 2 Hill (N. Y.) 606.

²⁹ *New York*.—*Earl v. Peck*, 64 N. Y. 596, 598, per Church, Ch. J.; *Johnson v. Titus*, 2 Hill (N. Y.) 606.

See also *Connecticut*.—Appeal of Clark, 57 Conn. 565, 19 Atl. 332 (applied where there is a legal consideration); *Abbe v. Newton*, 19 Conn. 20 (consideration of note was grossly inadequate and fair inference was that parties so understood).

Georgia.—*Green v. Lowry*, 38 Ga. 5848 (under Code, §§ 2700, 2701, mere inadequacy of consideration alone will not void a contract. If the inadequacy be great, it is a strong circumstance to evidence fraud, and on a suit for damages for breach of the contract the inadequacy of the consideration will always enter as an element in estimating the damages).

Indiana.—*Hereth v. Bank*, 34 Ind.

380; *Wheelock v. Barney*, 27 Ind. 462.

Iowa.—*Lay v. Isman*, 36 Iowa 305. *Kentucky*.—*Roby v. Sharp*, 6 T. B.

Mon. (Ky.) 375.

Massachusetts.—*Dean v. Carruth*, 108 Mass. 242, 245.

New York.—*Vosburg v. Diefendorf*, 119 N. Y. 357, 23 N. E. 80; *Maas v. Chatfield*, 90 N. Y. 303 (purchased at a discount exceeding the legal rate of interest); *Root v. Strang*, 77 Hun (N. Y.) 14, 28 N. Y. Supp. 273.

Ohio.—*Dieringer v. Klekamp* (Ohio), 11 Wkly. Law Bul. 123 (fraud was not alleged).

Virginia.—*Loftus v. Maloney*, 89 Va. 576, 16 S. E. 749.

Federal.—*Boggs v. Wann*, 58 Fed. 681 (not a good defense in absence of misrepresentations or fraud).

³⁰ *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428.

³¹ *Parish v. Stone*, 31 Mass. (14 Pick.) 198, 207, 25 Am. Dec. 378, per Shaw, C. J.

³² *Jones v. Deggs*, 84 Va. 685, 5 S. E. 799.

consideration.³³ When the inadequacy of the consideration is such as to create a presumption of fraud and overreaching, or of unconscientious advantage, taken under circumstances of distress and improvidence, on the one side, or of mental incompetency on the other, the contract founded thereon cannot be enforced in law or in equity; and a court of equity will, at the instance of the party deceived, interfere and set it aside after it is executed. In cases of gross inadequacy the court will also take advantage of every circumstance which indicates imposition or improper advantage, to found a presumption of fraud, and thereby to rescind the contract. The mere inadequacy of the consideration is not, however, in such cases, the ground upon which a contract is invalidated, but the fraud which is thereby indicated, and however inadequate the consideration may be, yet if the circumstances of the case indicate no unfair advantage on the one side, or no great incompetency on the other, the contract will be valid.³⁴ Again, inadequacy will not be of avail as a defense in an action by an indorsee against an indorser,³⁵ nor, in general, will inadequacy support a plea of want of consideration;³⁶ but in an action by the indorsee against the maker, upon a note indorsed after maturity, it is a defense that there was want of sufficient consideration, such note being also based upon a consideration which was but the promise to pay the debt of another.³⁷

§ 194. **Sufficient consideration—Illustrations.**—Negotiable paper has been held to be founded upon a sufficient consideration; where such consideration consists of the value of an interest in land and the balance is for compensation for domestic services, rendered by an adult daughter to her widowed mother, such note being given by the mother to the daughter;³⁸ where the consideration is expressed to be for money and services rendered equivalent to the amount of the note and in full therefor when paid, and the note was executed to the testator's granddaughter who had lived with him for years and rendered household and personal services both before and after the delivery of the note;³⁹ where a check was delivered *inter vivos* to decedent's housekeeper, upon whom he had been more dependent than upon any other person, and

³³ *Harlem v. Read*, 3 Ham. (Ohio) 285, 17 Am. Dec. 594.

³⁴ *Green v. Lowry*, 38 Ga. 548, 552, quoting from Story on Contracts, § 432.

³⁵ *Dunn v. Ghost*, 5 Colo. 134.

³⁶ *Rice v. Rice*, 106 Ala. 636, 17 So. 626.

³⁷ *Wyman v. Gray*, 7 Har. & J. (Md.) 409. See §§ 234, 235, 239-241, 243, herein.

³⁸ *Petty v. Young*, 43 N. J. Eq. 654, 12 Atl. 374.

³⁹ *Velie v. Titus*, 60 Hun (N. Y.)

405, 15 N. Y. Supp. 467.

who had been faithful and honest;⁴⁰ where the payee, being under no legal obligation to live with his wife, nor compelled to support her child, with whom she was pregnant by another man at the time of her marriage, but without her husband's then knowledge, agrees as a consideration for a note to live with and support them;⁴¹ where the paper is given by a stockholder of an association for his proportionate share of guaranteed indebtedness and he is released therefrom, and transfers his stock, although he had paid in full for such stock;⁴² where the note is executed to an incorporated college as an aid toward effectuating the purposes of its incorporation, and on the strength thereof the college has incurred obligations;⁴³ where it was given as part of a consideration of an agreement to quitclaim an interest in certain land, and to dismiss an action to quiet title as fast as certain portions of the land were sold, even though a part of the note remaining unpaid, the suit to quiet title was renewed and finally determined against the plaintiff;⁴⁴ where the paper is given for a deed to remove a supposed cloud upon title to land;⁴⁵ where there were differences between plaintiff and defendant, and the former had a lien upon the latter's property which prevented him from receiving a payment on a building contract, and for the purpose of discharging that lien and thus obtaining the desired payment, there being no duress, and the order in question was given upon an account stated;⁴⁶ where a surety's note on a cashier's bond is executed for forbearance in suing on such bond;⁴⁷ where a note of a son is indorsed by a mother to secure a debt of her husband in consideration of an agreement to forbear action;^{47*}

⁴⁰ *Clay v. Layton*, 134 Mich. 317, 96 N. W. 458, 10 Det. Leg. N. 481.

⁴¹ *Brannum v. O'Connor*, 77 Iowa 632, 42 N. W. 504.

⁴² *Hilbert v. Burry*, 111 Mich. 698, 70 N. W. 318, 3 Det. L. N. 866.

⁴³ *Irwin v. Webster*, 56 Ohio St. 9, 46 N. E. 63, 60 Am. St. Rep. 727, 36 L. R. A. 239, 37 Ohio L. J. 157.

⁴⁴ *Sharp v. Bowie*, 142 Cal. 462, 76 Pac. 62. The action was one for specific performance and one of the appellant's claims was based partly upon the failure of the plaintiff to allege, and of the court to find that there was a fair and adequate consideration for the contract and note and partly upon the evidence, and Beatty, C. J., said: "The failure of

the court to make a finding upon this matter is accounted for by the absence of any such issue, and the deficiency of the complaint, if any, cannot be considered on this appeal. As to evidence, it showed a good and sufficient consideration for the contract at the time it was made."

⁴⁵ *Rowe v. Barnes*, 101 Iowa 302, 70 N. W. 197.

⁴⁶ *Creveling v. Saladino*, 89 N. Y. Supp. 834, 836, 97 App. Div. 202. "The renewal of the lien was a sufficient consideration for the order," per Bartlett, J.

⁴⁷ *Fink v. Farmers' Bank*, 178 Pa. 154, 35 Atl. 636.

^{47*} *Emerson v. Sheffer*, 113 App. Div. (N. Y.) 19, 98 N. Y. Supp. 1057.

where the note is executed, without fraud, to cover a shortage in a deceased husband's account as co-executor of an estate, and in pursuance of a compromise and dismissal of legal proceedings against the surviving executor;⁴⁸ where a person who is either a defaulter or a debtor executes a note for the amount due and his sister also executes a note as collateral;^{48*} where the consideration of a note, given by surviving partners and an executrix and residuary legatee of a deceased partner, is the surrender of a guaranty of collection or payment of certain securities and the transfer to the members of the old firm of the partnership property;⁴⁹ where a note is given by a debtor of the testator to one who was about to administer the estate, the latter promising to execute a receipt for the money as administrator after qualifying as such;⁵⁰ where the maker of the note has received all of the testator's property, and as a consideration therefor decedent's note is cancelled and additional time given to pay the debt;⁵¹ where a party enters into a compromise agreement with his other creditors, at the instance of a bank, and gives to said bank its note to obtain funds to consummate said settlement;⁵² for the execution of a note by another, where the time of payment of a note is extended to one of the makers.⁵³ Where a third person gives his check to discharge a note secured by a mortgage which the holder was threatening to enforce by taking the property covered by the mortgage.^{53*} So a note is founded upon a good consideration where it is given for information of an outstanding title to land in another's adverse possession.⁵⁴ And the release of dower by a wife is a valuable consideration for a note executed by her husband to her.⁵⁵ So a note is based upon a sufficient consideration where it is given between citizens of the United States for the right of occupancy of land of an Indian Nation, and peaceable possession is taken.⁵⁶ The consideration is also valid

⁴⁸ *Rohrbacher v. Aitken*, 145 Cal. 485, 78 Pac. 1054.

^{48*} *Henry v. State Bank* (Iowa 1906), 107 N. W. 1034.

⁴⁹ *Fitch v. Frazer*, 82 N. Y. Supp. 138, 84 App. Div. 119.

⁵⁰ *Nelson v. Lovejoy*, 14 Ala. 568.

⁵¹ *McCormal v. Redden*, 46 Neb. 776, 65 N. W. 881.

⁵² *Mahoney v. Barber*, 67 Minn. 308, 69 N. W. 886.

⁵³ *Union Banking Co. v. Martin*, 113 Mich. 521, 71 N. W. 867, 4 Det.

L. N. 482. See *In re Kemp's Estate*, 49 Misc. R. (N. Y.) 396, 100 N. Y. Supp. 221.

^{53*} *National Bank of Newbury v. Sayer*, 73 N. H. 595, 64 Atl. 189.

⁵⁴ *Lucas v. Pico*, 55 Col. 126.

⁵⁵ *Trust Co. v. Bendow*, 135 N. C. 303, 47 S. E. 435, granting rehearing of same case, 131 N. C. 415, 42 S. E. 896.

⁵⁶ *Tye v. Chickasha Town Co.*, 2 Ind. Ty. 113, 48 S. W. 1021.

where there is a benefit to the maker or a third person, as well as where the maker is benefited.⁵⁷ Again, a purchase of property is a valid consideration for a married woman's note and a promissory note is property. The fact that the maker may be irresponsible does not change the rule that one buying a note buys property.⁵⁸ And where the agent of the maker receives the amount of a note and it is used for the latter's benefit, it is immaterial that it was furnished for the payee by a third person.^{58*} But services rendered by a daughter to her mother, which are such as she is morally bound to render, do not constitute a valuable consideration for a note subsequently given by her father, and no recovery can be had thereupon in the absence of an express promise.⁶⁰

§ 195. Compromise, settlement or relinquishment note.—A note given in compromise or settlement of a doubtful claim in dispute, or of a controversy likely to become the subject of litigation, or in settlement of a litigated claim, such compromise or settlement being a discharge or extinguishment of the claim or controversy, is based upon a valid and sufficient consideration where such compromise or settlement is made fairly, in good faith, without mistake, undue influence, misrepresentation, false statement, fraud or duress, and each party understands the facts, and the maker of the note is not ignorant of the nature of his rights.⁶¹ The invalidity of the original obligation is no de-

⁵⁷ *Barrett v. Mahnken*, 6 Wyo. 541, 48 Pac. 202. See *Fulton v. Loughlin*, 118 Ind. 286.

⁵⁸ *Crampton v. Newton's Est.*, 132 Mich. 149, 93 N. W. 250, 9 Det. L. N. 570.

For other instances of a sufficient consideration for a note see the following cases:

California.—*Baldwin v. Hart*, 136 Cal. 222, 68 Pac. 698; *Wheelan v. Swain*, 132 Cal. 389, 64 Pac. 560; *Placer County Bank v. Freeman*, 126 Cal. 90, 58 Pac. 388.

Colorado.—*Reed v. First Nat. Bank*, 23 Colo. 380, 48 Pac. 507.

Illinois.—*Hart v. Strong*, 183 Ill. 349, 55 N. E. 629; *Smith v. McLennan*, 101 Ill. App. 196; *Rodgers v. Jewell Belting Co.* (Ill. App.), 56 N. E. 1017.

New York.—*Chapman v. Ogden*, 37 N. Y. App. Div. 355, 56 N. Y. Supp. 73, aff'd 165 N. Y. 642, 59 N. E. 1120; *General Electric Co. v. Nassau Electric Co.*, 36 N. Y. App. Div. 510, 55 N. Y. Supp. 858, aff'd 161 N. Y. 650, 57 N. E. 1110.

Federal.—*Morris v. North*, 21 C. C. A. 553, 43 U. S. App. 739, 75 Fed. 912.

Examine *Murphy v. Gumaer*, 18 Colo. App. 183, 70 Pac. 800.

^{58*} *Hale v. Harris*, 28 Ky. Law R. 1172, 91 S. W. 660.

⁶⁰ *Shugart v. Shugart*, 111 Tenn. 179, 76 S. W. 821. See § 192 herein.

⁶¹ *Alabama*.—*Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369, 24 So. 405; *Wyatt v. Evins*, 52 Ala. 285 (when no fraud).

fense,^{61*} as it does not matter on whose side the right ultimately turns out to be,⁶² and the validity of the compromise will not be affected by the subsequent ascertainment of the fact that the claim is without foundation;⁶³ for, if the setting up of the original defense to the whole

Arkansas.—Richardson v. Comstock, 21 Ark. 69.

California.—Rohrbacher v. Aitken, 145 Cal. 485, 78 Pac. 1054.

District of Columbia.—Northern Liberty Market Co. v. Steubner, 4 Mackey (D. C.) 301.

Georgia.—Johnson v. Redwine, 98 Ga. 112, 25 S. E. 924 (compromise of doubtful claim to sufficient consideration to support a note fairly given in settlement of the controversy compromised); Austell v. Rice, 5 Ga. 472 (forbearance to prosecute a legal claim and the compromise of a doubtful right are both sufficient considerations).

Iowa.—Rowe v. Barnes, 101 Iowa 302, 70 N. W. 197; French v. French, 84 Iowa 655, 15 L. R. A. 300, 51 N. W. 145.

Kentucky.—Power v. Hambrick, 25 Ky. L. Rep. 301, 74 S. W. 660. (Settlement of suit is sufficient consideration for note); Rains v. Lee, 18 Ky. L. Rep. 285, 36 S. W. 176 (compromise of claim and dismissal of suit is sufficient consideration).

Massachusetts.—Bent v. Weston, 167 Mass. 529, 46 N. E. 386 (there was no contention of any fraud or duress and the check was voluntarily given. All the facts were known, and a settlement was effected by giving the check); Easton v. Easton, 112 Mass. 438 (note was fairly and freely given in settlement of a disputed claim likely to become the subject of litigation); Cobb v. Arnold, 49 Mass. (8 Metc.) 403, 405 (a compromise fairly made of a claim in dispute between the parties, there being no misrepresen-

tation or false statement of facts, and the defendant not being ignorant of the nature of his rights constitutes a good consideration for a note, per Hubbard, J.).

Minnesota.—Northern Pac. Ry. Co. v. Holmes, 88 Minn. 389, 93 N. W. 606.

Mississippi.—Boone v. Boone, 58 Miss. 820.

Missouri.—Pickel v. St. Louis Chamber of Commerce Assn., 80 Mo. 65, 66 ("in the absence of fraud in procuring it, mistake in making it, or ignorance of his rights when the settlement was made" a counterclaim against such note arising out of the matters compromised will not be allowed).

New Jersey.—Conover v. Stillwell, 34 N. J. L. 54, 58.

New York.—Housatonic National Bk. v. Foster, 85 Hun (N. Y.) 376, 32 N. Y. Supp. 1031, 66 N. Y. St. R. 435.

Vermont.—Willard v. Dow, 54 Vt. 182, 186, 41 Am. Rep. 841 (compromise of a doubtful right is sufficient).

Virginia.—Zane v. Zane, Munf. (Va.) 406, 412 ("here were two considerations, not only good, but favored in law, to compromise doubtful right, and to settle boundaries").

Federal.—Northern Liberty Market Co. v. Kelly, 113 U. S. 199, 28 L. Ed. 948, 5 N. Y. Supp. 422.

^{61*} French v. French, 84 Iowa 655, 15 L. R. A. 300, 51 N. W. 145.

⁶² Willard v. Dow, 54 Vt. 182, 186, 41 Am. Rep. 841, per Veazey, J.

⁶³ Rowe v. Barnes, 101 Iowa 302, 70 N. W. 197.

claim were not precluded, all compromises would be unavailing and all settlements by way of mutual concession would be defeated.⁶⁴ So a counterclaim against such a note arising out of the matters compromised will not be allowed.⁶⁵ And where legal proceedings have been dismissed upon a compromise agreement, the parties cannot afterward make the agreement depend upon the question whether or not the party could have prevailed in such proceeding.⁶⁶ Again, as is said in a Pennsylvania case: "The mutual giving up of something for the sake of peace is itself a consideration for an agreement that each party shall be satisfied with the event, however it may turn out."⁶⁷ In a New Jersey case the court also asserts the rule that a compromise of a doubtful claim constitutes a sufficient consideration, whatever the actual rights of the parties may have been, and adds: "What substance there must be in a claim, to make a compromise of it, unless it is actually in suit, a valid consideration has occasioned a great contrariety of decision. * * * But * * * there is no controversy that the claim, whatever it was, must be extinguished or discharged."⁶⁸ If a note is given in settlement of an amount found due upon a contract for work which was represented to have been properly done, in an action by the payee upon the paper it is no defense that the work was not done in compliance with the contract, it not being averred that the defendant was deceived in any way or was ignorant of the character of the work, or that he had no opportunity to examine it, or had not examined it, or that there was any concealment by the plaintiff as to the work.⁶⁹ In case a note given to cover a supposed liability is coupled with a release of all claims and demands it is founded upon a valuable and sufficient consideration,⁷⁰ and the general rule that a settlement of a claim is a sufficient consideration for a note applies where the ownership of trees, cut from land, is asserted by a claimant thereto, and in settlement therefor a note is given to the claimant of the land by the alleged trespasser.⁷¹ There is also a good, sufficient and valuable consideration for a note where it is given, without duress, in settlement of

⁶⁴ Cobb v. Arnold, 49 Mass. (8 Metc.) 403, 405, per Hubbard, J.

⁶⁵ Pickel v. St. Louis Chamber of Commerce Assn., 80 Mo. 65, 66.

⁶⁶ Rohrbacher v. Aitken, 145 Cal. 485, 78 Pac. 1054.

⁶⁷ Clement v. Reppard, 15 Pa. St. 111, 113, per curiam.

⁶⁸ Conover v. Stillwell, 34 N. J. L. 54, 58, per Depue, J.

⁶⁹ Marion & Monroe Gravel Road Co. v. Kessinger, 16 Ind. 549. See Ostrow v. Tarver (Tex. Civ. App. 1894), 28 S. W. 701, 29 S. W. 69.

⁷⁰ Booth v. Dexter Steam Fire Engine Co., 118 Ala. 369, 24 So. 405.

⁷¹ Northern Pacific Ry. Co. v. Holmes, 88 Minn. 389, 93 N. W. 606.

damages, for which it was believed that the maker was liable by reason of the fact that certain sheep had been stolen from the payee, who believed the maker was in some way connected with the theft.⁷² If a note and deed are given in good faith, without undue influence, each party understanding the acts upon which the claim is based, and the purpose of the transaction is to remove a supposed cloud on title to land, and that is accomplished, there is a sufficient consideration for the note, even though the claim in question was without any valid consideration.⁷³ Again, the release of claims is a good consideration for a note.⁷⁴ And where legal proceedings have been instituted, and the parties, after investigation, in the absence of fraud, make a compromise agreement, and the proceedings are in consideration thereof dismissed, the dismissal of the proceedings constitutes a consideration for the agreement; and a note given in conformity with such compromise is enforceable;⁷⁵ for settlement and discontinuance of an action is a sufficient consideration, and an actual settlement involves practically a discontinuance, the latter being a mere incidental matter not affecting the rights of either party.⁷⁶ The relinquishment of an attachment also forms a good consideration for a note.⁷⁷ A note for a sum resulting from a compromise constitutes no exception to the rule which permits an inquiry into the consideration of the note.⁷⁸

§ 196. **Same subject.—Unfounded or illegal claim.**—A mere controversy between the parties will not be sufficient,⁷⁹ the compromise must be a *bona fide* controversy or disputed claim.⁸⁰ So forbearance to sue on a claim not maintainable is without consideration;⁸¹ and a note given for a supposed demand which did not in fact exist is without consideration.⁸² There must be at least a colorable ground of a claim, in law or in fact, to sustain an executory contract given as a compromise

⁷² Bullard v. Smith, 28 Mont. 387, 72 Pac. 761.

⁷³ Rowe v. Barnes, 101 Iowa 302, 306, 70 N. W. 197.

⁷⁴ Housatonic National Bk. v. Foster, 85 Hun (N. Y.) 376, 32 N. Y. Supp. 1031, 66 N. Y. 435.

⁷⁵ Rohrbacher v. Aitken, 145 Cal. 485, 78 Pac. 1054.

A promise to discontinue poor debtor proceedings is a sufficient consideration. Fay v. Hunt, 190 Mass. 378, 77 N. E. 502.

⁷⁶ Wesselman v. Stuart, 30 Misc. 808, 61 N. Y. Supp. 1110, per O'Dwyer, J.

⁷⁷ Smith v. Taylor, 39 Me. 242.

⁷⁸ Clement v. Reppard, 15 Pa. St. 111, 113.

⁷⁹ Boone v. Boone, 58 Miss. 820.

⁸⁰ Duck v. Autle, 5 Okla. 152, 47 Pac. 1056.

⁸¹ Foster v. Metts, 55 Miss. 77.

⁸² Bullock v. Ogburn, 13 Ala. 346.

for it, there must be a surrender of some legal benefit which the other party might have retained.⁸³ If a claim is without legal merit and is clearly and absolutely unsustainable at law or in equity, its compromise and promise to pay it, whether its legal validity was known or not at the time, constitutes no sufficient legal consideration for a release or agreed compromise.⁸⁴ And if the claim settled is wholly illegal and unfounded, and no suit is brought thereon which is the subject of a compromise, its settlement is not a sufficient consideration for a note.⁸⁵ Therefore, where the sole consideration of a note is the dismissal of a contest which the party asserting it knew was groundless and without any cause and which was prosecuted solely for a wrongful and illegal purpose no recovery can be had on the note.⁸⁶ So a due-bill given by the defendant in a criminal case to the clerk of a court, in settlement of a bill for costs rendered by the clerk before there had been any conviction of the accused, who was eventually acquitted, is without any legal consideration.⁸⁷ And the holder of a note who has been paid cannot hold on to the security and the note secured, and by denying the payment create a controversy which will support a promise to pay him the second time, in whole or in part, as the price of doing that which the law and equity and good conscience require him to do without compensation.⁸⁸ Again, if the promise is extorted by threats to sue on a claim which the party knew was wholly unfounded, and which he was making for the purpose of extorting money, the contract is utterly void.⁸⁹

§ 197. **Compromise of forgery claim.**—A compromise is a good and sufficient consideration for a new note given in settlement of a civil suit upon a note to which the defense of forgery is set up. Such a case not being an indictment for forgery and a note given upon an agreement not to prosecute.⁹⁰

⁸³ *Smith v. Boruff*, 75 Ind. 412, 416.

⁸⁶ *Duck v. Autle*, 5 Okla. 152, 47 Pac. 1056.

⁸⁴ Acknowledged to be a "well recognized principle" in *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369, 377, 24 So. 405, per Haralson, J., but a note given to cover a supposed liability was held in that case to be based upon a valid consideration. *Union Collection Co. v. Buckman* (Cal. 1907), 88 Pac. 708.

⁸⁷ *Wells v. Potter*, 120 Ga. 889, 48 S. E. 354.

⁸⁸ *Smith v. Boruff*, 75 Ind. 412, 416.

⁸⁹ *Willard v. Dow*, 54 Vt. 182, 186, 187, 41 Am. Rep. 841, per Veazey, J.

⁹⁰ *Grant & Kelly v. Chambers*, 30 N. J. L. 323.

⁸⁵ *Tucker v. Ronk*, 43 Iowa 80. See *Conover v. Stillwell*, 34 N. J. L. 54.

CHAPTER X.

WANT OR FAILURE OF CONSIDERATION.

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§ 198. **Total want of consideration—Defense between original or immediate parties.**—It is a well-settled rule that as between original or immediate parties to a bill or note, or negotiable paper generally, it is a good defense to an action thereon to show an entire or total want of consideration.¹ So it is a good defense in law or equity that a note

¹ *Alabama*.—Ragsdale v. Gresham, 141 Ala. 308, 37 So. 367. (Under the Alabama statute, Code 1896, § 1800, the consideration of every and any written instrument, the foundation of the suit, may be impeached at law, and shown to have been made without any consideration, or that the consideration has failed); Bullock v. Ogburn, 13 Ala. 346.

California.—Union Collection Co. v. Buckman (Cal. 1907), 88 Pac. 708.

Connecticut.—Litchfield Bank v. Peck, 29 Conn. 384; Bunnell v. Butler, 23 Conn. 65, 67; Raymond v. Sellick, 10 Conn. 482; Barnum v. Barnum, 9 Conn. 242, 250; Lawrence v. Stonington Bk., 6 Conn. 521, 525–527.

Delaware.—McCready v. Cann, 5 Harr. (Del.) 175.

Georgia.—Whitt v. Blount, 124 Ga. 671, 53 S. E. 205; Radcliff v. Biles, 94 Ga. 480, 20 S. E. 359.

Indiana.—Meyer v. Brand, 102 Ind. 301, 26 N. E. 125; Moore v. Boyd, 95 Ind. 134, 135; Smith v. Boruff, 75 Ind. 412 (want of consideration may be shown by parol); Barner v. Morehead, 22 Ind. 354.

Iowa.—Farmers' Savings Bank v. Hansmann, 114 Iowa 49, 51, 86 N. W. 31, per Sherwin, J.; Simpson College v. Tuttle, 71 Iowa 596, 599, 33 N. W. 74; Swan v. Ewing, 1 Morris (Iowa) 344.

Kansas.—Hale v. Aldaffer, 5 Kan. App. 40, 47 Pac. 320, rehearing denied, 49 Pac. 684.

Kentucky.—Coyle v. Fowler, 3 J. J. Marsh. (Ky.) 473 (holding that plea denying any consideration in

fact is good since 1801). Sullivan v. Sullivan, 29 Ky. Law Rep. 239, 92 S. W. 966.

Louisiana.—Krumhaar v. Lude-ling, 3 Mart. O. S. (La.) 641, 643.

Maryland.—Beall v. Pearre, 12 Md. 550, 566; Wyman v. Gray, 7 Harr. & J. (Md.) 409. (Parol evidence is admissible to show want or failure of consideration.)

Massachusetts.—Arpin v. Owens, 140 Mass. 144, 145, 3 N. E. 25 (quoting Byle on Bills (6th Am. Ed.) 206); Parish v. Stone, 31 Mass. (14 Pick.) 198, 201; Hill v. Buckminster, 22 Mass. (5 Pick.) 391.

Michigan.—Nowack v. Lehmann (Mich. 1905), 102 N. W. 992; Brown v. Smedley, 136 Mich. 65, 98 N. W. 856, 10 Det. L. N. 960. (Parol evidence admissible to show want of consideration); Kelley v. Guy, 116 Mich. 43, 74 N. W. 291.

Minnesota.—Wilderman v. Donnelly, 86 Minn. 184, 90 N. W. 366, per Collins, J.; Anderson v. Lee, 73 Minn. 397, 76 N. W. 24; Ruggles v. Swanwick, 6 Minn. 526 (Gil. 365).

Mississippi.—Hamer v. Johnston, 5 Miss. (6 How.) 698, 721, per Sharkey, C. J.

Missouri.—Chicago Title & Trust Co. v. Brady, 165 Mo. 197, 65 S. W. 303. (Want of consideration; no consideration was ever received or intended, and the fact that the notes were given to increase a bank's apparent assets does not prevent such defense of want of consideration, and the same rule applies where the notes were given as accommodation notes for the same purpose.) Har-

was without consideration and was procured by fraud.² The defense of want of consideration is also held available by the maker against the receiver of a payee bank.³ Again, a promissory note not negotiable and not a specialty may be defended against for want of consideration in avoidance thereof.⁴ Under an averment of want of consideration and failure of consideration, in an action upon notes against the maker's estate by the payee, it is clearly competent evidence that said notes were asked for and given merely as a matter of form, but failure of consideration cannot be proven without first showing the consideration.⁵

§ 199. Upon acceptance—Between acceptor and other parties—Want of consideration.—The presumption, raised by an unconditional acceptance of a bill of exchange by the drawee, that he has funds in his hands to the amount of the bill,⁶ may be rebutted between the ac-

wood v. Brown, 23 Mo. App. 69. See Rogers v. Mercantile Adjuster Pub. Co. (Mo. App. 1906), 93 S. W. 328.

Nebraska.—Fellers v. Penrod, 57 Neb. 463, 77 N. W. 1085.

New Hampshire.—Morton v. Stone, 67 N. H. 367, 368, 29 Atl. 845 (words "value received" were expressed); Copp v. Sawyer, 6 N. H. 386; Tillotson v. Grapes, 4 N. H. 444; Haynes v. Thorn, 8 Fost. (N. H.) 386.

New York.—Ross v. Saron, 93 N. Y. Supp. 553; Higgins v. Ridgway, 153 N. Y. 130; 47 N. E. 32; aff'g 90 Hun 398, 35 N. Y. Supp. 944; Chase v. Senn, 35 N. Y. St. Rep. 36, 13 N. Y. Supp. 266; McCulloch v. Hoffman, 10 Hun (N. Y.) 133; Sawyer v. McLouth, 46 Barb. (N. Y.) 350, 353; Johnson v. Titus, 2 Hill (N. Y.) 606, 607 (Cowan, J., says substantially that although want of consideration may always be insisted upon as a complete answer to an action upon an executory contract, yet the only difficulty lies in the application of the rule); Slade v. Halstead, 7 Cow. (N. Y.) 322; Fink v. Cox, 18 Johns. (N. Y.) 145; Pearson v. Pearson, 7 Johns. (N. Y.) 26.

Ohio.—Loffland v. Russell, Wright (Ohio) 438.

Oklahoma.—Hagan v. 'Bigler, 5 Okla. 575, 49 Pac. 1011.

Pennsylvania.—Barnett v. Offerman, 7 Watts (Pa.) 130; Child v. McKean, 2 Miles (Pa.) 192; Moore v. Phillips (Pa.), 13 Mont. Co. L. Rep. 173.

Vermont.—Stone v. Peake, 16 Vt. 213, 219.

Federal.—National Bank v. Brush, 10 Biss. (U. S.) 188, 6 Fed. 132.

Absence or failure of consideration a defense against any person not a holder in due course. Neg. Inst. Law, § 54. See appendix herein.

² Radcliff v. Biles, 94 Ga. 480, 20 S. E. 359.

³ Litchfield Bk. v. Peck, 29 Conn. 384.

⁴ Barnum v. Barnum, 9 Conn. 242, 250.

⁵ Independent Brewing Assoc. v. Kleit, 114 Ill. App. 1.

⁶ *Arkansas*.—Byrd v. Bertrand, 7 Ark. 322.

Connecticut.—Jarvis v. Wilson, 46 Conn. 90, 33 Am. Rep. 18 (in this

case *Loomis, J.*, said: "The presumption is that every bill of exchange is drawn on account of some indebtedness from the drawee to the drawer, and that the acceptance is an appropriation of the funds of the latter in the hands of the former").

Georgia.—*Flournoy v. First Nat. Bk.*, 79 Ga. 810, 816, 78 Ga. 222, 228, 2 S. E. 547. (In this case *Bleckley, C. J.*, said: "The effect of accepting a bill is to acknowledge that the drawer has funds in the hands of the acceptor applicable to its payment, and the payee is entitled to repose with absolute trust and confidence upon that admission.")

Kentucky.—*Byrne v. Schwing*, 6 B. Mon. (Ky.) 199, 203.

Louisiana.—*Eastin v. Succession of Osborn*, 26 La. Ann. 153.

Maine.—*Kendall v. Galvin*, 15 Me. 131, 132, 32 Am. Dec. 141 (holding also that instruments liable to any objection preventing them from being regarded as bills of exchange are not within the rule).

Minnesota.—*Vanstrum v. Liljengren*, 37 Minn. 191, 192, 33 N. W. 555. (It was said in this case: "By accepting the bill the defendant had admitted the possession of funds of the drawer applicable to the payment of the same, and had assumed the absolute obligation of making such payment. He became the principal debtor as respects the holder of the accepted bills.")

Nebraska.—*Trego v. Lowrey*, 8 Neb. 238, 243.

New York.—*Hidden v. Waldo*, 55 N. Y. 294, 297.

North Carolina.—*Jordan v. Tarkington*, 15 N. C. 357 (a case of an acceptance of an order).

Pennsylvania.—*Bockoven v. National M. & T. Bk.*, 11 Wkly. N. Cas. (Pa.) 570.

Federal.—*Hortsmann v. Henshaw*, 11 How. (U. S.) 177, 183, 18 Curt. Dec. 590, 52 L. Ed. 653 (holding that the acceptor is presumed to accept upon funds of the drawer in his hands, and if he accepts without funds upon the credit of the drawer he must look to him for indemnity): *Baborg v. Peyton*, 2 Wheat. (U. S.) 385, 386, 4 Curt. Dec. 144, 15 L. Ed. 268 (*Story, J.*, said: "*Prima facie* every acceptance affords a presumption of funds of the drawer in the hands of the acceptor, and is of itself an express appropriation of those funds for the use of the holder." The case, however, rested upon whether an action of debt would lie by the payee or indorsee against the acceptor).

English.—*Vere v. Lewis*, 3 Term R. 182 (the court said that the mere circumstance of the defendant's accepting was evidence that he had received value from the drawers).

Examine also *Steiner v. Jeffries*, 118 Ala. 573, 24 So. 37.

See *Gillian v. Myers*, 31 Ill. 525 (holding that rule does not apply to acceptance of a writing which is a mere letter of request payable on a contingency which might never happen).

"The effect of the acceptance of the order was to constitute the acceptor the principal debtor. By the act of acceptance he assumed to pay the order or bill, and became the principal debtor for the amount specified; the acceptance being an admission of everything essential to the existence of such liability. It admits that the acceptor had funds of the drawer in his hands, for the drawing of the order or bill implied this." *Ragsdale v. Gresham*, 141 Ala. 308, 37 So. 367, 369, per *Haralson, J.*, citing 1 *Daniel on Neg. Inst.*, §§ 552, 554, and quoting 1 *Parsons on Notes & Bills*,

ceptor and drawer.⁷ So a plea of want of consideration for the acceptance of an order is good under the Alabama statute.⁸ And a demurrer to such a plea, that it did not aver in what way or under what circumstances the order was wanting in consideration, will be properly overruled.⁹ But an unconditional acceptance, however valid under the statute or otherwise, binds the acceptor as to a *bona fide* payee or holder for value,¹⁰ so that one who has accepted a bill cannot thereafter, as against such *bona fide* payee or holder, show that there was

p. 323; Story's Bills of Exchange, § 113; Capital City Ins. Co. v. Quinn, 73 Ala. 560, per Brickett, C. J.; Story on Bills, § 252.

⁷ Trego v. Lowrey, 8 Neb. 238, 243 (as between the acceptor and the drawer and indorsers, for whose accommodation the acceptance was given, this presumption may be rebutted and the exact relations of the parties shown); Hidden v. Waldo, 55 N. Y. 294, 297 ("as between the parties to the contract the presumption may be rebutted and their true relation shown and the liability of the one to the other will be that resulting from the true rather than the apparent relation of each to the other" a case of acceptance for accommodation); American Boiler Co. v. Foutham, 50 N. Y. Supp. 351.

See Kortepeter v. List, 16 Ind. 295. This case was a suit by the payees of a bill of exchange against the drawer and acceptor, the bill having been indorsed by the payers and returned unpaid. The drawer answered that he, together with said payee, were sureties for the acceptor and known to each other as such, and that he had paid his contributive share to the holder, and it was held that as this was a controversy between the drawer and drawees of a bill the consideration could be inquired into.

⁸ Code 1896, § 1300.

⁹ Ragsdale v. Gresham, 141 Ala. 308, 37 So. 367.

¹⁰ Ray v. Morgan, 112 Ga. 923, 38 S. E. 335 (holding also that acceptor bound whether he had funds in his hands or not); Towsley v. Sumrall, 2 Pet. (U. S.) 169, 183, 8 Curt. Dec. 68, 27 L. Ed. 386 (holding that acceptance binds acceptor even though he had no funds of the drawer in his hands and even though the holder knew of such fact); Corbin v. Southgate, 3 Hen. & M. (Va. P.) 319.

In McMurray v. Sisters of Charity &c., 68 N. J. L. 312, 53 Atl. 389, it is held that the drawee is only bound to the extent of the availability of a particular fund on which it is drawn.

As to necessity of acceptance being in writing, see Lewin v. Grieg, 115 Ga. 127, 41 S. E. 497, Civ. Code, § 2693, par. 8; Erickson v. Inman, 34 Oreg. 44, 54 Pac. 949, 15 Bkg. L. J. 717; Ravenswood Bk. v. Reneker, 18 Pa. Super. Ct. 192, Act May 10, 1881, P. L. 17. In Durkee v. Conklin, 13 Colo. App. 313, 57 Pac. 486, it is held that a verbal acceptance may bind even though the party has not at that time in his hands the funds of the drawer, if thereafter such funds should come into his hands.

As to implied acceptance, see Bell v. Pletscher, 65 N. Y. Supp. 669, 32 Misc. 746.

no consideration as between him and the drawer, for if the payee parts with his money and gives value to the drawer on the faith of the acceptance, and acquires the bill in due course of trade before maturity he is entitled to all the protection which the commercial law affords and he has nothing whatever to do with the state of accounts between the drawer and acceptor.¹¹ Again, the acceptor has no right to inquire into the want of consideration between the drawer and payee, or between the latter and a subsequent indorsee. If he pay the bill on the order of his creditor it is ample protection against any future claim of the creditor for the same money, whether the order was made with or without consideration.¹² Nor can an acceptor set

¹¹ *Georgia*.—*Flournoy v. First Nat. Bk.*, 79 Ga. 814, 78 Ga. 222, 2 S. E. 547.

Illinois.—*Nowak v. Excelsior Stone Co.*, 78 Ill. 307 (so even though he had no funds in his hands at date of acceptance).

Massachusetts.—*Arpin v. Owens*, 140 Mass. 144 (rule applied to foreign bill of exchange, although bill taken before acceptance).

New Jersey.—*Huertematte v. Morris*, 101 N. J. 63, 4 N. E. 1, 54 Am. Rep. 657.

New York.—*Hollister v. Hopkins*, 13 Hun (N. Y.) 210 (evidence of no consideration for acceptance excluded); *Grant v. Ellicott*, 7 Wend. (N. Y.) 227 (so held even though fact of acceptance without consideration was known to payee).

Pennsylvania.—*Boggs v. Bank*, 7 Watts & S. (Pa.) 331.

Vermont.—*Arnold v. Sprague*, 34 Vt. 402.

See also, *Federal*.—*Hortman v. Henshaw*, 11 How. (U. S.) 177, 183, 18 Curt. Dec. 590, 52 L. Ed. 653; *United States v. Metropolis Bk.*, 15 Pet. (U. S.) 377; *Seymour v. Malcolm*, 16 U. S. App. 245, 7 C. C. A. 593, 58 Fed. 597.

In *Law v. Brinker*, 6 Colo. 555, it is held that the drawees of a

bill, each of whom has indorsed thereon his unconditional acceptance, becomes severally liable for the payment thereof, and having voluntarily placed themselves in this attitude they cannot plead want of consideration for their acceptance in an action by the payee.

In *Sherwin v. Brigham*, 39 Ohio St. 137, there was a letter of credit agreeing to honor drafts, but there was no acceptance and it was held that in order to render the writer of a letter of credit liable, either upon an implied acceptance or an agreement to accept drafts taken on the faith of such letter, the drafts must have been taken for a valuable consideration, and that a promise to have drafts discounted and to take up notes on which the persons taking the drafts are liable as indorsers is not a valuable consideration.

¹² *Colorado*.—*Welch v. Mayer*, 4 Colo. App. 440, 36 Pac. 613 (this case, however, was an order payable out of a particular fund).

Louisiana.—*Smith v. Adams*, 14 La. Ann. 409 (holding also that not even accommodation acceptors, and that to the knowledge of the payee, have the right to plead in compensation or reconvention a debt due

up the want of consideration for an acceptance as against an indorsee from whom the consideration did not move and who is not an immediate party.¹³ So where the payees were plaintiffs and innocent holders it was declared that whatever might be the want or failure of consideration it could make no difference where the plaintiff purchased the paper after acceptance and before it was due.¹⁴ And if the drawer of a bill, payable to his own order before it is indorsed, give the acceptor a general release, it is no defense to an action by the indorsee against the acceptor unless there be proof that the indorsee knew of the release.¹⁵ If, however, an acceptor of a bill of exchange sets up the want of consideration as against a third indorsee, he must show such want not only between the drawer and himself but also between the subsequent indorsee and himself.¹⁶ It is declared in an English case that "In questions between bankers, or those representing them, and their customers, they have been considered for some purposes as factors, or in the nature of factors; upon the same principle as in other cases, between holders of bills of exchange, and acceptors, or the first indorser of bills payable to a man's own order, the truth of the transactions between them has been allowed to be entered into to destroy the *prima facie* consideration of a bill, the supposed value received. But no evidence of want of consideration, or other ground to impeach the apparent value received, was ever admitted in a case be-

by the payee to the drawer); Davidson v. Keyes, 2 Rob. (La.) 254, 38 Am. Dec. 209 (holding also that if the acceptor pay the bill he cannot be affected by any want or failure of consideration which the drawer or payee may set up); Debuis v. Johnson, 4 Mart. N. S. (La.) 286.

Minnesota.—Vanstrum v. Liljengren, 37 Minn. 191, 33 N. W. 555.

Federal.—Kemble v. Lull, 3 McLean (U. S.) 272, Fed. Cas. No. 7683 (a case of an order contingent on payment, "if in funds," but as it was drawn on funds in the acceptor's hands, it was declared that they could not, after acceptance, allege a want of consideration, "and having incurred this liability to the plaintiffs *bona fide* and on a suffi-

cient consideration, they cannot set up as a defense a want of consideration between the drawer of the bill and the plaintiffs").

In Tompkins v. Carner, 8 N. Y. Supp. 193, it was held no defense to an action by the transferee against the acceptor that a draft was drawn as an advance payment on a proposed charter party, which the payees subsequently refused to sign, the defense being personal to the drawer.

¹³ Robinson v. Reynolds, 2 Ad. & Ell. (N. S.) 196.

¹⁴ Bridge v. Livingston, 11 Iowa 57.

¹⁵ Dod v. Edwards, 2 Carr. & P. 602.

¹⁶ Whittaker v. Edmunds, 1 Mood. & R. 366, 1 Adol. & E. 638.

tween such acceptor or drawer, and the third person holding the bill for value. And the rule is so strict that it will be presumed that he does hold for value until the contrary appears."¹⁷

§ 200. Indorser and indorsee as immediate parties—Want of consideration.—In an action by the indorsee of negotiable paper against his immediate indorser, the title of no innocent third party intervening, the defendant can avail himself by way of defense against the plaintiff of the entire want of consideration, or may show that there was no valuable consideration for the indorsement or that it was made without any consideration.¹⁸ The rule has also been held to ap-

¹⁷ *Collins v. Martin*, 1 Bos. & P. 648, 651, per Eyre, Ch. J.

Acceptor precluded from denying liability, to holder in due course. Eng. Bills of Exch. Act, § 52.

¹⁸ *Indiana*.—*Parker v. Morton*, 29 Ind. 89, 92 (want of consideration for indorsement may be shown); *Shanklin v. Cooper*, 8 Blackf. (Ind.) 41 (plea that indorsement was made without any consideration whatever is in substance valid); *Miles v. Porter*, 6 Blackf. (Ind.) 44 (indorsement may be shown to have been made without any consideration except in case of accommodation note and indorsee is *bona fide* holder for value).

Louisiana.—*Brown v. Fort*, 1 Mart. O. S. (La.) 34 (in this case the note was indorsed merely to secure the payment of it, and the plaintiff having received the note from the makers was regarded as the original payee).

Maine.—*Larrabee v. Fairbanks*, 11 Shep. (Me.) 363, 41 Am. Dec. 389 (in this case the plaintiff had accepted the note which was transferable by delivery without the defendant's indorsement and the indorsement subsequently obtained was without consideration and the par-

ties being immediate parties the defense was held good.

Maryland.—*Hamburger v. Miller*, 48 Md. 317, 325, 326 (where Alvey, J., said: "That in an action by the holder of negotiable paper against the immediate indorser, the title of no innocent third party intervening, it is always competent for the defendant to show, by parol evidence, either the want of consideration as between himself and the plaintiff, or that the indorsement was procured by fraud, or that it was made upon some special trust, or for a special purpose, as to an agent to enable him to use the paper or the money in some particular way, or to make collection, or have the paper discounted, for the benefit of the principal; or that the note was indorsed and delivered to the plaintiff to be used only upon some express condition that has not been complied with").

Massachusetts.—*Arpin v. Owens*, 140 Mass. 144, 145, 3 N. E. 25, quoting Byle on Bills (6th Am. ed.) 206.

Federal.—*Martin v. Kercheval*, 4 McLean (U. S.) 117, Fed. Cas. No. 9,163; *National Bank of Rising Sun v. Brush*, 6 Fed. 132, where the indorsement was for convenience and without consideration.

ply in an action where the note had been assigned by an indorsement in blank.¹⁹

§ 201. **Partial want of consideration.**—The principle that in an action between the original or immediate parties to a bill or note the consideration may be inquired into, applies where the consideration is less than the amount of the bill or note, and in such case no recovery can be had beyond the sum actually paid;²⁰ and judgment rendered for the sum actually due, that is, an objection to a note that there is only a partial want of consideration may be sustained, but it affects the note with nullity only *pro tanto*.²¹ A partial want of consideration may therefore be relied on as a defense between the original parties.²² Again, “whenever the defendant is entitled to go into the question of consideration he may set up the partial as well as the total want of consideration.”²³ And want of consideration may be pleaded to a part as well as the whole of a cause of action when limited to that part.²⁴ If an unjust claim is added to a note given in settlement of a balance found due on adjustment of mutual accounts such note is without consideration and void as to the amount added.²⁵ So a note may be without consideration as to a part of the matters wrongfully

¹⁹ *Parker v. Morton*, 29 Ind. 89.

²⁰ *Lawrence v. Stonington Bank*, 6 Conn. 521, 525-527; *Wilson v. Ellsworth*, 25 Neb. 246, 41 N. W. 177, holding that consideration may be inquired into and judgment rendered for the sum actually due.

²¹ *Sawyer v. McLouth*, 46 Barb. (N. Y.) 350, 353, citing Story on Prom. Notes, § 187. When there is not a partial want of consideration within the Code, § 1806. See *Griffin v. Simons*, 61 Tenn. (2 Baxt.) 19.

As to partial want of consideration, see *Klein v. Keys*, 17 Mo. 326, a case of a partnership note given by a partner and the defense was that the note was not a partnership transaction and that only part of the consideration was due on account of the firm and the balance for a debt not growing out of the part-

nership business and that such fact was known to the plaintiff.

²² *Beall v. Pearce*, 12 Md. 550.

A partial want of consideration can be shown if properly pleaded as a defense *pro tanto* to a negotiable instrument in the hands of the original payee, or of a party standing in his shoes. *Brown v. Roberts*, 90 Minn. 314, 96 N. W. 793, per Start, C. J.

Evidence of partial want of consideration is not admissible unless notice of such defense shall be given. *Hubbard v. Freiburger*, 133 Mich. 139, 94 N. W. 727, 10 Det. L. N. 123; Comp. Laws, §§ 769, 828.

²³ *Daniel on Neg. Inst.* (5th ed.), § 201.

²⁴ *Moore v. Boyd*, 95 Ind. 134, 135.

²⁵ *Briscoe v. Kinealy*, 8 Mo. App. 76.

or not properly included therein.²⁶ In a Massachusetts case the court states the following rule: If a note is taken for two distinct liquidated sums consolidated, and the consideration had been wholly wanting, or wholly failed as to one, the note, as between the original parties, and all who stand in such relation as to allow the defense of want of consideration, may be apportioned by the court and found good in part and void in part and the holder be permitted to recover accordingly, and where the parts of a bill are divisible, making an aggregate sum and as to one liquidated and definite part there is a valuable consideration and as to the other part there is no consideration, the bill as such may be apportioned and the holder may recover for such part as was founded on a good consideration. Want of consideration, therefore, either total or partial, may always be shown by way of defense. Where the note is not given upon any one consideration, which, whether good or not, whether it fail or not, goes to the whole note at the time it was made, but for two distinct and independent considerations, each going to a distinct portion of the note, and one is a consideration which the law deems valid and sufficient to support a contract and the other not, there the contract shall be apportioned and the holder shall recover to the extent of the valid consideration and no further.²⁷

§ 202. Total failure of consideration—Defense between original or immediate parties.—It is a well-settled rule that as between original or immediate parties to a bill or note, or negotiable paper generally, that in an action thereon an entire or total failure of consideration constitutes a good defense.²⁸ But where the consideration of a

²⁶ *Bean v. Jones*, 8 N. H. 149. In this case a creditor charged his traveling and other expenses incurred on a journey made for the purpose of collecting a debt and included them in a new note given by the debtor.

²⁷ *Parish v. Stone*, 31 Mass. (14 Pick.) 198, 208-210, 25 Am. Dec. 378. See also *Washburn v. Picot*, 14 N. C. (3 Dev.) 390, where it is said that if a part of a contract arises on a good consideration and part on a bad one, it is divisible, but otherwise as to the security, that being entire. This statement, however, was made in connection with a con-

sideration of the difference between want and failure of consideration.

²⁸ *California*.—*Russ Lumber & Mill Co. v. Muscupiabe L. & W. Co.*, 120 Cal. 521; *Estudillo v. Aguirre* (Cal. 1884), 5 Pac. 109 (in this case a note was given in part for a definite sum innocently represented to have been fixed, allowed and determined by the probate court for services as guardian of defendant and the allowance had not been made, and this was held to constitute a failure of consideration to the extent of the amount of the note).

Delaware.—*Mills v. Gilpin*, 2 Harr. (Del.) 32.

note sued on was the conveyance of land, secured by a deed of trust, the sale of the land under the deed of trust does not constitute a failure of consideration, for the conveyance having been fully rendered at the date of the deed there could be no failure otherwise than for some defect or deficiency in the consideration at the time of the rendition, and a sale subsequently made as provided for in the agreement of the parties could not be given such effect.²⁹ If, however, personal property is sold and the title reserved and the seller retakes the property and sells it under warranty that he is the owner, it is

Georgia.—Whitt v. Blount, 124 Ga. 671, 53 S. E. 205.

Illinois.—Sturges v. Miller, 80 Ill. 241; Winkleman v. Choteau, 78 Ill. 107; Capps v. Smith, 3 Scam. (Ill.) 177; Winnemann v. Oberne, 40 Ill. App. 269.

Indiana.—Moore v. Boyd, 95 Ind. 134, 135.

Iowa.—George v. Gillespie, 1 G. Greene (Iowa) 421 (so under the Rev. Stat., p. 453, §§ 5, 6).

Kansas.—Blood v. Northup, 1 Kan. 28, 35.

Kentucky.—Coyle v. Fowler, 3 J. J. Marsh. (Ky.) 473 (holding plea of failure of consideration good since statute of 1801).

Louisiana.—Kernion v. Jumonville de Villier, 8 La. 547; Byrd v. Craig, 2 Mart. N. S. (La.) 625.

Maryland.—Ingersoll v. Martin, 58 Md. 67, 73, 42 Am. Rep. 322; Beall v. Pearre, 12 Md. 550, 566.

Massachusetts.—Arpin v. Owens, 140 Mass. 144, 145, quoting 1 Byle on Bills (6th Am. ed.) 206.

Michigan.—Hubbard v. Freiburger, 123 Mich. 139, 94 N. W. 727, 10 Det. L. W. 123; Comp. Laws, §§ 709, 828; Kelley v. Guy, 116 Mich. 43, 74 N. W. 291.

Minnesota.—Warner v. Schultz, 74 Minn. 252, 77 N. W. 25.

Mississippi.—Stigler v. Anderson (Miss. 1893), 12 So. 831; Hamer v. Johnson (5 Miss.), 6 How. 698, 721 (per Sharkey, J.).

Missouri.—Harwood v. Brown, 23 Mo. App. 69.

New York.—Sawyer v. Chambers, 44 Barb. (N. Y.) 42; Chase v. Senn, 36 N. Y. St. Rep. 36, 13 N. Y. Supp. 266; Sawyer v. McLouth, 46 Barb. (N. Y.) 350, 353; Britton v. Hall, 1 Hilt. (N. Y.) 528; American Boiler Co. v. Foutham, 50 N. Y. Supp. 351.

North Carolina.—Washburn v. Pi-cott, 14 N. C. (3 Dev.) 390.

Ohio.—Loffland v. Russell, Wright (Ohio) 438.

Oregon.—Sayre v. Mohney, 30 Oreg. 238, 47 Pac. 197.

Pennsylvania.—Barnett v. Offerman, 7 Watts (Pa.) 130.

Tennessee.—Turley v. Bartlett, 57 Tenn. (10 Heisk.) 221, 225.

Texas.—Branch v. Howard, 4 Tex. Civ. App. 271, 23 S. W. 476.

Vermont.—Stone v. Peake, 16 Vt. 213, 219.

Federal.—Scudder v. Andrews, 2 McLean (U. S.) 464, Fed. Cas. No. 12,564; Hoopes v. Northern Nat. Bk., 102 Fed. 448; Neg. Inst. Law, § 54. See Jones v. Swan, 6 Wend. (N. Y.) 589, 593.

In the case of a note under seal it is held that failure of consideration may be pleaded, whether or not want may be. Slaton v. Fowler, 124 Ga. 955, 53 S. E. 567.

²⁹ Thurgood v. Spring, 139 Cal. 596, 73 Pac. 456.

held that the consideration of notes given by the first purchaser fails.³⁰ A plea of total failure of consideration filed to an action on a note, given by one person to another to pay a certain amount at a fixed time, is not good when the time for the performance of the service has not expired, although the note has matured.³¹ And failure of the performance of the services to be performed by the payee is no defense to an action on the note brought by the purchaser thereof for value and before its maturity, though he knew of the consideration, but not of its failure when he purchased.³² But a defense of failure of consideration is available where the note was given in consideration of an agreement to perform certain work under a contract which was performed but the work done was not in accordance with the agreement and did not fulfill the conditions represented, there being an alleged misrepresentation of material facts.³³

§ 203. Upon acceptance.—Between acceptor and other parties—

Failure of consideration.—Failure of consideration as between the drawer and drawee is no defense to an action by the payee or holder against an acceptor, if the payee or holder took the bill before maturity in good faith and for value;³⁴ provided also that the considera-

³⁰ *Earle v. Robinson*, 91 Hun (N. Y.) 363, 70 N. Y. St. R. 831, 36 N. Y. Supp. 178.

³¹ *Morrison v. Hart*, Ga. 1905, 50 S. E. 471.

³² *Wilensky v. Morrison*, Ga. 1905, 50 S. E. 472.

³³ *Conroy v. Logue*, 87 Minn. 289, 91 N. W. 1105.

³⁴ *Morrison v. Farmers' and Merchants' Bank*, 9 Okla. 697, 60 Pac. 275 (a foreign bill of exchange. "It is a well-settled rule of law that an acceptor of a bill of exchange will not be permitted to vary his liability from that which is apparent on the face of the bill by setting up against *bona fide* holders for value, who took the bill before maturity, statements made by the drawers to the drawees whereby they were induced to accept the bill").

See *Colorado*.—*Wyman v. Bank*, 5 Colo. 30, 33, 40 Am. Rep. 133.

Georgia.—*Flournory v. First Nat. Bk.*, 79 Ga. 814, 78 Ga. 222, 2 S. E. 547.

New Hampshire.—*Clement v. Leverett*, 12 N. H. 317, 320.

New York.—*American Boiler Co. v. Foutham*, 50 N. Y. Supp. 351.

England.—*Arden v. Watkins*, 3 East. 317.

In *Gilman v. Pillsbury*, 16 La. Ann. 51, it is held that the acceptor, when sued by the payee, may call the drawer of the bill in warranty in the case where the drawee is requested to pay, not unconditionally but in accordance with a contract, and he has been notified by the drawer, because the consideration of the draft has failed, and when cited in warranty by the drawee the drawer may plead a failure of consideration as a defense to the suit.

tion for the acceptance fails without any fault on the part of the payee.³⁵ So an acceptor cannot, by paying a bill before he is bound to do so, and before maturity or out of due course, exchange the relations of the original parties and cut off the drawer from the defense of failure of consideration. An acceptor paying before maturity is not a holder for value of the paper as against the drawer, and even though an acceptor may have been a surety for the drawer for personal property purchased by him from the payee, yet such acceptor by paying before maturity is subject to any defense which the maker would have had in a suit by the payee.³⁶ Again, the rule which precludes the acceptor from inquiring into the want of consideration between the drawer and payee or between the latter and a subsequent indorsee applies to exclude inquiry into the failure of consideration between such parties.³⁷ But it is no defense in favor of an acceptor when sued on his acceptance that there are subsequent dealings between the parties when his liability has not been changed thereby and such dealings are not to his prejudice or against his rights.³⁸ In an action by the indorsee against the maker of promissory notes, the consideration of which was the purchase price of certain bills of exchange, it is not available by way of defense to show a total failure of consideration on the ground that the drawee refused to accept, where recovery can be had against the indorser, especially where it does not appear that the plaintiffs are *bona fide* holders. The court said: "What was the consideration for the notes on which this action is brought? The two bills of exchange! Were they of any value at the time they were given as the consideration for the notes? That they were of no value will hardly be affirmed without deciding the question whether the defendants could have resorted to" the payee when the bills were not ac-

³⁵ *Corbin v. Southgate*, 3 Hen. & M. (Va.) 319. In *Walker v. Squires, Hill & Den.* (N. Y.) 23, the payee of a bill knowingly sold standing timber, not his own, to the drawer, who was to manufacture it into boards and deliver them to the acceptors upon whom the bill was drawn and accepted. The drawer was forbidden by the owner to cut the timber, and it was held that even though he proceeded to get the timber and manufacture and deliver it to the acceptors, the latter

were not bound because of the fraud of the payee, and that the acceptors could not be regarded as in funds, and even if there were no fraud the act of the owner of the timber was equivalent to an eviction, and the failure of consideration was complete.

³⁶ *Stark v. Alford*, 49 Tex. 260.

³⁷ See § 199, *ante*, as to acceptor and other parties and want of consideration.

³⁸ *Canadian Bk. v. Coumbe*, 47 Mich. 358, 11 N. W. 196.

cepted "they had a perfect right to enforce the payment of them against the indorser. * * * In the case under consideration the bills were not void; the responsibility of the indorser, if there was none in the drawer, constituted a good consideration."³⁹

§ 204. Indorser and indorsee as immediate parties—Failure of consideration.—In an action by the holder of negotiable paper against his immediate indorser, the title of no innocent third party intervening, the entire failure of consideration between such immediate parties may be shown.⁴⁰

§ 205. Consideration acknowledged—Failure of consideration. Where a certificate of deposit acknowledges the receipt of money upon its face the maker is not estopped from showing as against assignees occupying the status of payees that there was a failure of consideration.⁴¹ So the statement in a promissory note that it is given in consideration of "money loaned" does not preclude the defense that the consideration was different from that expressed in the note and that it had failed.⁴²

§ 206. Non-negotiable paper made at request of another—Failure of consideration.—In a suit upon a non-negotiable promissory note made payable to plaintiff at the request of a party from whom the consideration moved, and therefore presumed to be held in trust for the benefit of such party, the failure of consideration, total or partial, may, it is decided, be set up in defense whether the payee at the time of receiving the note did, or did not, know what the character of the consideration was; especially so where it does not appear that the plaintiff paid anything for the note or that he was in any manner a holder for a valuable consideration, and the note being regarded as the property of the party from whom the actual consideration moved the defense was still available in the same manner as if the action had been in the name of the last mentioned party.⁴³

§ 207. Partial failure of consideration—Defense—Between original parties.—Although there has been much discussion upon the ques-

³⁹ Jones v. Swan, 6 Wend. (N. Y.) 589, 594.

⁴⁰ Hamburger v. Miller, 48 Md. 317, 325, 326.

⁴¹ Blood v. Northup, 1 Kan. 35.

Quære in this case whether such certificate was a promissory note.

⁴² Pollen v. James, 45 Miss. 129.

⁴³ Herbert v. Ford, 33 Me. 90.

tion whether or not a partial failure of consideration may be availed of as a defense to an action on a bill of exchange, promissory note, or negotiable paper generally, and although in certain jurisdictions such partial failure is no defense, and in others, where land is the subject of contract or purchase and there is a defect of title, such partial failure is precluded as a defense, especially where the contract remains unrescinded and there has been no fraud, this rule being extended also to cases where the quality or quantity is deficient, still the great weight of modern authority, either by force of some statute or to avoid circuitry of action, permits such defense, between the original parties to the paper, either wholly or *pro tanto* as a rule, at least so when properly pleaded. But the manner in which such defense may be availed of as well as the nature thereof varies in different jurisdictions, it being held in some courts that such partial failure of consideration can only be taken advantage of by way of abatement or in reduction or mitigation of damages, or as a set-off, recoupment, counterclaim, or discount, and in certain cases it is allowed as a bar. In some states, however, the defense or allowance in reduction of damages, etc., is limited to those cases where the consideration or amount of the paper is divisible, or ascertainable and capable of liquidation, and in still other jurisdictions the right to make the defense of partial failure as such is absolute or it may be given in evidence. Such technical distinctions as to its not being a defense but being merely available under a proper plea to reduce the amount of recovery will fully appear in the following review of the decisions.

§ 208. **Same subject—Review of decisions.**—The following review of decisions is subject to such qualifications and exceptions as may exist by reason of any statute more recent than the decision given.⁴⁴ In *Alabama* evidence is admissible which tends to prove a partial failure of consideration.⁴⁵ And wherever a defendant can maintain a cross-action for damages on account of a defect in personal property purchased by him, or for a non-compliance by the plaintiff with his part of the contract, the former may, in defense to an action upon his note made in consequence of such purchase or contract, claim a deduction corresponding with the injury he has sustained, as it is the policy in that state to avoid circuitry of action. The rule, however, is different where real estate is the subject of the contract of purchase and a par-

⁴⁴ See Appendix herein.

⁴⁵ *Agnew v. Walden*, 84 Ala. 502, 4 So. 672.

tial defect in title, while the contract remains unrescinded, cannot be alleged as a defense to an action for the recovery of the purchase money.⁴⁶ A distinction has, however, been made in regard to fraud.⁴⁷ In *Arkansas*, in all that class of cases commonly called partial failure of consideration, whether involving bad faith or not, or where fraud has intervened, whether in the obtaining or the performance of contracts, or there has been a breach of warranty, fraudulent or not, or of any other stipulation of the contract sued upon entitling the defendant to a cross-action against the plaintiff to recover damages for such failure, fraud or breach, he may, if he elect to do so, instead of resorting to such cross-action, recoup the damages sustained by him in diminution of what the plaintiff would otherwise be authorized to recover.⁴⁸ In *California* a failure of consideration either total or partial may be pleaded as a defense to an action upon a promissory note, either wholly or *pro tanto*.⁴⁹ But in a case in that state where

⁴⁶ *Peden v. Moore*, 1 Stew. & P. (Ala.) 71, 21 Am. Dec. 649.

In *Lee v. White*, 4 Stew. & P. (Ala.) 178, the court charged the jury that in the sale of real estate, to render a failure of title a defense against a promissory note, the failure of title should be total and the judgment for plaintiff was affirmed. In *Evans v. Murphy*, 1 Stew. & P. (Ala.) 226, however, a note was given for the rent of eighty acres of land including a ferry, and it was held that the failure of consideration from being deprived of the ferry could be shown in mitigation of the demand; "that by this course much delay and vexation, and the circuity of action will be avoided which should be regarded as a desideratum in the administration of justice."

⁴⁷ *Wilson v. Jordan*, 3 Stew. & P. (Ala.) 92. In this case it was held no defense that the consideration of the note was the sale of land, the title to which was alleged to be defective and incumbered, but a distinction was made as to fraud. The court said: "Nor do we feel

the least dissatisfaction with our former decisions so far as they tend to place partial and total failure of consideration on the same footing instead of driving parties to circuity of action." It was also said, however, that "The principles of relief should in this respect be the same in reference to the same of either kind of property 'real or personal' provided the circumstances constituting the failure of consideration be equally conclusive and susceptible of proof at law."

⁴⁸ *Desha v. Robinson*, 17 Ark. 228, 246-248. *Petillo v. Hopson*, 23 Ark. 196, holding that on a plea of failure of consideration defendant is entitled to abatement for only so much as the consideration has failed; "most assuredly defendant had no right to keep back the full amount of the note when there was but a partial failure of consideration."

⁴⁹ *Russ Lumber & Mill Co. v. Muscupiabe L. & W. Co.*, 120 Cal. 521, 529, 52 Pac. 995, 65 Am. St. R. 186, per Haynes, C. See *McGue v. Rommell* (Cal. 1906), 83 Pac. 1000.

the note was given for the purchase price of land it was held that the failure of consideration must be total. It was declared, however, that "In cases of fraud or warranty, where the consideration is divisible or capable of apportionment, a partial failure may sometimes be given in evidence in reduction of damages, but the practice in this respect proceeds upon the principle of a cross-action, and an affirmative right of action must exist in favor of a party seeking relief in this form."⁵⁰ The court also said in this case: "A partial failure of consideration is not a defense to an action on a promissory note or bill of exchange; but when properly pleaded it may be shown in reduction or recoupment of damages."⁵¹ In another case in the same state, where a note was given for defendant's interest in a ranch and money expended in bringing cattle across the plains, but it was not alleged that it was given in payment for a division of cattle, it was held no defense or counter-claim that the maker of the note had been deceived as to the division of the stock, as such division had nothing to do with the consideration of the note.⁵² In *Connecticut*, if the partial failure of the consideration of a note is of a sum liquidated or capable of liquidation it may be availed of. "The general principle that a partial failure of consideration, whether the action be for the price of property sold or upon a bill or note given for such price, may go to reduce the plaintiff's damages in such action has been fully recognized and is now well established in this court."⁵³ But we do not suppose this principle should be applied to cases such as this, wherein the damage or amount to be deducted from the plaintiff's demand is merely conjectural, unliquidated and incapable of liquidation by known rules, at least we have seen no case which has extended the application of the rule so far."⁵⁴ And the rule of an English case⁵⁵ is approved which holds that the quantum to be deducted on account of partial failure of the consideration must be of definite computation and not of unliquidated damages.⁵⁶ In *Delaware* a *pro tanto* recovery may be had under the

⁵⁰ *Reese v. Gordan*, 19 Cal. 147, 149.

⁵¹ Quoting *Edwards on Bills & Notes*, 333, 334.

⁵² *Case v. Maxey*, 6 Cal. 276.

⁵³ *McAlpin v. Lee*, 12 Conn. 129; *Cook v. Mix*, 11 Conn. 432; *Nichols v. Alsop*, 6 Conn. 477.

⁵⁴ Citing *Chitty on Bills* 71; 2

Stark. Ev. 281; *Bailey on Bills* 344; *Roscoe on Ev.* 168; *Byles on Bills* 65; *Day v. Nix*, 9 J. B. Moore 159; 1 *Saund. Pl. & Ev.* 304; *Green v. Pratt*, 11 Conn. 205; *McAlpin v. Lee*, 12 Conn. 129.

⁵⁵ *Day v. Nix*, 9 J. B. Moore 159.

⁵⁶ *Pulsifer v. Hotchkiss*, 12 Conn.

statute.⁵⁷ In *Florida* a partial failure of consideration is not a good plea to a note for the purchase price of lands when the quantity is deficient.⁵⁸ In *Georgia*, in an action on a note given for the price of land sold, it is held that partial failure cannot be availed of as a defense, and the court said: "A partial failure of consideration cannot be gone into unless that part which has failed could be as clearly and distinctly ascertained in liquidated damages as the whole amount. But here the partial failure is as to the quality, not as to the quantity."⁵⁹ In another case in the same state where the consideration was a special interest in real estate, it was held that a partial failure of consideration could not be shown. But defendant was in quiet possession of the land and it was declared that he could not be protected from payment of the note from a mere apprehension of being disturbed at some future time.⁶⁰ In *Illinois*, where the averment was that the consideration of the note sued on had wholly failed, it was held that to sustain such a plea a total failure must be shown and that it was insufficient to show a partial failure.⁶¹ But where the note in such case was for the price of real estate in fee and the land was incumbered by a life estate, it was decided that the consideration had failed as to the value of the estate of which defendant was deprived and that he might recoup damages sustained by the breach.⁶² And the defense of partial failure of consideration where land purchased was incumbered was also allowed under the statute in another case.⁶³ Again, where a note was sued on in violation of an agreement not to sue for a certain time, upon the faith of which agreement a part of the amount was incorporated into the note and promised to be paid, it was decided that

⁵⁷ *Journal Printing Co. v. Maxwell*, 1 Pennew. (Del.) 511, 43 Atl. 615; under Chap. 588, Vol. 20, Laws of Del. But an exception is made as to *bona fide* holders.

As to rule under earlier cases, see *Carpenter v. Phillips*, 2 Houst. (Del.) 524, a case of a due bill, but the rule was applied that partial failure of consideration was no defense to a promissory note, a bill of exchange; but a recovery could be had upon the note for the full amount, leaving defendant to this action for damages for the partial failure of consideration. See,

also, *Mills v. Gilpin*, 2 Harr. (Del.) 32, 34, holding that partial failure of consideration cannot be set up as a defense, but that there must be a cross action except in cases of fraud.

⁵⁸ *Reddick v. Mickler*, 23 Fla. 335, 2 So. 698.

⁵⁹ *Hinton v. Scott*, Dud. (Ga.) 245.

⁶⁰ *Jordon v. Jordon*, Dud. (Ga.) 181.

⁶¹ *Stocks v. Scott*, 188 Ill. 266, 58 N. E. 990.

⁶² *Chrity v. Ogle*, 33 Ill. 295.

⁶³ *Schuckmann v. Knoebel*, 27 Ill. 175, under *Scates Comp. Stat. Ch.* 73, p. 292.

the consideration had necessarily failed in part and so constituted a defense.⁶⁴ In *Indiana* an answer that the property sold was not worth half its price was held not a good defense.⁶⁵ Although it is determined in an earlier case that defendant may reduce the damages by showing a partial failure of consideration.⁶⁶ In *Iowa* a partial failure of consideration, arising from breach of warranty or otherwise, may be shown both on the ground of avoiding circuitry of action, also because the statute allows the same as a defense.⁶⁷ In *Kentucky* a plea impeaching the consideration of a note upon the ground that it was given upon a parol contract for land, and the inability of the obligee to convey a title to the property, must show a total failure of consideration, for a partial failure is no bar.⁶⁸ So where a note was given for the part of the price of a lot and possession of the lot was retained, it was decided that a partial failure of consideration furnished no defense at law, that the relief of defendants, if any, should be sought in equity and that they ought not to be permitted to avoid the contract while they still retained possession.⁶⁹ And under a statute permitting the consideration of writings to be impeached a partial failure of consideration is not a legal ground for defense.⁷⁰ So a plea which is only of a partial failure is no bar. If a contract is to be regarded as executory the agreement and not the performance of the agreement is to be taken as the true consideration of the agreement on the other side to pay the price, and unless, by the terms of the contract, the payment of the price is made to depend upon the performance of the agreement to let or hire, a failure to perform the latter cannot be pleaded in bar to an action for the non-payment of the price.⁷¹ In *Maine* it is well settled that, as between the original parties or between others standing in no better position, for the purpose of avoiding a circuitry of action, a partial failure of consideration can be shown in reduction of damages where a promissory note is given for two or more independent considerations and there is failure of consideration as to one.⁷²

⁶⁴ *Hill v. Enders*, 19 Ill. 163.

⁶⁵ *Case v. Grim*, 77 Ind. 565.

⁶⁶ *Catlett v. McDowell*, 4 Blackf. (Ind.) 556.

⁶⁷ *Griffey v. Payne*, 1 Morris (Iowa) 68. See *Beatty v. Carr*, 109 Iowa 183, 80 N. W. 326.

⁶⁸ *Wise v. Kelly*, 2 A. K. Marsh. (Ky.) 545.

⁶⁹ *Bull v. Jackson*, 1 A. K. Marsh. (Ky.) 176.

⁷⁰ *Williams v. Bristole*, 1 A. K. Marsh. (Ky.) 168.

⁷¹ *Owsley v. Beasley*, 4 Bibb (Ky.) 277.

⁷² *Tuttle v. George A. Tuttle Co.* (Me. 1906), 64 Atl. 496; *Hathorn v. Wheelwright*, 99 Me. 351, 59 Atl. 517. See Rev. Stat., c. 84, § 40, as to note given for real estate and partial failure of consideration as to patent right.

Under an earlier decision it is determined that in an action upon a note between the original parties a partial failure of consideration, though the amount be unliquidated, may be proved by defendant in mitigation of damages and the jury may, upon the evidence, determine the amount of the failure; it being declared by the court that the tendency of modern decisions in this country has been to allow a broader latitude of defense than was permitted by the rules of the common law to bills of exchange and promissory notes where the justice of the case required it and a circuity of action could be avoided.⁷³ So in another case in that state such partial failure of a note for goods sold is held to be a good defense *pro tanto* between parties,⁷⁴ although it is also determined that there must be a failure of an entire or a certain and distinct part of the consideration.⁷⁵ Again it is declared that if upon inquiry it results that there was no consideration or that it had failed totally or partially, the plaintiff fails to recover, or recovers a part only of the note; but in this case the note was for sale of timber and the defense was that the defendant by agreement was to be held to pay only so much as he might actually realize from the property.⁷⁶ It is also held that the holder of a non-negotiable promissory note, made payable to him at the request of the party from whom the consideration moved, is presumed to hold it in trust for the benefit of the party from whom the consideration moved, and in a suit upon such a note the defense is available of either a total or partial failure of consideration, whether the payee at the time of recovering the note did or did not know what the character of the consideration was.⁷⁷ But a partial failure alone of title to land constitutes no defense in that state to a note given in payment for it.⁷⁸ After the death, however, of the payee and the insolvency of his estate, the maker may, in a suit against him by the administrator, set off the

⁷³ *Herbert v. Ford*, 16 Shep. (Me.) 546.

⁷⁴ *Wadsworth v. Smith*, 10 Shep. (Me.) 500.

⁷⁵ *Clark v. Peabody*, 9 Shep. (Me.) 500.

⁷⁶ *Folsom v. Mussey*, 8 Greenl. (Me.) 400, 23 Am. Dec. 522.

⁷⁷ *Herbert v. Ford*, 33 Me. 90.

⁷⁸ *Hogdon v. Golder*, 75 Me. 293; *Thompson v. Mansfield*, 43 Me. 490; *Morrison v. Jewell*, 34 Me. 146; *Jenness v. Parker*, 11 Shep. (Me.) 289

(holding that partial want of title is no defense to a note given for land; to constitute a valid defense between the parties, or wherein the same defense may be made, the defeat of title must be entire so that nothing valuable passes by the conveyance; *Wentworth v. Goodwin*, 8 Shep. (Me.) 150; *Howard v. Witham*, 2 Greenl. (Me.) 390; *Lloyd v. Jewell*, 1 Greenl. (Me.) 352, 10 Am. Dec. 73.

breach of covenant against the note.⁷⁹ In *Maryland* partial failure of consideration may be relied on as a defense and it avoids the note only *pro tanto*.⁸⁰ In *Massachusetts* the defendant is entitled to have so much deducted from the amount of the note as the chattel by reason of its defects was worth less than it should have been had it been as warranted, or if the defects had not existed; but he is not entitled to a deduction of the difference between the amount of the note and the sum which the jury may deem the true value of the chattel. Shaw, C. J., said: "This mode of defenses is of modern origin, founded on a liberal application of the rules of law which allow such deduction as a substitute for a cross-action on the warranty to avoid circuity of action. The same rule of damages, therefore, must be adopted as would be adopted in assessing damages in such cross-action. In that case it is very clear that the rule of damages would be the loss ensuing from those defects in respect to which the warranty is broken."⁸¹ In *Michigan* evidence of failure of consideration, in whole or in part, may be given in any action or set-off upon, or arising out of any contract except negotiable instruments, negotiated before due, to persons not having notice.^{81*} In *Minnesota* a partial failure of consideration can be shown, if properly pleaded, as a defense *pro tanto* to a negotiable instrument in the hands of the original payee, or of a party standing in his shoes.⁸² It is also decided in that state that the allegation of a breach of warranty in the sale of chattels may be set up as a partial defense by way of recoupment, and it is well settled in that state that a partial failure of consideration is a good defense or partial defense, and may be availed of to defeat a recovery *pro tanto*.⁸³ In another case the defense is held available by way of reduction of damages recoverable upon a non-negotiable contract or instrument.⁸⁴ In earlier

⁷⁹ *Morrison v. Jewell*, 34 Me. 146.

⁸⁰ *Beall v. Pearce*, 12 Md. 550.

⁸¹ *Goodwin v. Morse*, 9 Metc. (Mass.) 278.

Examine Parish v. Stone, 14 Pick. (Mass.) 198, 208-210, 25 Am. Dec. 378 (although the language used in this case refers more particularly to partial want of consideration); *Noble v. Smith, Quincy* (Mass.) 254, states the doctrine that a partial consideration of a note cannot be shown in reduction of damages, but

as appears from the preceding cases the opposite doctrine prevails.

^{81*} *Hubbard v. Freiburger*, 133 Mich. 139, 94 N. W. 727, 10 Det. L. N. 123; *Comp. Laws*, §§ 769, 828.

⁸² *Brown v. Roberts*, 90 Minn. 314, 96 N. W. 793.

⁸³ *Nichols and Shepard Co. v. Soderquist*, 77 Minn. 509, 80 N. W. 630; *Durment v. Tuttle*, 50 Minn. 426, 52 N. W. 909; *Torinus v. Buckingham*, 29 Minn. 128, 12 N. W. 348.

⁸⁴ *Stevens v. Johnson*, 28 Minn. 172, 9 N. W. 677.

cases, however, it is also determined that where the consideration is apportionable a partial failure thereof is a defense; but where it is not shown to what extent the consideration has failed in proportion to the whole consideration the whole amount of the note may be recovered.⁸⁵ In *Mississippi*, in an action upon instruments for a sum certain, if introduced under a special plea, the defense of partial failure of consideration can be made.⁸⁶ In *Missouri* it is declared that, "It may now be considered as settled in this state, that part failure of consideration may be pleaded to an action at law on a note."⁸⁷ And may be shown in evidence.⁸⁸ And where there was an agreement with an out-going partner for a *pro tanto* rebate if accounts proved worthless, such partial failure may be availed of as a defense in an action at law upon notes for the purchase price of notes and accounts of the firm at their face value.⁸⁹ In a *Nebraska* case it is decided that in an action between the parties on a negotiable check and persons not *bona fide* purchasers, a partial failure of consideration may be shown, and where defendant admits an amount due and alleges such partial failure in an action against the drawer the plaintiff may recover the amount due.⁹⁰ In *New Hampshire*, under the statute, such part failure may be proved in reduction of damages, after filing a brief statement thereof,⁹¹ in all cases where total failure would have been a good defense.⁹² It was also at common law a good defense *pro tanto* where the sum to be deducted could be ascertained by mere computation, but otherwise where the amount to be deducted was unliquidated.⁹³ In *New Jersey* it is held that in a suit between the original parties a partial failure

⁸⁵ *Bisbee v. Tornius*, 26 Minn. 165, 2 N. W. 168; *Leighton v. Grant*, 20 Minn. 345, Gil. 298, 306.

⁸⁶ *Raspberry v. Moye*, 23 Miss. 320. See *Etheridge v. Gallagher*, 55 Miss. 458, considering code, § 2281; *Merchants' Bank v. Millsaps* (Miss.), 15 So. 659, considering code, § 3503; *Stokes v. Winslow*, 31 Miss. 518, considering code, 640, § 9.

⁸⁷ *Barr v. Baker*, 9 Mo. 850, 854.

⁸⁸ *Gamacke v. Grimm*, 23 Mo. 38.

⁸⁹ *Battrel v. Franklin*, 57 Mo. 566. See p. 320, § 3; *Briscoe v. Kinealy*, 8 Mo. App. 76; *Smith v. Giegrick*, 36 Mo. 369, under rev. code 1865.

⁹⁰ *Lanning v. Burns*, 36 Neb. 236, 54 N. W. 427.

⁹¹ *Pike v. Taylor*, 49 N. H. 124, 127, under stat. 1861, c. 2497.

⁹² *Nichols v. Hunton*, 45 N. H. 470.

⁹³ *Nichols v. Hunton*, 45 N. H. 470 (Stat. 1861, c. 2497, § 1); *Riddle v. Gage*, 37 N. H. 519, 75 Am. Dec. 151; *Drew v. Towle*, 27 N. H. 412, 59 Am. Dec. 380. See *Fletcher v. Chase*, 16 N. H. 38, holding that past failure was not, in general, a defense, for the defendant was left to resort to action on covenants for indemnity. A tract of land was sold, but no distinction was made between land and personal property.

of the consideration may be set up as a defense to the same extent as though the action were founded upon such consideration itself.⁹⁴ But it is also decided that partial failure is no defense where the amount to be deducted on account of such failure is unliquidated.⁹⁵ In *New York* partial failure of consideration is, under the negotiable instruments law, a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.⁹⁶ In an early decision in that state it is determined that if a note be given on account of part performance of an entire contract, the non-performance of the entire contract is no defense to the note, and that a claim for damages for not completing the contract cannot be recouped against the note.⁹⁷ In another case in that state the court declares that partial want of consideration affects the note with nullity *pro tanto*, and that the same rule applies where there has been a part failure of the consideration," not indeed in all cases, but in many cases, at least where it is a matter capable of definite computation and not mere unliquidated damages.⁹⁸ Under earlier decisions such partial failure may be shown in defense,⁹⁹ or be given in evidence to reduce the damages or recovery, under notice of defense.¹⁰⁰ Defendant may also show that the note was given for more than plaintiff was entitled to and the excess should be deducted.¹⁰¹ But it is also determined in that state that where there has been only a partial failure of consideration the defendant cannot say that the note is wholly void; in such case each party may have an action and this is the only way in which complete justice can be done.¹⁰² In *North Carolina* such partial failure is inadmissible to defeat recovery or lessen the sum due, but resort must be had to a counterclaim or cross-action for damages;¹⁰³ or as it has been decided in another case, such part failure furnishes a distinct and independent cause of action, and a distinction is made between the contract and the

⁹⁴ Wyckoff v. Runyon, 33 N. J. L. 107.

⁹⁵ Allen v. Bank of U. S., 20 N. J. L. 620.

⁹⁶ Neg. Inst. Law, § 54. See Appendix herein.

⁹⁷ Walker v. Millard, 29 N. Y. 375.

⁹⁸ Sawyer v. McLouth, 46 Barb. (N. Y.) 350, 353, quoting Story on Prom. Notes, § 187.

⁹⁹ Sawyer v. Chambers, 44 Barb. (N. Y.) 42, 43 Barb. (N. Y.) 622.

¹⁰⁰ Payne v. Cutler, 13 Wend. (N.

Y.) 605; Judd v. Dennison, 10 Wend. (N. Y.) 512 (available in mitigation or in bar); Burton v. Stewart, 3 Wend. (N. Y.) 236, 20 Am. Dec. 692; Spalding v. Vandercook, 2 Wend. (N. Y.) 431; Jones v. Swan, 6 Wend. (N. Y.) 589, 593.

¹⁰¹ Phoenix Ins. Co. v. Fiquet, 7 Johns. (N. Y.) 384.

¹⁰² Payne v. Ladue, 1 Hill (N. Y.) 116.

¹⁰³ Evans v. Williamson, 79 N. C.

86.

security. If a part of the contract arises on a good consideration and part on a bad one it is divisible. But it is otherwise as to the security, that being entire.¹⁰⁴ In *Ohio* recovery is barred to the extent of failure of consideration,¹⁰⁵ and a party is entitled to abatement in price, in case of a partial failure of consideration, against all persons seeking to enforce a vendor's lien, as they are not *bona fide* holders.¹⁰⁶ But a purchaser of land who has received a deed containing a covenant of warranty cannot plead in bar, to an action on a note given for the purchase money, a defect of title, unless he has been evicted by title paramount.¹⁰⁷ In *Oklahoma* partial failure of consideration in recoupment of damages may be shown.¹⁰⁸ In *Oregon* such part failure may be set up, and defendant may recoup his damages, though they be unliquidated.¹⁰⁹ In a *Pennsylvania* case a note was given in payment *pro tanto* of work, but it was not to be extinguished or paid if the work was never completed. It was left to the jury to determine whether the work was substantially performed or not, under an instruction to allow an offset if so done, but compensating plaintiff in damages for such part as was not fully completed.¹¹⁰ In *South Carolina* it is held that where it appears that a purchaser would have the right to recover back the purchase money he has a good defense by way of set-off in a case where he has not paid the purchase money; that is, he who has a cross-action has a right of discount against an action brought; and a set-off which equals a total failure as to part of a divisible consideration may be shown under the terms of a contract allowing a return of part of the goods for the purchase price of which the note was given, although it was declared to be in strict analogy to a case of total failure of consideration.¹¹¹ In *Tennessee* a maker of a note is held to be entitled to credit to the amount and extent that the consideration has failed, caused by the land being held for debts of the grantor when the note is not in the hands of a *bona fide* holder.¹¹² In

¹⁰⁴ *Washburn v. Picot*, 14 N. C. (3 Dev.) 390.

¹⁰⁵ *Lowenstine v. Males*, 3 Ohio Dec. (reprint) 330.

¹⁰⁶ *Sutton v. Kautzman*, 6 Ohio Dec. (reprint), bottom page 910.

¹⁰⁷ *Picket v. Picket*, 6 Ohio St. 525, distinguished in *Kyle v. Thompson*, 11 Ohio St. 616, 623, where an order was made enjoining collection of so much of a note as was necessary to cover a mortgage encumbered.

¹⁰⁸ *Hagan v. Bigler*, 5 Okla. 575, 49 Pac. 1011.

¹⁰⁹ *Davis v. Wait*, 12 Oreg. 425, 428, 8 Pac. 356.

¹¹⁰ *Truesdale v. Watts*, 12 Pa. St. 73.

¹¹¹ *Barnes v. Shelton*, Harp. (S. C.) 21, 18 Am. Dec. 642.

¹¹² *Edwards v. Porter*, 42 Tenn. (2 Cold.) 42.

a *Texas* case it is decided that a defense of partial failure of consideration may be shown between original parties.¹¹³ In *Vermont*, prior to the statute of 1867, partial failure of consideration could not be set up as a defense even in a suit between the original parties, unless there was fraud and an offer to rescind, and the amount to be deducted could be ascertained by computation; and under the statute such a defense became available only between the original parties as expressed by the instrument itself, as between the maker and payee.¹¹⁴ And where a note was given in part payment of land, the rest being in cash, it was held that the consideration of the note was the whole property purchased and not any particular part of it and that the case was not therefore within the statute, the alleged partial failure being greater than the amount of the note.¹¹⁵ It is also held in that state that it is no defense that the land is incumbered, and that fraud which probably affects the consideration is inadmissible to reduce damages.¹¹⁶ In a *Federal* case it is said: "It is urged that a partial failure of consideration is not a good defense at law, the amount being unliquidated. This is the English rule formerly followed in the United States.¹¹⁷ But the rule is now otherwise and the cases referred to in Connecticut and New Jersey have been in express terms overruled by the courts of those states."¹¹⁸ So where a promissory note was given for the purchase price of land it was decided that failure of consideration through defect in title must be total to constitute a good defense, as any defect in the title or deed was inadmissible in a court of law in an action on a note, but relief must be sought in chancery.¹¹⁹ In a *Canada* case it

¹¹³ *Branch v. Howard*, 4 Tex. Civ. App. 271, 23 S. W. 478.

¹¹⁴ *Craigne v. Hall & Farr*, 72 Vt. 104, 50 Atl. 806, 87 Am. St. Rep. 690, 55 L. R. A. 876; *Russell v. Rood*, 72 Vt. 238, 47 Atl. 789; *Burgess v. Nash*, 66 Vt. 44, 28 Atl. 419; *Hoyt v. McNally* (Rev. Laws, § 911); *Thrall v. Horton*, 44 Vt. 386; *Cragin v. Fowler*, 34 Vt. 326, 80 Am. Dec. 680; *Richardson v. Sanborn*, 33 Vt. 75; *Walker v. Smith*, 2 Vt. 339.

¹¹⁵ *Craigne v. Hall & Farr*, 73 Vt. 104, 50 Atl. 806, 87 Am. St. Rep. 690, 55 L. R. A. 876.

¹¹⁶ *Hassam v. Dompier*, 28 Vt. 32.

¹¹⁷ Citing *Wentworth v. Goodwin*,

21 Me. 150; *Morrison v. Jewell*, 34 Me. 146; *Hogden v. Golder*, 75 Me. 293; *Drew v. Towle*, 27 N. H. 412, 59 Am. Dec. 380; *Riddle v. Gage*, 37 N. H. 519, 75 Am. Dec. 151; *Richardson v. Sanborn*, 33 Vt. 75; *Pulsifer v. Hotchkiss*, 12 Conn. 234; *Allen v. Bank*, 20 N. J. L. 620.

¹¹⁸ *American Nat. Bk. v. Watkins*, 119 Fed. 545, 555, 556. Citing *Avery v. Brown*, 31 Conn. 398; *Bonker v. Randles*, 31 N. J. L. 335; *Wyckoff v. Runyon*, 33 N. J. L. 107.

¹¹⁹ *Greenleaf v. Cook*, 2 Wheat (U. S.) 13, 4 L. Ed. 172. See also, *Packwood v. Clark*, 2 Sawy. (U. S.) 546, Fed. Cas. No. 10656 (U. S. C. C. D.

is decided that a partial failure of consideration is no objection in an action on a bill of exchange if that failure applies to a defined portion of the sum claimed, otherwise it is no defense.¹²⁰ But it is also held that a plea is bad in law which shows only partial failure of consideration, as defendant's remedy is by cross-action or by suit in equity.¹²¹ In an *Ontario* case it is decided that a partial failure of consideration for an ascertained and liquidated amount, such sum having been agreed to be allowed, may constitute a defense by way of

Oregon) (holding that a failure of consideration to be defense must be total, and where some portion of the consideration still remains the defense can only come in by way of recoupment of damages for the partial failure, and under the code the damages, if any, can only be allowed as a counterclaim, which must be pleaded and proved in the same manner as if a separate action.) *Elminger v. Drew*, 4 McLean (U. S.) 368, Fed. Cas. No. 4416 (holding that total failure is a good defense, but partial is no defense where goods are sold and delivered with warranty and the contract is absolute and there is a breach; unless the contract be rescinded by consent it remains open; fraud avoids, but there must be an offer to rescind except where impracticable to return property, as in the case of death of a horse, and that the weight of authority is against the right to set up part failure, although the court says: "A very recent case, not yet reported in the supreme court, has overruled the cases in that court.") *Scudder v. Andrews*, 2 McLean (U. S.) 464, Fed. Cas. No. 12564 (holding that partial failure cannot be shown unless there has been a fraud. The case was one of a purchase-money note, and the court considers *Chitty on Bills* (Ed. 1839), p. 86, to the point that a sub-

sequent failure of the consideration for which a bill or note has been given, either in whole or in part, when of a definite amount, such as the non-performance of a condition precedent, frequently, between the original parties or their representatives affords a defense entirely or partially. But the court denies that this is the law, except in cases of fraud.) *Varnum v. Mauro*, 2 Cranch (U. S. C. C.) 425, Fed. Cas. No. 16889 (holding that partial failure is no defense.) *Boone v. Queen*, 2 Cranch (U. S. C. C.) 37, Fed. Cas. No. 1643 (holding partial failure no defense, unless there is fraud.) *Martin v. Barton Iron Works*, Fed. Cas. No. 9157 (holding that in Georgia a total as well as partial failure of consideration may be set up as a defense to what is commonly known as a sealed note or single bill. The writing was not, strictly speaking, commercial paper governed by the law merchant).

¹²⁰ *Georgian Bay Lumber Co. v. Thompson*, 35 Up. Can. Q. B. 64, 70, 72.

¹²¹ *Kilroy v. Simkins*, 26 Up. Can. C. P. 281, 285.

So a plea to an action on a promissory note showing not a total but only a partial failure of consideration, is bad. *Hill v. Ryan*, 8 Up. Can. Q. B. 443.

reduction of the amount agreed upon.¹²² In another case it is held that partial failure of consideration, being a sum capable of a definite computation, can be set up as an answer *pro tanto*.¹²³ And in a *New Brunswick* case it is held that defense can only be made where the failure of consideration is entire, and parties must resort to a cross-action for damages sustained by claimed part failure.¹²⁴ If a person who is under indictment engages the services of a lawyer and executes and gives to the latter his note for the amount of his fee, and commits suicide before his trial, the fact of non-performance by the lawyer of the services for which the note was given, and that he did not defend the criminal on his trial constitutes no ground in law or equity for impeachment of the consideration of the note. The promise to perform the service was the consideration of the note. The performance was not a condition on which the obligation of the note depended, but if by any act or omission on the lawyer's part, without default of the obligor, the stipulated service had not been rendered there would have been a partial failure of consideration. There exists in such a case as this no failure of consideration, because the non-performance resulted from the obligor's acts, without the concurrence or delinquency of the obligee who was ready and willing to perform his undertaking and would have done so had not the obligor's act prevented.¹²⁵

§ 209. Where number of notes are given—Partial failure of consideration.—Where several notes are given for a consideration which with the assent of defendant has partially failed, it cannot be set up in defense against all the notes. The amount of the note first sued on may be recovered for past performance; that is, the money actually owed thereon may be recovered.¹²⁶ There may, however, owing to a mistake between the parties be a *pro tanto* failure of consideration for notes and a mortgage for which equity will grant relief where there

¹²² *McGregor v. Bishop*, 14 Ont. 7, quoting Chalmers on Bills (1st ed.), p. 78, art. 93, that a "partial failure of consideration is a defense *pro tanto* against the immediate party when the failure is an ascertained and liquidated amount, but not otherwise."

¹²³ *Star Kidney Pad Co. v. Greenwood*, 5 Ont. 28, 33.

¹²⁴ *Clarke v. Ash*, 5 N. Brunsw. (3 Kerr) 211. See further, *Daniels on Neg. Inst.* (5th Ed.), § 201.

¹²⁵ *Mitcherson v. Dozier*, 7 J. J. Marsh. (Ky.) 53, 22 Am. Dec. 116.

¹²⁶ *Hansford v. Mills*, 9 Port (Ala.) 509; notes were for sale of personal property.

is no longer any consideration some of the notes having been paid and it being obvious that the parties did not intend to bind themselves to the full extent of said obligation represented by all the notes and the surrender and cancellation will be ordered of the unpaid notes.¹²⁷ If there is one consideration, not susceptible of apportionment, for several promissory notes, a partial failure of that consideration cannot, in the absence of fraud or mistake, impeach any one of the notes in an action on it.¹²⁸

§ 210. Rescinding contract and restoring consideration—General rule.—It is as a general rule a prerequisite to the defense that the consideration of a bill or note has failed or that it is without consideration, that such consideration, if of any value, should be restored, or there should be an offer to restore it. The underlying principle is that a party must affirm or avoid a contract in toto and not in part, and cannot at the same time repudiate and retain the benefit of a contract. The party seeking to rescind must put the other party in *statu quo*.¹²⁹ So where the purchaser of property gives a note for the price

¹²⁷ *Thompson v. Hudgins*, 116 Ala. 93, 116, 117, 22 So. 632.

¹²⁸ *Leighton v. Grant*, 20 Minn. 345 (Gil. 298, 306).

¹²⁹ *Alabama*.—*Gillespie v. Battle*, 15 Ala. 276 (holding that the maker of a promissory note given in part payment for the purchase price of land cannot retain the land, no fraud being shown, and insist that the contract is a nullity and that the note given is without consideration. It was also held that there was a failure of consideration).

Arkansas.—*Desna v. Robinson*, 17 Ark. 228.

California.—*Fitz v. Bynum*, 55 Cal. 459 (in this case it appears that the court instructed the jury that if the stock for which the notes in suit were given had any value, the defendant must have offered to return it or the plaintiff would be entitled to a verdict, and such instruction was held correct; but the verdict was for defendant upon con-

flicting evidence, and the judgment was affirmed).

Indiana.—*Heaton v. Knowlton*, 53 Ind. 357 (holding that a party cannot repudiate a contract on the ground of fraud and at the same time retain the benefits derived from it, but must, when he discovers the fraud, restore, or offer to restore to the other party what he has received, and failing to do this he affirms the contract. When the consideration received is of any value to either party it must be returned or must be tendered before the party can sustain an action for rescission of the contract or successfully defend an action based upon such contract. A party cannot treat a contract as good in part and void in part, but must affirm it or avoid it as a whole. In this case the notes were claimed to have been procured by false and fraudulent representations, having been given for the right to use, and in a cer-

and subsequently ascertains that he has been defrauded in the sale, if the property is of any value, and he ascertains the fraud in season to enable him to do so, he must rescind the contract by returning the

tain locality, a patented machine).

Iowa.—*Moore v. Moore*, 39 Iowa 461 (it was said in this case: "It is urged that defendant has not rescinded nor offered to rescind the contract under which the note was given, and he cannot therefore refuse payment now. No further answer need be given to this position than this. If what defendant received under the contract was worthless, the consideration of the note failed, and recovery cannot therefore be had by a holder with notice." Plaintiff was the indorsee, and note was given in consideration of the appointment of defendant as agent for the sale of roofing cement under contract between defendant and the payee, who indorsed the note in blank without recourse. The consideration of the contract proved worthless, and it was held that a holder with notice could not recover. "If the note was taken out of the 'due course of business' under circumstances calculated to impart notice of its infirmities, plaintiff received it at his peril, though taken before due and without notice of fraud").

Kentucky.—*Bull v. Jackson*, 1 A. K. Marsh. (Ky.) 176 (holding that contract ought not to be avoided while possession remained).

Louisiana.—*Brown v. Lambeth*, 2 La. Ann. 822 (in this case the defendant, holder of a note indorsed by plaintiff, gave it up to him on the latter's executing his own note for the amount payable at a future period. Judgment was obtained upon the last note without defense. Plaintiff claimed that he had been

discharged as indorser of the original note by the laches of the holders in not giving notice of protest, of which discharge he was ignorant. Upon these allegations an injunction was obtained, which defendants moved to dissolve, and it was held that it must be dissolved, the plaintiff having no right to require the second note to be cancelled without restoring the original note received from defendants "*non constat* that the plaintiff may not have collected the note from the maker or otherwise disposed of it").

Missouri.—*Fenwick v. Bowling*, 50 Mo. App. 516.

New York.—*Burton v. Stewart*, 3 Wend. (N. Y.) 236, 20 Am. Dec. 692.

Ohio.—*Mellen v. Harvey*, 6 Super. & Com. P. Dec. (Ohio) 15 (in this case the defense was that the paper was signed to accommodate the payee, who, as executor of an estate desired to purchase the interest of another therein, that the foreclosure was made in the defendant's name, but in fact by and for the payee. The court said: "From all that appears from the second defense the purchase was actually made, and defendant neither handed it over to the executor nor offered to rescind, and may be now enjoying it; hence this defense is not sufficient").

Vermont.—*Harrington v. Lee*, 33 Vt. 249 (holding that an offer to rescind was necessary, and if the maker of a note insists upon holding the property in consummation of which the note was given, this operates as an affirmation of the contract in all its particulars and

property, and he cannot retain the property and at the same time refuse to pay the note.¹³⁰ In an Indiana case the appellant held a number of notes and accounts against the appellee. Upon a settlement had, a certain aggregate sum was fixed as due upon them. In judgment of this sum appellee gave a certain amount in cash and conveyed the land for a certain price which equaled the balance of the indebtedness. Upon this being done the accounts and notes were surrendered to him, and appellant asked that the conveyance of land be rescinded and that the accounts and notes be returned, he retaining the sum paid to him. There was a claimed offer to rescind the contract and sale of the land and to return notes and accounts surrendered on settlement and conveyance of the land, but not in toto, and the court held that the rule was well settled that if a contract is rescinded at all it must be rescinded in toto; that a party cannot rescind a contract and retain the whole or a part of the benefits of it, and that a contract cannot be rescinded unless the parties can be placed in *statu quo*.¹³¹ So where notes were given in consideration of a lease, of which the appellants had received the benefit, and fraud was alleged in the procurement of the notes in the form in which they were given, but the particular acts of fraud were not stated, and it was also asked that the notes not due be surrendered and cancelled, but no offer was made to give new notes or to compensate the appellee for the rent of the land for which they were given, it was declared that a decree of that kind could not be had without an offer to execute other notes, or in some way placing the appellee in *statu quo*. The court said: "The appellants having received the benefit of appellee's lease could not be heard to say that the notes given in consideration thereof should be destroyed without giving equivalent value for the lease."¹³² And the fact that the note was given for a particular purpose does not

disentitles defendant to question either the validity or amount of the note).

In *Ansern v. Byrd*, 6 Ind. 475, a plea of fraud and misrepresentation as to the contents and nature of the note was not sustained. The action was for the recovery of the entire amount due on account of non-payment of interest. There was a special plea alleging readiness to pay the interest, but averring that the

plaintiff fraudulently left the state to prevent it, and demurrer was sustained. It was also held that if viewed as a plea of tender it was defective for not making profert of the money in court.

¹³⁰ *Smith v. Smith*, 30 Vt. 139, 144, per Poland, J. But examine *Bell v. Sheridan*, 21 D. C. 370.

¹³¹ *Worley v. Moore*, 97 Ind. 15.

¹³² *Norris v. Scott*, 6 Ind. App. 18, 32 N. E. 103.

change the above rule.¹³³ Thus, in a suit by an indorsee, in behalf of one of the original payees, it appeared that the note was made to be offered at a bank for discount on certain terms which were refused, and it was held that it ought to have been returned to the maker, the object of it having failed, and that it would have been fraudulent in the payees to have negotiated the note without notice of the agreement under which it was drawn and received, and as the terms upon which the note was to be offered to the bank were not accepted the maker was discharged from it.¹³⁴ Again, where a promissory note is based upon a conditional agreement to return, upon inability to perform a certain condition, it is not enough to show a failure to perform such condition in order to avoid the note, but it must also be shown that the property received by the maker has not been used and that he has returned or tendered it.¹³⁵ And where there is an absence of a total failure of consideration, and no offer has been made on the part of the defendant to rescind the contract, he cannot set up as a defense fraud in the contract on which the note was given, especially when the damages are unliquidated. If a defendant relies upon proving fraud as a defense to an action on a note, when there has been only a partial failure of consideration, he should in the first place offer to rescind the contract so as to place the parties in *statu quo* if he has it in his power to do so.¹³⁶ The general rule has also been applied, although the property is only of nominal value.¹³⁷ But where a note is given for the right to use patented machinery in a certain locality and the patent has proved a useful one in other places, it is based upon a valuable consideration, even though it has failed of success in the locality for which the note was given. In such case, if the rescinding of the contract depends entirely upon an agreement, its terms should be strictly complied with, and where such agreement also prescribes the terms upon which the note is to be given up, and no sufficient excuse for non-compliance is shown, the maker cannot avoid the note as a rescinded contract.^{137*} If, however, the answer sets forth that a suit has been commenced to rescind a conveyance tendered, the defense is good.¹³⁸

¹³³ So held in *Denniston v. Bacon*, 10 Johns. (N. Y.) 198.

¹³⁴ *Denniston v. Bacon*, 10 Johns. (N. Y.) 198.

¹³⁵ *Wood v. Ridgeville College*, 114 Ind. 320, 16 N. E. 619.

¹³⁶ *Stone v. Peake*, 16 Vt. 213.

¹³⁷ *Boggs v. Wann* (C. C. N. D. Ohio), 58 Fed. 681.

^{137*} *Pottle v. Thomas*, 12 Conn. 565.

¹³⁸ *Knappen v. Freeman*, 47 Minn. 491, 50 N. W. 533.

§ 211. Same subject—Exceptions to and qualifications of rule.

If the thing purchased is of no value to either party it need not be restored.¹³⁹ And if at the time the defendant discovers that he has been defrauded into giving a note for the purchase price of property the then state of affairs is such that it is impossible to rescind the contract and restore either of the parties to their former condition and rights, it is unnecessary either to rescind or restore. Thus, where the consideration of a note is a falsely and fraudulently represented interest in property, if no such interest exists in fact, it cannot, therefore, be restored to the vendor by a disaffirmance of the contract, and the maker of the note may defend an action thereon upon the ground of want of consideration, even though he makes no effort to rescind the purchase.¹⁴⁰ An actual tender will also be excused where it is rendered impossible by sickness or death or the destruction of the chattel.¹⁴¹ Again, if one is induced by fraud and circumvention to execute a note, believing that he is executing another paper and he is not guilty of negligence, it is immaterial whether such maker offers to return everything he has received under the contract he supposed he was making.¹⁴² The maker of a note, the consideration of which was a draft which proves to have been forged, may also set up such defense without restoring or offering to restore the draft.¹⁴³ Nor is it necessary in setting up usury in order to defeat the collection of interest or to have interest payments applied that the party pleading it should offer to restore benefits received.¹⁴⁴ Other exceptions and qualifications are illustrated by the following decisions. Where the

¹³⁹ *Desha v. Robinson*, 17 Ark. 228; *Burton v. Stewart*, 3 Wend. (N. Y.) 236, 20 Am. Dec. 692 (holding that article purchased must be returned or shown to be of no value).

¹⁴⁰ *Smith v. Smith*, 30 Vt. 139. In this case a note was given by one partner to another for his interest in an insolvent firm, which interest was falsely and fraudulently represented to be valuable when it was totally worthless. *Examine Bell v. Sheridan*, 21 D. C. 370.

¹⁴¹ So held in *Desha v. Robinson*, 17 Ark. 228.

¹⁴² *Hubbard v. Rankin*, 71 Ill. 129. In this case appellant sued as as-

signee. It was also held that the note was void in the hands of a *bona fide* holder whether or not such holder had notice of the defense.

¹⁴³ *Blood v. Northup*, 1 Kan. 28. In this case the point was made that the defendant was not seeking to rescind the contract, but that he had performed the same while his adversary had performed nothing. The plaintiffs were assignees and occupied the same status as would the payee had he sued.

¹⁴⁴ *First Nat. Bank v. Ledbetter* (Tex., 1896), 34 S. W. 1042.

payee named in a note and mortgage, procured by him by threats of prosecution and intimidation and without consideration, and which are therefore absolutely void, voluntarily leaves on the table another note and chattel mortgage after said execution, and the party executing the first note and mortgage never examined the papers so left as a pretended consideration and never agreed to receive them as a consideration and never received any benefit from them, they form no part of the consideration and there exists no obligation in such case to return said papers or to account for their absence in order to defend an action on the first note and mortgage.¹⁴⁵ In another case it was held that in an action on a note given as the consideration of an assignment of a bond of a third person for the conveyance of a tract of land on payment of a certain sum, within a certain time, the defendant could give in evidence that the contract was fraudulent without returning the bond, if the time had expired before he had knowledge of the fraud; and that the defendant was not bound to restore the bond assigned before its expiration unless he had ascertained that the statements were false and fraudulent before said expiration of the bond; but if the facts had been ascertained before such expiration of the term limited by the bond it should have been returned.¹⁴⁶ Again, where the vendor of property received from the vendee a promissory note indorsed by the latter, for an amount larger than the purchase money and gave his own note payable at a day certain for the excess; to entitle the vendor to insist upon a want of consideration when sued on his note, it is not necessary that he should release the vendee from his indorsement to a corresponding extent; if the defense is successful the plaintiff may claim a reduction from his liability as indorser. Nor will the pendency of a suit by the vendor, as indorsee, against his indorser in any manner prejudice the defense; such an action may be maintained to recover the price of the property sold.¹⁴⁷ It has also been decided that where a note was fraudulently obtained from plaintiff's husband and defendant knew that he had no title thereto, it was unnecessary for plaintiff to refund the amounts given for said note at the time it was received; since the note belonged to plaintiff, defendants could not acquire the right to retain it by purchasing it from one

¹⁴⁵ Lee v. Ryder, 1 Kan. App. 293, 41 Pac. 221.

¹⁴⁶ Winslow v. Bailey, 4 Shep. (Me.) 319.

¹⁴⁷ Litchfield v. Allen, 7 Ala. 779, 783. It was said, to entitle the de-

fendant (Allen) to insist upon a failure of consideration it was not necessary that Allen should have released the plaintiff from his indorsement, to the extent of the sum the latter is now seeking to recover.

who had no right to dispose of it.¹⁴⁸ In another case it is declared that the defense of want or failure of consideration may be pleaded without a rescission of a contract for fraud.¹⁴⁹ Again where a party makes a defense of only a partial failure of consideration it is held that an offer to return the article purchased is unnecessary.¹⁵⁰ And in a marine case it is held that it is not necessary in order to make the defense of partial failure of consideration that the party who sets it up should restore what he has received under the contract.¹⁵¹ But in Vermont, prior to the statute of 1867, partial failure of consideration was no defense unless there was fraud and an offer to rescind.¹⁵² So a defense of total failure of consideration is available by the maker without any offer to return worthless corporate stock constituting the consideration.¹⁵³

§ 212. **As to guarantors.**—It may be stated generally that there must be some consideration to support a guaranty.¹⁵⁴ But, although

¹⁴⁸ *More v. Finger*, 128 Cal. 313, 60 Pac. 933, 38 Pac. 322.

¹⁴⁹ *Russ Lumber & Mill Co. v. Muscupiabe L. & W. Co.*, 120 Cal. 521, 527, 52 Pac. 995, 65 Am. St. Rep. 186 ("Where the failure of consideration is total, as where nothing of value has been received by the defendant under it and the plaintiff cannot perform it, but the defendant may plead want or failure of consideration." Per Haynes, C.)

¹⁵⁰ *Rasberry v. Moye*, 23 Miss. 320.

¹⁵¹ *Herbert v. Ford*, 16 Shep. (Me.) 546.

¹⁵² *Hoyt v. McNally*, 66 Vt. 38, 28 Atl. 417. See, also, *Walker v. Smith*, 2 Vt. 539, where fraudulent representations were held inadmissible, in an action on a note for purchase, to reduce wages, the defendants not having rescinded the purchase.

¹⁵³ *Taft v. Myerscough*, 197 Ill. 600, 64 N. E. 711, rev'g 92 Ill. App. 560.

¹⁵⁴ A guaranty is a contract in and of itself but it has relation to some other contract or some obligation with reference to which it is collat-

eral and it always requires a consideration. If the guaranty is executed at or about the time the main contract is executed and both contracts form parts of the same transaction one transaction may support both contracts. But where the contract is sold and assigned and the guaranty is executed in contemplation or in pursuance of such sale and assignment one consideration may support both the sale and the guaranty. In all cases, however, where the guaranty is executed after the execution of the original contract, or after a sale thereof, and not in pursuance of any understanding had at the time of the execution of the original contract or at the time of the sale, neither the consideration for the original contract nor the consideration for the sale can support the guaranty. But the guaranty in all such cases must have a separate and independent consideration, and unless it has it is void. *Briggs v. Latham*, 36 Kan. 205, 209-210, 13 Pac. 129, per Valentine, J.,

a guaranty may be a contract separate from the execution of the note or undertaking of the principal debtor it does not follow that the guarantor cannot make defense when sued upon his guaranty, and although a counterclaim or set-off may not be pleaded it does not follow that the plea of no consideration is not available, and if there be any consideration for the execution of a note it is sufficient to support a guaranty, yet if there be no consideration the guarantors may plead and prove that fact and thus defeat the creditor's action, unless the guarantors have received a consideration direct to them from the creditors.¹⁵⁵ So the want of consideration for a guaranty may be set up

citing Daniel on Neg. Inst., § 1759; Randolph on Commercial Paper, § 856; 2 Parsons on Notes & Bills, p. 125. See, also, Stearns on Suretyship (ed. 1903), §§ 16, 57, 144; 1 Brandt on Suretyship & Guaranty (3d ed.), §§ 22, *et seq.*; Colston v. Pemberton, 47 N. Y. Supp. 1110, 1111, 21 Misc. 619, per McAdam, J. (case affirms 45 N. Y. Supp. 1034, 20 Atl. 410), who says: "In Hall v. Rodgers, 26 Tenn. (7 Humph.) 540 the Supreme Court of Tennessee * * * followed the rule laid down by Kent, C. J., in Leonard v. Vredenburg, 8 Johns. 29, 30, and adopted the classification of cases made by that eminent jurist, first in which are 'cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time and becomes an essential ground of the credit given to the principal or direct debtor. Here * * * is not, nor need be any other consideration than that moving between the creditor and original debtor.' This classification of the cases has been a landmark of the law of our state for more than half a century. Baylies Sur. P. 66. Following it, the court of Appeals, in Bank v. Coit, 104 N. Y., at p. 537, 11 N. E., at p. 54, said: 'Where a contract of guaranty is entered into concurrently

with the principal obligation, a consideration which supports the principal contract supports the subsidiary one also. We understand this to be the settled doctrine,' citing McNaught v. McClaughtry, 42 N. Y. 22; Simons v. Steele, 36 N. H. 73; Brandt Sur., §§ 6, 7."

¹⁵⁵ Wood Mowing & Reap. Mach. Co. v. Land, 98 Ky. 516, 32 S. W. 607, where the court, per Guffy, J., quotes from 2 Parsons on Contracts, p. 7, as follows, as to guarantees: "It is itself a distinct contract and must rest upon its own consideration, but this consideration may be the same with that on which the original debt is founded for which the guarantor is liable. The rule of law is this: If the original debt or obligation is already incurred or undertaken previous to the collateral undertaking, then there must be a new and distinct consideration to sustain the guaranty. But if the original debt or obligation be founded upon a good consideration and at the time when it is incurred or undertaken or before that time the guaranty is given and received, and enters into the inducement for giving credit or supplying goods, then the consideration for which the original debt is incurred is regarded as a consideration also for the guaranty." Citing also, Winans v.

even against a subsequent *bona fide* purchaser, where the guarantor never executed the paper, was never liable thereon and never owned the same, and there was no consideration whatever for the writing on the notes of the claimed words of guaranty.¹⁵⁶ Where the matters which operate as a defense to guaranteed notes grow out of the contract under which the notes were given, there is no objection, where the state procedure so permits, to giving relief to a guarantor, where the person primarily liable for the debt guaranteed is shown to have a defense growing out of the same transaction and going to the consideration of the notes which entitles him to a judgment; and it is generally true that a surety may set up any defense by offset or counterclaim which would be available to his principal. So where a defective warranty arising at the sale of personal chattels may be availed of as a defense, or the maker becomes entitled by reason thereof to recover a sum equal to the balance due on the notes as for damages, the notes are paid and the guaranty satisfied, and if the original promisor can thus be discharged the guarantor can.¹⁵⁷ This rule does not, however, prevent the statement of a case which would render guarantors liable on their guarantee, notwithstanding the defenses set up by the makers, if the notes were good as to themselves.¹⁵⁸ Again, where the guarantors or the parties assuming the payment of notes have not put their names to the notes sued on and are not bound by the law merchant, but solely on their assumpsit of the notes, they may plead all the equities against the notes which the maker could, and may avail themselves of failure of consideration as to both a personal and real obligation, and a partial failure may be shown.¹⁵⁹ So in an action by the transferee of the guarantor, but not a *bona fide* holder, defendant may show that the note was invalid in the original transaction between the guarantor and defendant and therefore was without consideration.¹⁶⁰ And if there is valid consideration for a

Gibbs & Starrett Mfg. Co., 48 Kan. 777, 30 Pac. 163; Standley v. Miles & Adams, 36 Miss. 434.

¹⁵⁶ Briggs v. Latham, 36 Kan. 205, 13 Pac. 120, the words of the guaranty written upon a mortgage securing certain negotiable notes were "I hereby guarantee the payment of the within mortgage—L. D. L."

¹⁵⁷ Aultman Taylor Co. v. Hefner,

67 Tex. 54, 2 S. W. 861, citing Baylies on Sureties & Guarantors 408; Brandt on Suretyship & Guaranty 203; De Golyer on Guarantees 431. But compare 1 Brandt on Suretyship (3d ed.), §259, p. 512.

¹⁵⁸ Aultman & Taylor Co. v. Hefner, 67 Tex. 54, 2 S. W. 861.

¹⁵⁹ Brou v. Bechel, 20 La. Ann. 254.

¹⁶⁰ Gross v. Kellard, 26 N. Y. Supp. 69, 6 Misc. 27, 56 N. Y. St. R. 617.

guaranty, a motion to dismiss a complaint, seeking recovery upon the note, is properly denied.¹⁶¹ If a "transfer and guaranty of collection" operates only as an assignment thereof, any defense available between the original parties, including that of want of consideration, can be made in a suit brought by the assignee, even though the latter took the note before due and without knowledge of any infirmities.¹⁶² And, although a holder of a note who purchases before maturity and for value has knowledge of the consideration of a note and of the guaranty, but has no notice at the time of his purchase that the guarantor had failed to perform his guaranty, this will not preclude a recovery, although if he had had knowledge or notice of the failure to perform or inability to perform the guaranty it might have been a sufficient defense.¹⁶³

§ 213. **As to sureties.**—No exact line of demarcation between a guarantor and surety can be satisfactorily made and it has been well said in a Connecticut case that: "With respect to the technical distinction in legal character and effect between a surety, guarantor, indorser, and maker of promissory notes, there is so much nicety of refinement as often to lead to great uncertainty as to the real nature of the distinctions, and especially as to the principle on which some of the assumed distinctions rest. In many cases the shades of legal difference between a guarantor and surety are so subtle and readily blended as to be almost impossible of separate and satisfactory discrimination, and sometimes also between an indorser, guarantor and surety, and in some instances the question whether a party was maker, guarantor, or surety has been found not free from difficulty upon any clearly defined and well settled principles."¹⁶⁴ This difficulty in determining whether or not a party is a surety becomes important in determining not only his liability but also in formulating any rule in the matter of defenses as to sureties. It was the established law of England before the judicature act that in equity the true relations of the parties to a negotiable instrument could be inquired into and that it could be shown in equity that the maker of a note was in fact a surety and an indorser the principal, and further, that in such case

¹⁶¹ *Colston v. Pemberton*, 47 N. Y. Supp. 1110, 21 Misc. 639, aff'g 45 N. Y. Supp. 1034, 20 Misc. 410.

¹⁶² *Omaha Nat. Bank v. Walker*, 5 Fed. 399.

¹⁶³ *Hudson v. Best*, 104 Ga. 131, 30 S. E. 688.

¹⁶⁴ *Monson v. Drakeley*, 40 Conn. 552, 561, 16 Am. Rep. 74, per Phelps, J. See 15 Central L. J. 82.

if the indorser, who was in fact the principal, was dealt with so as to discharge a surety, the maker was discharged.¹⁶⁵ So generally a surety may show, by way of defense, the facts going to the consideration of the execution of the note, as that he was a mere accommodation maker and the purpose for which the maker stated he wanted the surety's signature as an initial step affecting its consideration in the hands of the holder and notice thereof to the latter.¹⁶⁶ But a party cannot be bound as surety for a debt which is not due because of failure of consideration against the principal.¹⁶⁷ Although the mere liability of one as surety for another on a note not yet due will not of itself give a cause of action against the principal in favor of the surety, still it may, however, furnish a good consideration for a promissory note, upon a promise either express or implied by law, on the part of the surety, that he will pay and discharge the debt of his principal; and such a note may be the foundation of an action and a valid attachment, at least to the extent of the actual payment made by the surety before taking judgment in his action; but where the attachment is made upon real estate before the note is signed and upon personal estate thereafter it constitutes a defense, since no claim was due and payable when the action was commenced.¹⁶⁸ But the agreement between the payee of a promissory note and a third party that the latter would become surety on the note and sign it in consideration that the payee would forbear to sue on the note is a valid enforceable agreement, no question being raised as to the statute of frauds. Such agreement may be either express or inferred from the facts and circumstances of the case.¹⁶⁹ If the principal and sureties unite in a common defense of partial failure of consideration, and no plea peculiar to the contract of suretyship is entered by the sureties, they must stand or fall, according to the validity of the defense in favor

¹⁶⁵ *Jennings v. Moore*, (Mass., 1905), 75 N. E. 214, 215, per Loring, J.

What acts do and do not discharge surety see generally, Daniels on Neg. Inst. (5th ed.), §§ 1308e, *et seq.* See, also, chapter herein on Satisfaction and Discharge.

¹⁶⁶ *St. Louis Nat. Bank v. Flannagan*, 129 Mo. 178, 201, 31 S. W. 773.

¹⁶⁷ *Adams v. Curry*, 15 La. Ann. 485. See *Johnson v. Marshall*, 4

Rob. (La.) 157, Civ. Code Art. 2208, as to defenses as to indorsers as sureties.

¹⁶⁸ *Swift v. Crocker*, 38 Mass. (21 Pick.) 241. See *Flagg v. Locke*, 74 Vt. 320, 52 Atl. 424, as to right, under statute, of a surety in an action to set-up any defense that the principal might have availed himself of in an action brought against him.

¹⁶⁹ *Hockenbury v. Myers*, 34 N. J. L. 346.

of the principal.¹⁷⁰ If paper is signed for a special purpose in which the sureties are interested, the fact that it is made payable to a particular person may be sufficient to put another who takes it upon inquiry, and if to take it would operate as an injury to or fraud upon the sureties, the latter may defend against it for want of consideration.¹⁷¹ A promissory note given by a surety in discharge of the obligation in its original form, but which the principal debtor had discharged, although the surety was ignorant of said fact, is based upon no consideration whether inquiry had or had not been made of the principal debtor as to the payment or existence of the original debt.¹⁷²

§ 214. **As to donor and donee.**—It constitutes a defense in an action by the donee against the donor of a promissory note that the note was a gift and that there was no valuable consideration, but only one based on love and affection;¹⁷³ for as a want of consideration is a

¹⁷⁰ *American Car Co. v. Atlantic Street Ry. Co.*, 100 Ga. 254, 256, 28 S. E. 40.

¹⁷¹ *Meeker v. Shanks*, 112 Ind. 207, 212, 13 N. E. 712, per Mitchell, J. See *Voreis v. Nussbaum*, 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45, as to stat. 1881, § 5119, precluding married women becoming sureties, etc., available as defense against *bona fide* holder.

¹⁷² *Pettyjohn v. Liebscher*, 92 Ga. 149, 17 S. E. 1007.

¹⁷³ *Loudermilk v. Loudermilk*, 93 Ga. 443, 21 S. E. 77. A non-negotiable note.

A note based on love and affection cannot be enforced. *Kline's Est.*, *In re*, 9 Pa. Dist. R. 386; *Shugart v. Shugart*, 111 Tenn. 179, 76 S. W. 821. *Examine Head v. Baldwin*, 83 Ala. 132, 3 So. 393; *West v. Cavins*, 74 Ind. 265; *Fink v. Cox*, 18 Johns. (N. Y.) 145, 9 Am. Dec. 191; *Kern's Estate*, *In re*, 171 Pa. St. 55, 33 Atl. 129.

A donor's own promissory note is held to be unenforceable; *Shu-*

gart v. Shugart (Tenn., 1903), 76 S. W. 84.

But as to gifts of bills and notes generally:

See *California*.—*Pullen v. Placer County Bank*, 138 Cal. 169, 71 Pac. 83.

Illinois.—*Hagermann v. Hagermann*, 188 Ill. 363, 53 N. E. 950, 90 Ill. App. 251; *Morey v. Wiley*, 100 Ill. App. 75; *Martin v. Martin*, 89 Ill. App. 147.

Kansas.—*Gallagher v. Donahy*, 65 Kan. 341, 69 Pac. 330.

Maine.—*Bickford v. Mattocks*, 95 Me. 547, 50 Atl. 894.

Michigan.—*Conrad v. Manning*, 125 Mich. 77, 83 N. W. 1038, 7 Dec. L. W. 440.

New Hampshire.—*Blazo v. Cochran*, 71 N. H. 585, 53 Atl. 1026.

New York.—*Timerson*, *In re*, 80 N. Y. Supp. 639, 39 Misc. 675.

North Carolina.—*Flanner v. Butler*, 131 N. C. 150, 42 S. E. 557.

Texas.—*Deussen v. Moegelin*, 24 Tex. Civ. App. 339, 59 S. W. 51.

Canada.—*Ekemberg v. Mousseau*,

good defense, a promise to give money cannot, as between original parties, be enforced even in the form of a promissory note.¹⁷⁴ So there is no consideration for a new note intended as a gift and given for a larger sum in lieu of a prior note made and executed as a gift.¹⁷⁵ It is established as a rule of law that in a suit upon a promissory note against the promisor by the promisee, or by an indorsee without value given, or taking the note under such circumstances as to enable him to stand only upon the rights of the promisee, it is competent for the promisor to show by way of defense that it was gratuitous and made without any legal consideration, that a donor's promissory note, payable to the donee, cannot be the subject of a *donatio causa mortis*.¹⁷⁶ And the indorsement of a promissory note by the donee cannot be the subject of a gift *causa mortis* so as to render his estate liable on his indorsement.¹⁷⁷ But upon a plea of want of consideration it is not a defense, which will defeat recovery upon a note, that the consideration of the note sued on was a loan to the donor of the money proceeds of a share of stock which was a voluntary gift from the donor to the plaintiff.¹⁷⁸ It is lawful for one to transfer notes to his wife by gift;¹⁷⁹ and a check drawn by a testator, payable to his wife or order, given to her before his death, and indorsed and paid by her into a foreign bank against the amount of

Rap. Jud. Queb. 19 C. S. 289; Foster v. Walker, 32 N. S. 156.

A relinquishment of a note by way of gift with the intent that it should operate as a release or extinguishment of all obligation to make further payment of the previously existing indebtedness is valid. Percival-Porter Co. v. Oaks (Iowa 1906), 106 N. W. 626.

A delivery of the promisor's note to a party payable out of the former's estate without any actual delivery of the property or amount is without consideration, being a mere promise to make a gift or deliver the property in the future, and such note cannot be enforced. Tyler v. Still (Wis.), 106 N. W. 114.

¹⁷⁴ Simpson College v. Tuttle, 71

Iowa 596, 33 N. W. 74. See last preceding note.

¹⁷⁵ Copp v. Sawyer, 6 N. H. 386.

¹⁷⁶ Parish v. Stone, 31 Mass. (14 Pick.) 198, 201, per Shaw, C. J.

When checks deposited, to be delivered after death, are not good as gifts for want of delivery, see Clay v. Layton, 134 Mich. 317, 96 N. W. 458.

¹⁷⁷ Weston v. Hight, 17 Me. 287, 35 Am. Dec. 250. Compare Whitehouse v. Whitehouse, 90 Me. 468, 38 Atl. 374.

¹⁷⁸ Rice v. Rice, 106 Ala. 636, 17 So. 628.

¹⁷⁹ Lee v. Newell, 107 Pa. St. 283, see this case also as to legal and equitable defenses.

which she drew, is enforceable in the hands of such *bona fide* holder, even though not presented until after such donor's death.¹⁸⁰

§ 215. **As to donor and donee—Negotiable check on bank.**—In case of a negotiable check on a bank made and delivered to the payee in the lifetime of the drawer and not presented for payment until after the latter's death, but actually paid on presentation, there is such immediate possession and control of the thing intended to be given as to constitute an executed and perfected gift, and it is of no importance that the drawer after delivery of the check expressed a wish that it would not be delivered until after his death, and the bank would have no defense for refusal to pay it.¹⁸¹

§ 216. **Joint and joint and several notes.**—Where a note is upon its face a joint one, presumably both makers executed it at the same time, and upon ample consideration as to each and both, but such presumption is not conclusive and under proper pleas it may be shown as a defense that there was no consideration at all, and it is decided that it may also be shown that there was a consideration as to one of the makers and none at all as to the other, and one of the joint makers cannot be precluded from setting up the defense of want of consideration as to him because it is common to all.¹⁸² But it is also decided that in a suit on a joint note it is not sufficient for one of the joint defendants to show that he received no consideration; it is necessary for him to show want of consideration between the plaintiff and the other makers. Proof that one of the joint makers of a note signed it without consideration, as between him and the payee, and at the request of another joint maker, is insufficient to destroy the presumption of consideration contained in the note itself; it must be shown that there was no consideration moving between the payee and the other joint maker.¹⁸³ If all the joint payees of a note indorse the same to the holder, he is not a *bona fide* indorsee and holder for value so as to preclude the defense of want of considera-

¹⁸⁰ *Rolls v. Pearce*, 5 Ch. Div. 730. But quære if the check had been payable to bearer.

¹⁸¹ *Pullen v. Placer County Bk.* (Cal.), 66 Pac. 740.

¹⁸² *Meyer v. Brand*, 102 Ind. 301, 26 N. E. 125; so also under Rev. St. 1881, §§ 366, 568.

¹⁸³ *Kinsman v. Birdsall*, 2 E. D. Smith (N. Y.) 395. Examine generally *Yoho v. McGovern*, 42 Ohio St. 11, as to Rev. Stat., § 5366, when not applicable to charge joint maker of note.

tion in an action by him upon the note, nor is he entitled to notice of want or failure of consideration to constitute it a defense.¹⁸⁴ Failure of consideration without fraud may be pleaded to a note which is a joint and several promise to pay by two, purporting to be signed and sealed by the makers, but sealed only as to one and signed only by the other as security.¹⁸⁵ In Minnesota a partial failure of consideration may be interposed by one of the makers of a joint and several note to defeat a recovery *pro tanto*. The defense cannot be taken away because it is also available to another maker should he be sued on the note.¹⁸⁶

§ 217. **Notes under seal.**—The availability of the defenses of want or failure of consideration as against sealed notes and like obligations must rest largely, if not entirely, upon their character as non-negotiable, or as negotiable by statute, or as subject to assignment and equities under the statute. Thus a note may not be commercial paper governed by the law merchant, and yet under the statute total as well as partial failure of consideration may afford a good defense to writings which are commonly known as sealed notes or single bills.¹⁸⁷ So a distinction has also been made between bonds or sealed obligations and notes, in that inquiry may not be made into the consideration of the former, but may as to the latter, between immediate parties.¹⁸⁸ So upon the principle that a seal imports a consideration and creates a legal obligation, it is decided that, in an action on a bond or note under seal, want of consideration is no defense.¹⁸⁹ But it is also determined that want of consideration may be

¹⁸⁴ Saxton v. Dodge, 57 Barb. (N. Y.) 84.

¹⁸⁵ Albertson v. Halloway, 16 Ga. 377.

¹⁸⁶ Nichols & Shepard Co. v. Soderquist, 77 Minn. 509, 80 N. W. 630.

¹⁸⁷ Martin v. Bartow Iron Works, Fed. Cas. No. 9, 157, so under Ga. Stat. Action was between maker and payee. When distinction exists between simple contracts and those under seal, see Williams v. Haines, 27 Iowa 251, 1 Am. Rep. 268.

Failure of consideration can be pleaded to a note under seal. Slaton v. Fowler (Ga. 1906), 53 S. E. 567.

Quære: Not definitely decided in Iowa whether or not want of consideration may be pleaded in defense of note under seal. Slaton v. Fowler (Ga. 1906), 53 S. E. 567.

¹⁸⁸ Sprigg v. Bank of Mt. Pleasant, 10 Pet. (U. S.) 257, 266, 9 Sup. Ct. 416, a case of principal and surety on a bond and of estoppel.

When mortgage coupon bond with interest coupons attached and conditions therein is sealed instrument, see Gibson v. Allen (S. D. 1905), 104 N. W. 275.

¹⁸⁹ Cosgrove v. Cummings, 195 Pa. St. 497, 498, 46 Atl. 69.

available by way of an equitable defense to a note under seal.¹⁹⁰ Again, notes under seal for the payment of money, negotiated before due, in good faith, are to be regarded as commercial paper, and all the incidents of such paper should attach to them, so that the makers cannot avail themselves of any breach of confidence by one of the parties in filling them up and putting them into circulation.¹⁹¹ But it is decided that the want of consideration cannot be availed of in defense on a sealed note against a *bona fide* holder.¹⁹² But whatever infirmities or equities exist in favor of the maker against the payee are available against an assignee of a sealed note, and this applies to an accommodation note executed solely to enable money to be raised to pay a debt to a third person.¹⁹³ Where notes purport on their face to have been given by decedent, not as evidence of any debt due to the payee, but to enable the latter to collect the amount thereof after the maker's death for the benefit of other persons named therein, they are unenforceable, even though under seal, where there exists a total want of consideration for such notes.¹⁹⁴

§ 218. **Notes under seal—Gratuitous promise to pay.**—It is decided not to be a good defense that a promise in writing under seal to pay money was voluntary.¹⁹⁵

§ 219. **Renewal notes generally.**—In an action by the payee against the maker of a note payable to a bank, which, under a statute, is governed by the law merchant as applicable to inland bills of ex-

¹⁹⁰ *Londerman v. Judy*, 48 Ohio St. 562, 2 Ohio Cir. Ct. R. 351, 29 N. E. 181, within code provision allowing legal and equitable defenses.

¹⁹¹ *Bank of St. Clairsville v. Smith*, 5 Ham. (Ohio) 222.

¹⁹² *Bradford v. Williams*, 91 N. C. 7.

Examine Gebhart v. Sorrels, 9 Ohio St. 461. This case was one of an action on a bill of exchange brought by an indorser, but the instrument was not in the ordinary form of a bill of exchange intended to be negotiated in the market, and was under seal and was indorsed by a bank to plaintiff without re-

course. The answer was set aside as insufficient and judgment rendered for plaintiff which was reversed.

¹⁹³ *Stevenson v. Bethea*, 68 S. C. 246, 47 S. E. 71.

¹⁹⁴ *Anthony v. Harrison*, 14 Hun (N. Y.) 198; 2 Rev. Stat. 406, § 77, makes a seal only presumptive evidence of a sufficient consideration.

¹⁹⁵ *Aller v. Aller*, 40 N. J. L. 446. But statute Rev. St., p. 387, § 52, as to showing want of consideration as defense to sealed instrument considered. See *Abel v. Burgett*, 3 Blackf. (Ind.) 502.

change, it is no defense that the note sued on was in lieu of another paper for the same amount executed without consideration to a third person, who had indorsed the same to the plaintiff before maturity for an amount much less than the face value.¹⁹⁶ And the maker of the old note, who has failed to sign a renewal note, is not released by the acceptance of such renewal note, where the agreement not to release or extinguish the old note is the consideration for the renewal being accepted.¹⁹⁷ Under a Massachusetts decision it is held that where a note was given in pursuance of a promise to name a child after the maker of the note, such child can recover on a renewal note given in place of said note. The court said in this case: "The defendants concede that the privilege * * * was a valid consideration. * * * But they contend that the plaintiff was a stranger to the consideration and that he could not recover upon that note, and that he cannot recover upon the note in suit, which the testator afterwards gave to the plaintiff in renewal of the original note. We have no doubt that the privilege of naming a child is a valid consideration for the promise. * * * In this case it is fair to say that, in the transaction in which the original note was given, the parents were acting for the child, and were understood * * * to be so acting," and that the child had ratified the contract after becoming of age.

§ 220. Renewal notes—Waiver by principal precluding defense of failure of consideration—Sureties defense.—The principal cannot defeat a recovery upon a renewal note by setting up a failure of consideration, where a waiver of the right to take advantage of defects, based upon facts existing at or about the time of the maturity of the original note and before the renewal, which facts were then fully known to the principal; especially so when, in addition to giving the new note, he had repeatedly, in writing, acknowledged his liability both before and after giving the new note. And if the sureties have not pleaded any facts which would discharge them from liability on the contract of suretyship, and have no other defense than that relied on by their principal, they are bound thereby, although if they had a complete defense to the first note, and the holder knew it, and if in ignorance of the facts upon which their defense could have been predicated they signed the second note and renewed their contract of suretyship, they could by proper pleadings and proof have presented

¹⁹⁶ *Murphy v. Lucas*, 58 Ind. 360.

¹⁹⁷ *Bowman v. Rector* (Tenn., 1900), 59 S. W. 389.

the question whether or not they could be discharged from liability thereon.¹⁹⁸

§ 221. **Renewal notes—Implied or expressed consideration.**—Even though matters are not expressed as part of an agreement which constitutes the consideration of a renewal note, yet the failure to perform such matters when not demanded cannot be availed of as a defense to an action on paper so renewed.¹⁹⁹ If a note is based upon a valid consideration, and a renewal note which expresses the receipt of value is given therefor, the maker in an action by the payee cannot defend on the ground of want of consideration.²⁰⁰

§ 222. **Renewal note—Consideration for original paper.**—If the original note is given for an adequate consideration it follows that no new or additional consideration is necessary to give validity to a renewal note.²⁰¹ But a contract to extend the time of a payment of a promissory note, made after maturity of the note, is not one which necessarily imports a consideration.²⁰² And a note given in renewal of a note voidable for want of consideration is without consideration.²⁰³ If a note is given in renewal only, and not in payment of a prior note, the real consideration is the same as that of the prior note, and failure of the consideration of the original note may be availed of in a suit on the renewal note.²⁰⁴ So if the maker takes up a note by executing

¹⁹⁸ *American Car Co. v. Atlanta Street Ry. Co.*, 100 Ga. 254, 28 S. E. 40. In this case the principal and sureties all united in the common defense of partial failure of consideration and the sureties entered no plea peculiar to their contract of suretyship and the court said: "Whether these sureties would be bound by the waiver of the principal if the facts were unknown to them at the time they signed the last note, or whether for that reason they could avail themselves of any other defense is not now for decision."

¹⁹⁹ *West v. Banigan*, 51 N. Y. App. Div. 328, 64 N. Y. Supp. 684, aff'd 172 N. Y. 622.

²⁰⁰ *Ross v. Western Loan & Trust Co.*, Rap. Jud. Queb., 11 R. R. 292.

²⁰¹ *Lockner v. Holland*, 81 N. Y. Supp. 730.

²⁰² See *National Citizens' Bank v. Toplitz*, 178 N. Y. 464, 468, 71 N. E. 1.

²⁰³ *Hill v. Buckminster*, 22 Mass. (5 Pick.) 391. Action here was between original parties.

Where original note is without consideration renewal note is also. *Cockran v. Perkins* (Ala., 1906), 40 So. 351; *Gilbert v. Brown* (Ky., 1906), 97 S. W. 40.

²⁰⁴ *Wheelock v. Berkeley*, 138 Ill. 153, 157, 27 N. E. 942, citing *House v. Davis*, 60 Ill. 367; 1 *Parsons on Bills and Notes*, pp. 176, 177; *Tiedeman on Com. Paper*, § 180.

A note given in renewal of one which in fact had been paid is without consideration. *Smith v. Taylor*, 39 Me. 242.

to the same payee new notes for the same amount, the consideration of the new notes is the same as that for the old, and the maker may set up failure of consideration in a suit by an assignee upon the new notes.²⁰⁵ So it is said in a Maryland case: "The taking from the same party of a security of no higher grade or dignity, for another, never works an extinguishment or amounts to a payment, but leaves the original obligation in full force."²⁰⁶ And where notes were given in settlement of a note on which it was represented one was surety, but he was not, it was held that the consideration had failed.²⁰⁷ But it is insufficient evidence of want of consideration to prove that a note previously given by another for the same amount to the same payee was satisfied by the payee about the same time the note sued on was given.²⁰⁸ If a renewal note is based upon an independent valid consideration an inquiry cannot be made, as against a *bona fide* holder, into the consideration of the original note. So where renewal notes or a bill of exchange are given for extension of the original notes the parties thereto cannot inquire into the consideration of the original notes, payable at a bank, as against said bank after it becomes a *bona fide* purchaser thereof.²⁰⁹ So the extension of time of payment of a note is a valuable consideration for other notes taken in lieu of it, and if a new note taken in lieu of another is founded on a valuable consideration, independent of that on which the original note was founded, the failure of the consideration of the former note is not a defense by the drawer in a suit against him on the last note.²¹⁰ Where no promise is made to pay a note in order to obtain an extension, and the maker does not authorize the payee to secure such extension from the indorsees, the maker is not, in an action against him by the indorsee, compelled to pay the last note where there has been a failure of consideration thereof.²¹¹ There has also been a total failure of consideration where there exists a failure or refusal to turn over the old notes as agreed to be done in consideration of new notes,

²⁰⁵ *Bray v. Pearsoll*, 12 Ind. 334.

²⁰⁶ *Hopkins v. Boyd*, 11 Md. 107, 118 per *Le Grand, C. J.*

²⁰⁷ *Wright v. Vetter*, 54 Mo. App. 384.

²⁰⁸ *Rowland v. Harris*, 55 Ga. 141.

²⁰⁹ *Estep v. Burke*, 19 Ind. 87.

²¹⁰ *Muirhead v. Kirkpatrick*, 21 Pa. St. 237. See *Gatzmer v. Pierce*, 6

Wkly. Notes Cas. (Pa.) 433, giving of time and release of indorser constitute new consideration and defense not good on original notes is no defense on substitute notes which have been negotiated.

²¹¹ *Merchants' & Planters' Bank v. Millsaps* (Miss.), 15 So. 659.

and in such case the payee cannot recover against the makers.²¹² But in an action by a holder for value against the maker and indorsee upon renewal notes given upon an agreement that the old notes should be turned over to plaintiff, and one of them is not delivered until presented in court for such purpose, and such non-delivery is waived, there is not such a failure of consideration as to prevent plaintiff from recovering on the renewal notes against the indorsee.²¹³ So the fact that old notes have never been surrendered as agreed constitutes no defense in law against the obligation of new notes in the hands of a *bona fide* purchaser before maturity and without notice, and where such purchaser obtains a judgment at law he is entitled to retain the same.²¹⁴

§ 223. Renewal notes—Discount before maturity.—One who takes good title, when he discounts an original note by receiving it before maturity, for value and without any notice of want of consideration, may recover on renewals thereof, unless the taking of the last notes is an extinguishment of the original note.²¹⁵ And where the note sued on is not a new transaction, but is a renewal note given by the maker to the payee for a balance due, and said renewal note has been purchased for value in due course of business without notice, said holder is not precluded from recovering by notice that the original note was without consideration.²¹⁶

§ 224. Notes or checks given for other notes or bills purchased. Where a note is given for the purchase price of another note which at the time had a certain cash value, the fact that the latter note was subsequently, in an action thereon, found, even though mistakenly, to be without consideration, does not constitute a defense to the former note.²¹⁷ And where the payee of a note has sold it to a third person, and the maker being present at the request of the vendee, and for his accommodation takes it up and executes a new note, payable to the purchaser in a suit upon a new note the maker cannot prove

²¹² *Perry v. Connell* (Tex. Civ. App.), 31 S. W. 685.

²¹⁵ *Hopkins v. Boyd*, 11 Md. 107.

²¹⁶ *Beattyville Bank v. Roberts*, 117

²¹³ *West v. Bannigan*, 51 N. Y. App. Div. 328, 64 N. Y. Supp. 884, aff'd 172 N. Y. 622, 65 N. E. 1123.

²¹⁷ *Bean v. Proseus* (Cal.), 31 Pac.

²¹⁴ *Martina v. Muhlke*, 186 Ill. 327, 49. 57 N. E. 954.

want of consideration for the note which has been canceled.²¹⁸ Again, it is no defense to an action upon a note that the consideration of it was another note, against one B., transferred to the defendant by the plaintiff, with a guaranty of payment before the note in suit should fall due, which note against B. has not been paid.²¹⁹ If a person purchases bills of exchange from an insolvent's syndics and gives cash and other notes therefor, and they are protested for non-payment and returned to the purchaser, he may, for want of failure of consideration, refuse to pay his notes in the hands of the syndics of the vendor, who has failed. Said notes being still in the payee's hands, or, which is the same, in those of his syndics, the consideration may be inquired into.²²⁰ But the fact that a check is given for the purchase price of a note, and that the makers of the note had stopped payment before the sale, does not constitute such a failure of consideration as to constitute a defense to an action on the check, where it was given for a note placed in a broker's hands to raise money.²²¹ And if post-dated checks are given in pursuance of an arrangement for the exchange of checks and notes for the accommodation of defendant, and they are deposited in a bank which takes them before maturity, for full value without notice of any equities or defenses, such bank has a perfect title against all defenses in a suit by it against the drawers.²²² Again where a note is transferred for a consideration of another note and a chattel mortgage, which latter note has indorsers against whom it may be enforced, there is not a total failure of consideration, even though the maker of the latter note and mortgage becomes insolvent.²²³

§ 225. Draft accepted to extinguish other drafts.—One who accepts a draft drawn to extinguish other outstanding drafts cannot set up a failure of consideration for which the first drafts were given as a defense to his acceptance.²²⁴

§ 226. Where only part of the consideration is good—Action by payee.—If part of the consideration of a note is good and there is no

²¹⁸ *Williams v. Rank*, 1 Ind. 230, 1 therefore that there was a consideration. *Smith* (Ind.) 176.

²¹⁹ *State v. Hobbs*, 40 N. H. 229.

²²⁰ *Grieve's Syndics v. Sagory*, 3 74 N. E. 926. ²²² *Symonds v. Riley* (Mass., 1905),

Mart. O. S. (La.) 599. ²²³ *Central Sav. Bank v. O'Connor*, 132 Mich. 578, 94 N. W. 11, 10 Det. L. N. 14.

²²¹ *Elwell v. Chamberlain*, 17 N. Y. Super. Ct. (4 Bosw.) 320, aff'd 31 N. Y. 611. There was also a claim here that the transaction was usurious, and that it was not so, and ²²⁴ *Kaufman v. Barringer*, 20 La. Ann. 419.

consideration for the balance, and the valid obligation is paid, an action upon the note by the original payee will fail.²²⁵

§ 227. **Defense to one note in action on another.**—If notes are exchanged each note is a valid consideration for the other, and is fully available in the hands of its holder, and such transaction being fully consummated and in no sense executory, a defense of failure of consideration, in an action upon one of them, will not be sustained by the fact that the other is not paid at maturity, where there is nothing amounting to a plea of an equitable set-off. If, however, an equitable counter-claim is set up under proper averments, defendant might then show that no equities or rights of others had intervened, and that the transaction was such as to justify offsetting one note against the other.²²⁶

§ 228. **Note given for political assessments.**—There is no want of consideration for a note given to the chairman of a campaign committee, by the nominee for a state office, to meet his proportion of campaign assessments and also of assessments to meet counsel fees and costs of a contest of election against all the candidates of the party, said note having been given after the contest was instituted.²²⁷

§ 229. **Where paper sued on is impossible to perform in reasonable time.**—There is both a want and failure of consideration where the paper sued on is impossible to perform within a reasonable time, at least, within the time contemplated by the contract on which the paper is based.²²⁸

§ 230. **As to agents.**^{228*}—If defendant gives his negotiable note to the order of agents, and such payees indorse the same to a *bona fide* indorsee for value before maturity, it is valid in his hands and not subject as against him to defenses affecting the consideration.²²⁹ And where an agent, at the request of his principal, drew his check

²²⁵ Littlefield v. Perkins (Me., 1905), 60 Atl. 707. See Tuttle v. George A. Tuttle Co., (Me., 1906), 64 Atl. 496.

²²⁶ Rice v. Grange, 131 N. Y. 149, 42 N. Y. St. R. 707, 30 N. E. 46.

²²⁷ Day v. Long, 26 Ky. L. Rep. 123, 80 S. W. 774.

²²⁸ German-American Security Co's Assignee v. McCulloch (Ky. App., 1905), 89 S. W. 5.

^{228*} See Neg. Inst. Law, § 119, appendix herein.

²²⁹ McCormack v. Warren, 74 Conn. 234, 50 Atl. 740. See Byers v. Harris, 56 Tenn. (9 Heisk.) 652.

to another to discharge a *bona fide* debt due from his principal to the payee, having in his possession funds enough of his principal to meet the check, it was decided that the payee could recover against the drawer and that the money or funds, for which the check was given, being in the drawer's hands at the time of giving plaintiff the check, there was no want of consideration.²³⁰ But if a person draws as agent upon his principal for a debt not personal to himself, but due by the principal to the payee, and an action is brought against the agent as drawer, he may avail himself of the defense of want of consideration.²³¹ If, however, an agent makes sales of the property of his principal, and in payment to the owner therefor has indorsed a note, which was not taken for the property sold, or any part thereof, such agent cannot set up want of consideration in defense of an action against him as indorser.²³² But it is also decided that the consideration of a note is open to inquiry except where the rights of a *bona fide* purchaser have intervened, and that a principal is chargeable with such facts as are known to his agent, which rule was applied to a purchase of a note by an attorney at law for his client;²³³ although as against a defense of failure of consideration a commercial firm holding a note in favor of one of its members, without indorsement, given for money loaned by the firm, cannot set up that they are innocent holders for value.²³⁴ And, if a general agent, who appoints sub-agents to work for an insurance company under his supervision, takes from an applicant for insurance a promissory note, to be negotiated and cash raised thereon, to be sent with an application in payment of a premium upon a policy, to be issued and delivered, and such general agent discounts the note in bank and forwards the money, with the application, he cannot, where he brings suit thereon, set up that he is a *bona fide* holder for value and so preclude the defense of failure of consideration, in that the note

²³⁰ Fish v. Jacobsohn, 1 Keyes 539, 2 Abb. Dec. 132, aff'g 18 N. Y. Super. 514.

²³¹ Wolfe v. Jewett, 10 La. 383; Coupry v. Dufau, 1 Mart. N. S. (La.) 9. The evidence showed that the bill on which suit was brought was drawn by defendant as the mere agent of Coupry and that he received no consideration for it whatever and oral evidence was received to show that no consideration was received by the drawer.

²³² Crocker v. Getchell, 10 Shep. (Me.) 392, 398.

²³³ Macomb v. Wilkinson, 83 Mich. 486, 47 N. W. 336.

²³⁴ Norton v. Pickens, 21 La. Ann. 575. Such was on a promissory note made by defendant to the order of one of the plaintiff's firm, but the note was never indorsed to the firm and they did not appear as *bona fide* holders.

was obtained before the policy was delivered, and the policy as delivered was not that contracted for and for which the application was made.²³⁵ If an agent has authority to make a contract on which a note is based, and there is a breach thereof, there is a failure of consideration.²³⁶ And where the purchaser of a note from a *bona fide* holder transfers it to the payee's agent it becomes subject in his hands to equitable defenses.²³⁷

§ 231. **As to trustees or committees.**—Generally, if notes are issued or held by trustees or committees, in determining whether there is a defense to such notes the objects and purposes contemplated, and upon the consideration of which the notes are issued, are the determining factors, as a rule, upon the question of availability of defense, which must therefore depend upon the particular circumstances of the case.²³⁸ If a note is given to a trustee or committee for money raised for a specific purpose, said trustee or committee not being owners of the fund, it is based upon a special consideration, and want of consideration can not be set up as a defense.²³⁹ Again, no recovery can be had upon a note executed by a father, given, upon compromise of certain suits, to a trustee, to secure a settlement on his minor children for their support, during the existence of a marriage.²⁴⁰ A note is also without consideration where it is given to a trustee, at his request, merely to enable him to show to the party for whom he was trustee to account for the disposition of money which said party had directed to be paid to defendant as a gift to the brother of said trustee, who was the plaintiff and son of the party for whom he acted as trustee.²⁴¹

²³⁵ *Shedden v. Heard*, 110 Ga. 461, 35 S. E. 707.

²³⁶ *Webb v. Mosely*, 30 Tex. Civ. App. 311, 70 S. W. 349.

²³⁷ *Battersbee v. Calkins*, 128 Mich. 569, 87 N. W. 769, 8 Detroit Leg. N. 778.

²³⁸ As to trustees or committees issuing or holding notes, and defenses thereto, see *Light v. Scott*, 88 Ill. 239. *Trustees of the Town of Ewing v. Clarksville*, 61 Ind. 129; *Russell v. Hall*, 8 Mart. N. S. (La.) 558.

That payees were trustees for another for whose use and benefit they received the notes may be

shown and that the consideration had failed.

²³⁹ *Town of Bayou Sara v. Harper*, 15 La. Ann. 233. See *Des Moines Valley R. Co. v. Graff*, 27 Iowa, 99, 1 Am. Rep. 256.

²⁴⁰ *Gates v. Renfro*, 7 La. Ann. 569. Court declared that it was doubtful if such contract could be enforceable in a common law state as it implied a delegation of paternal power which could not be recognized. As to compromise as a consideration see §§ 195–197 herein.

²⁴¹ *Norwack v. Lehmann*, (Mich. 1905), 102 N. W. 992, 11 Det. L. N. 908.

The principle involved in this case is, as is stated by the court therein, sustained by other decisions in the same state: thus where the amount of a promised legacy was advanced upon an understanding that interest should be paid during the testator's lifetime, and the legatee's husband, in recognition of the obligation to pay interest, voluntarily, without request, gave the testator his note for the amount, and paid interest thereon until the testator's death, it was held, in an action by the administrator, that there was no consideration for the note.²⁴² So in another case it is held that want of consideration for a note executed by defendant to decedent in her lifetime is established where it is shown that the note was executed merely as a memorandum of a previous transaction, whereby decedent paid to defendant the amount of the note in consideration of his agreeing to use the same in the construction of a house, where she might make her home and receive maintenance and support, which agreement was carried out to the satisfaction of decedent.²⁴³

§ 232. As to holders of municipal warrants and coupons attached to bonds.—The assignee of a municipal warrant is subject to the defense of failure of the consideration in the original contract occurring prior to notice, to the maker or drawer of the assignment.²⁴⁴ But where the evidence showed that defendant purchased a city warrant in good faith, and the warrant contained nothing giving any notice or intimation to put him on his guard as to another's ownership, the defendant was held not liable to the owner. The court in considering this case declared that a county or city warrant possesses all the qualities of negotiable paper but one, and that is, that it is open to any defense that might have been made to the claim on which it is founded; that for all purposes involving title it must be treated as negotiable.²⁴⁵ So city warrants regularly and legally issued and in

²⁴² *Graham v. Alexander*, 123 Mich. 168, 81 N. W. 1064.

²⁴³ *Kelly v. Guy*, 116 Mich. 43, 74 N. W. 291.

²⁴⁴ *Board of Supervisors of Jefferson County v. Arrghi*, 51 Miss. 667.

As to defenses on all promissory notes and other writings for the payment of money and other things, see Annot. Code Miss., § 3503.

²⁴⁵ *Washington*.—*Fidelity Trust Co.*

v. Palmer, 22 Wash. 473, 61 Pac. 158 citing numerous cases.

See generally as to negotiability of and defenses to municipal and county warrants, even in hands of *bona fide* holders:

Alabama.—*Allen v. McCreary*, 101 Ala. 514, 14 So. 320.

California.—*Santa Cruz County Bank v. Bartlett*, 78 Cal. 301, 20 Pac. 682; *Shakespear v. Smith*, 77 Cal.

the hands of innocent purchasers are not affected by the subsequent loss of bank deposits, applicable to their payment, through the bank's insolvency.²⁴⁶ Transferees, by delivery and written assignment from *bona fide* holders of coupons attached to county bonds, become the legal owners of such coupons and succeed to all the rights of such holders, and may recover upon such coupons, whether they have given

638, 11 Am. St. Rep. 327, 20 Pac. 294 (Municipal).

Colorado.—People v. Hall, 8 Colo. 485, 9 Pac. 34; Raymond v. People, 2 Colo. App. 529, 30 Pac. 504 (Municipal).

Illinois.—People v. Johnson, 100 Ill. 537, 39 Am. Rep. 63; Delfosse v. Metropolitan Nat. Bank, 98 Ill. App. 123 (Municipal).

Indiana.—Connersville v. Connersville Hydraulic Co., 86 Ind. 184 (Municipal).

Iowa.—Boardman v. Hayne, 29 Iowa 339 (Municipal); Shepherd v. Richland Dist. Tp., 22 Iowa 595 (Municipal).

Kansas.—Garfield Tp. v. Crocker, 63 Kan. 272, 65 Pac. 273; Atchison T. & S. F. R. Co. v. Kearney, 58 Kan. 19, 48 Pac. 583.

Michigan.—Van Aiken v. Dunn, 117 Mich. 421, 75 N. W. 938; Miner v. Vedder, 66 Mich. 101, 33 N. W. 47 (Municipal).

Missouri.—State v. Huff, 63 Mo. 283 (Municipal); State, Livesay v. Harrison, 99 Mo. App. 57, 72 S. W. 469.

Nebraska.—State, York First Nat. Bank v. Cook, 43 Neb. 318, 61 N. W. 693 (Municipal).

New Hampshire.—Eaton v. Berlin, 49 N. H. 219 (Municipal).

New York.—Bank of Staten Island v. City of New York, 68 N. Y. App. Div. 231, 74 N. Y. Supp. 284; Read v. Buffalo, 67 Barb. (N. Y.) 526 (Municipal).

North Carolina.—McPeeters v.

Blankenship, 123 N. C. 651, 31 S. E. 876.

North Dakota.—Gilman v. Township of Gilby, 8 N. D. 627, 80 N. W. 889 (Municipal); Erskine v. Steele County, 4 N. D. 339, 60 N. W. 1050, 28 L. R. A. 645.

Ohio.—State v. Liberty Tp., 22 Ohio St. 144 (Municipal).

Oklahoma.—Crawford v. Board of Commissioners of Noble Co., 8 Okla. 450, 58 Pac. 616.

Oregon.—Klamouth County v. Leavitt, 32 Ore. 437, 52 Pac. 20; Franki v. Bailey, 31 Ore. 285, 50 Pac. 186.

South Dakota.—Livingston v. Brown County, 15 S. D. 606, 91 N. W. 309; Hubbell v. Town of Coster City, 15 S. D. 55, 87 N. W. 520 (Municipal).

Tennessee.—Fine v. Stewart (Tenn.), 48 S. W. 371; Donaldson v. Walker, 101 Tenn. 236, 41 S. W. 417.

Washington.—Potter v. New Wheaton, 20 Wash. 589, 56 Pac. 394 (Municipal).

West Virginia.—Shinn v. Board of Education, 39 W. Va. 497, 20 S. E. 604 (Municipal).

Federal.—Ouachita County v. Wolcott, 103 U. S. 559, 26 L. Ed. 505 (Municipal); Wall v. Monroe County, 103 U. S. 74, 26 L. Ed. 430; Watson v. City of Huron, 38 C. C. A. 664, 97 Fed. 449 (Municipal).

²⁴⁶ New York Security & Trust Co. v. City of Tacoma, 21 Wash. 303, 57 Pac. 810.

any consideration for them or not, especially where no defense is pleaded which makes it material whether value was or was not paid for them.²⁴⁷

§ 233. Third persons as holders of notes.—It is decided that if a third person becomes the holder of a bill or note, negotiable by the law merchant, which had been obtained from the maker without consideration, and it can be proved that he had notice of the transaction between the original parties, and gave no value for the note or bill, he will be affected by everything which would affect the first holder.²⁴⁸ But a party defendant cannot defeat an action upon a note by showing that the plaintiff obtained it from the payee without consideration. Thus if a party to a suit in pursuance of an award executes his promissory note, payable to a third person, he cannot defeat a recovery thereon by showing that no consideration passed between the plaintiff and the payee.²⁴⁹

§ 234. Note of third person.—While the giving of a note of a third person by a debtor to a creditor, when it is agreed between the parties that such note shall be taken in payment of the indebtedness, operates to discharge the debt, yet where a third party, subsequent to the time of incurring the debt, and a stranger thereto, promises to pay such debt, such promise is unenforceable, such third party not having requested the loan and not having received any benefit therefrom, nor the payee having been injured, and there being no agreement between the debtor and the payee that such third person should give any note, nor between such third person and the debtor, the debtor being in no way a party to the transaction, and no forbearance on the creditor's part being shown. Such a case differs from one where the debtor is a party to the transaction and the payment made is enforceable against the debtor by such third person upon the express or implied promise of the debtor, or was a payment by the third person of his own debt to the creditor. This rule, with its qualifications, controlled the court in a recent case in New York. In this case the plaintiff was the owner of a copyright of a play, which he sold to a

²⁴⁷ *Dudley v. Lake Co.*, 26 C. C. A. 82, 80 Fed. 672.

As to negotiability of bonds and interest coupons see Article "Bonds," 5 Cyc., pp. 777-784.

²⁴⁸ *Munson v. Cheesborough*, 6 Blackf. (Ind.) 17, citing *Collins v. Martin*, 1 Bos. & Pull. 651.

²⁴⁹ *Yeatman v. Mattison*, 59 Ala. 382. See § 244 herein.

sister of defendant, she agreeing to pay therefor a certain sum of money as soon as she could sell some property owned by her. Defendant, to some extent, participated in the prior negotiations, but it was not claimed that the play was sold to him or that he ever agreed to pay any portion of the purchase price, except as hereinafter stated. Subsequently the plaintiff applied to defendant for a loan, and two notes were made and signed by defendant and another and delivered to the plaintiff to enable him to get them discounted. Thereafter plaintiff returned these notes to defendant, who thereupon gave the plaintiff, for his accommodation, two other notes, signed by defendant alone, and when they were delivered defendant asked for and obtained a receipt stating that the amount of the notes was in part payment of the play. These notes were kept until maturity, and not being paid, suit was brought thereon and the defense of want of consideration was set up. It was not claimed that the sister ever requested defendant to give the notes, and she had no knowledge about their being given. It was decided that the notes could not be enforced.²⁵⁰

§ 235. Note given to promote peace between husband and wife—Note of stranger.—A written promise by a stranger, in the form of a note, not given in satisfaction of any legal obligation, but given to a husband in order that he might deliver the same to his wife to secure domestic peace between them, is not in law a good promise in consideration of marriage, and such note is without consideration in the hands of the wife against the maker and cannot be collected, even though there was an ante-nuptial agreement, but not in writing, whereby the intended husband was to give the wife a certain sum of money, and the note was given about two and one-half years after their marriage.²⁵¹

²⁵⁰ *Tyler v. Jaeger*, 93 N. Y. Supp. 558. The case of *Kramer v. Kramer*, 90 App. Div. 176, 86 N. Y. Supp. 129, considered by the court in the principal case was subsequently reversed in 181 N. Y. 477. See §§ 235, 244 herein. *Examine Wyman v. Gray*, 7

Har. & J. (Md.) 409, considered under § 193 herein.

²⁵¹ *Kramer v. Kramer*, 181 N. Y. 477, 74 N. E. 474, revg. 90 App. Div. 176, 86 N. Y. Supp. 129, *Gray, J.*, dissenting. See §§ 234, 244 herein.

CHAPTER XI.

WANT OR FAILURE OF CONSIDERATION CONTINUED.

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| <p>Sec.</p> <p>236. Assignees—Consideration of assignment.</p> <p>237. Assignees—Want or failure of consideration.</p> <p>238. <i>Bona fide</i> indorsees or holders—Rule.</p> <p>239. Transfer after maturity.</p> <p>240. Rule as to payment of value; its basis and qualifications—<i>Bona fide</i> indorsees or holders.</p> <p>241. Rule as to value continued—Payment of pre-existing debt—<i>Bona fide</i> indorsees or holders.</p> <p>242. Same subject—Decisions <i>contra</i> or qualifications.</p> <p>243. Banks—Distinctions between crediting amount of note on undrawn deposit and credit on pre-existing indebtedness—<i>Bona fide</i> holder.</p> <p>244. Parting with value—Surrender by creditor of debtor's own note—Receiving negotiable note of third person.</p> <p>245. Joint note of husband and wife—Outlawed debt of husband—Indorsee for past indebtedness—Indorsement by president payee to bank.</p> <p>246. Rule as to value—Collateral security for pre-existing debt—<i>Bona fide</i> indorsees or holders.</p> <p>247. Same subject—Particular decisions.</p> <p>248. Same Subject—Specific exceptions.</p> | <p>Sec.</p> <p>249. Security for pre-existing debt—Additional consideration.</p> <p>250. Intermediary party—Holder from <i>bona fide</i> holder.</p> <p>251. Paper issued by corporation—<i>Bona fide</i> holder.</p> <p>252. Want or failure of consideration subsequent to transfer—<i>Bona fide</i> holder.</p> <p>253. Suit in name of original party—<i>bona fide</i> holder.</p> <p>254. <i>Lex Fori</i>.</p> <p>255. Indorsement for transfer merely or to pass title.</p> <p>256. Same subject—Instances.</p> <p>257. Purchase-price notes—Original parties.</p> <p>258. Same subject—Acceptor.</p> <p>259. Same subject—Guarantors.</p> <p>260. Same subject—<i>Bona fide</i> holder or assignee.</p> <p>261. Effect of judgment—Assignees.</p> <p>262. Purchase-price notes—Property useless or of no value.</p> <p>263. Vendor or seller without title—Loss of title.</p> <p>264. Purchase-price notes—Land—Warranty.</p> <p>265. Purchase-price notes—Personal property—Warranty.</p> <p>266. Where property for which note given is of some value—No failure of consideration.</p> <p>267. Rights of holder where prior indorsee held note as collateral security and for continuing credit—Lien.</p> |
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Sec.	Sec.
268. Purchase-price notes—Instances in general of want or failure of consideration.	279. Accommodation indorsers—Availability of defenses—General rule.
269. Accommodation paper—Consideration as between original or immediate parties.	280. Same subject—Application of rule.
270. <i>Bona fide</i> holders—Assignees—Notice or knowledge.	281. Same subject—Qualifications of and exceptions to rule.
271. Same subject—Particular decisions.	282. <i>Bona fide</i> holder—Accommodation paper taken after maturity—Want of consideration.
272. Accommodation acceptor—General rules and illustrations.	283. Accommodation of other parties in general.
273. Same subject—Continued.	284. Payment of pre-existing debt— <i>Bona fide</i> holder against accommodation maker.
274. Same subject continued—Exceptions and qualifications.	285. Same subject—Particular rulings and opinions.
275. Bill payable to order.	286. Same subject— <i>Bona fide</i> indorsee against indorser.
276. Taking before acceptance.	287. Same subject—Drafts and bills—Payee—Accommodation acceptor.
277. Accommodation paper—Conflict of laws—Acceptance.	
278. Accommodation check—Bank check.	

§ 236. **Assignees—Consideration of assignment.**¹—The assignment of a note is itself a contract which imports a consideration, and that consideration, *prima facie*, is the amount of the note.² The consideration of an assignment cannot be questioned by the maker of a note when sued by an assignee.³ And if a failure of consideration is so

¹ As to assignments generally see Daniels on Neg. Inst. (5th ed.), §§ 729-748a.

² Lee v. Pile, 37 Ind. 107, 109.

³ *Arkansas*.—Geisreiter v. Sevier, 33 Ark. 522, 531 ("whether the note was sold by the assignee for little or much did not concern Geisreiter, the maker of the note. * * * The maker of the note, when sued upon it by an assignee, cannot question the consideration given by the assignee to the assignor for the transfer of the note").

Indiana.—Shane v. Lowry, 48 Ind. 205, 206, 207. ("The answer alleges that there was no consideration for

the assignment of the note. This is no reason why the defendants should not pay the note. If the payees assigned it, it is not for them to question the consideration paid for the assignment. If the payees gave it to the plaintiff, it is no concern of theirs. If the action were on the assignment the rule would be different"); *Musselman v. Hays*, 28 Ind. App. 360, 62 N. E. 1022 (holding that answer is demurrable which avers in action by indorsee, that nothing was paid for assignment).

New York.—Oishei v. Craven, 11 Misc. (N. Y.) 139, 31 N. Y. Supp. 1021, 24 Civ. Proc. R. 301, 65 N. Y.

insufficiently pleaded that a demurrer will be sustained it is not a good defense in an action by an assignee.⁴ But if the assignee knows the facts, so that the note cannot be said to have been assigned *bona fide*, the maker may set up such facts in defense.⁵ And if a note is given without any consideration, and is indorsed by the payee without consideration, the maker will not, it is held, be precluded from showing these facts by way of defense to a suit brought by the assignee.⁶

St. R. 114 (consideration is not necessary to an assignment as against the maker. "It is not necessary to allege consideration for the assignment for, if it be the fact that it is assigned, it is of no consequence whether it be for value or not. Certainly the maker cannot complain." Per Hatch, J.); Snyder v. Gruniger, 77 N. Y. Supp. 234 ("it is no defense to a party sued upon commercial paper to show that the transfer under which plaintiff holds it is without consideration or subject to equities between him and his assignor or colorable and merely for the purpose of collection, or to secure a debt contracted by an agent without sufficient authority. It is sufficient to make the plaintiff the real party in interest, if he has the legal title, either by written transfer, as in the case at bar, or by delivery whatever may be the equities between the plaintiff and his assignor").

Assignment: See as to defenses generally:

Colorado.—Cannon v. Serrel, 15 Colo. App. 99, 61 Pac. 187 (Gen. Stat., § 107, provides that every assignor of a note becomes liable to the assignee, if the latter, by the use of due diligence in the institution and prosecution of the proper suit has failed to collect the money due, provided that, if the suit would be unavailing, it need not be brought and the assignor may be sued in the first

instance. This statute was held to afford no protection and it was also held that the assignor was liable to the holder before suit brought and that the holder, in order to fall back upon the indorsers, was obliged to seek a recovery outside of the terms of the note since the indorser warrants the genuineness of the instrument in every respect and engages that it may be recovered upon and collected according to its terms, citing 1 Daniel Neg. Inst., §§ 669, 672). *Illinois*: Wilson v. Van Winkle, 2 Gil. (Ill.) 684 (a case of an assignment by A. of a note to C. made by B. a recovery thereon against B., an injunction obtained by B., and a rescission of the contract, A. died and C. obtained a judgment against A.'s estate for the money originally paid A. for the note).

North Carolina.—Finch v. Gregg, 126 N. C. 176, 35 S. E. 251 (a case of assignment of bills of lading with drafts attached and liability for defective condition of consignment).

As to rights of purchaser before and after notice of assignment under Burn's Rev. Stat. 1894, § 277, see Rosenthal v. Rambo, 28 Ind. App. 285, 62 N. E. 637.

⁴ Couch v. McKee, 1 Eng. (Ark.) 484, 496.

⁵ Hammond v. Kingsley, 12 Ill. 343.

⁶ Martin v. Kercheval, 4 McLean (U. S.) 117, Fed. Cas. No. 9163.

§ 237. **Assignees—Want or failure of consideration.**—If there is a subsisting consideration at the time of the assignment, and there is no defense, a subsequent failure of consideration cannot affect the rights of an assignee of a note. Statutory provisions may, however, affect the question of availability of defenses against an assignee.⁷ And, if a statute so provides, the maker of a promissory note after assignment will be entitled to the benefit of all want of lawful consideration and of failure of consideration.⁸ So where assignees occupy the same position as the payee would, had he sued, the rule permitting a defense of failure of consideration, as between original parties, would apply.⁹ And it would seem that this defense ought to be available under laws which make an assignee take subject to all defenses or equities.¹⁰ It was said in a recent case that: "A negotiable instru-

⁷ *Woodruff v. Webb*, 32 Ark. 612, 615, 616. "According to the statute, ch. 15, § 3, Gould's Dig., in force when the assignment was made, and until the Act of April 24, 1873, the assignee of a note, unless it was expressed therein to be payable 'without defalcation' (and the note sued on was not such), took it at his peril, and at the risk of any defense that the maker could set up against the payee. But * * * whilst there was a subsisting consideration * * * the defendant had no defense to it, the subsequent failure of consideration, could not, therefore, affect the plaintiff's right."

⁸ *Mississippi*.—*Hamer v. Johnston*, 5 Miss. (6 How.) 698, 721, per Sharkey, C. J.

As to defenses generally against assignee under statutes see the earlier decisions of

Colorado.—*Dunn v. Ghost*, 5 Colo. 134; *Nowak v. Excelsior Stone Co.*, 78 Ill. 309.

Illinois.—*Peoria v. Neill*, 6 Peck (Ill.) 269.

Indiana.—*Sayres v. Linkhart*, 25 Ind. 145; *Eubler v. Pullen*, 12 Ind.

567; *Bowles v. Newby*, 2 Blackf. (Ind.) 364.

Kentucky.—*Spencer v. Biggs*, 2 Metc. (Ky.) 123; *Kelly v. Smith*, 1 Metc. (Ky.) 313.

Louisiana.—*Watt v. Rice*, 1 La. Ann. 280.

Iowa.—Examine also *Jack v. Hosmer*, 97 Iowa 17, 65 N. W. 1009.

Mississippi.—*Brown v. Union Bank*, 62 Miss. 754.

See second following note herein. See *Bowles v. Newby*, 2 Blackf. (Ind.) 364, under Rev. Code 1824, p. 295, (1) making notes negotiable and giving same defenses against the assignee as against the original payee, failure of consideration is a defense to an action on the note by an assignee against the maker.

⁹ *Blood v. Northrup*, 1 Kan. 28. See generally as to assignments, etc., *Daniels on Neg. Inst.* (5th ed.), §§ 729-748a.

¹⁰ That assignee of non-negotiable paper takes subject to all equities.

See *Pennsylvania*.—*Howie v. Lewis*, 14 Pa. Super. Ct. 23; *Zeis v. Potter*, 44 C. C. A. 665, 105 Fed. 671.

That transferee or assignee with-

ment, payable to order, must be indorsed by the payee in order to preserve its negotiability in the hands of a subsequent holder. A transfer without indorsement destroys its negotiable character, and the assignee takes it subject to all such defenses as might have been available against it in the hands of the payee."¹¹ If a note is expressed to be non-negotiable the assignee takes it subject to the maker's existing rights and other rights accruing prior to notice of the transfer.¹²

§ 238. **Bona fide indorsees or holders—Rule.**—The original want of consideration, or the original failure of consideration for negotiable paper between the parties to it constitutes no defense against it in the hands of a *bona fide* indorsee or holder without notice or knowledge of any facts tending to invalidate the note.¹³

out indorsement, takes subject to all defenses, see *Gray Tie Lumber Co. v. Farmers' Bank*, 22 Ky. Law Rep. 1333, 60 S. W. 537.

Ohio.—*Henniger v. Wager*, 4 Ohio Dec. 242, 1 Clev. Law Rep. 150.

When *bona fide* holder for value of note payable to order may be subject to all equities where note is taken without indorsement, see:

Idaho.—*Warren v. Stoddart*, 6 Idaho 692, 59 Pac. 540.

Utah.—*Lebcher v. Lambert*, 23 Utah 1, 63 Pac. 628.

Wisconsin.—*Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495.

That purchaser for value takes subject to all defenses against original holder, see *Wade v. Foster*, 24 Ky. Law Rep. 1292, 71 S. W. 443.

But as to assignability of negotiable instrument and latent defenses being cut off under statute, see *Mann v. Merchants' Loan & Trust Co.*, 100 Ill. App. 224.

See also, *Ohio.*—*Loudermann v. Judy*, 48 Ohio Cir. Ct. R. 351, 29 N. E. 181 (as to "equitable defense" under Code, § 93).

Texas.—*Wilson v. Denton*, 82 Tex. 531, 18 S. W. 620 (under Rev. Stat.,

Art. 265, protecting *bona fide* holders against equities).

Kentucky.—*Power v. Hambrick*, 25 Ky. Law Rep. 30, 74 S. W. 660. (Assignee of note is subject to defenses.)

Illinois.—*Harphane v. Haynes*, 30 Ill. 405, 410 (assignee of note without consideration held to take it subject to all infirmities, the same as if he had had actual notice of them, or as if the note had been assigned after due. Note was alleged to have been duly indorsed without consideration).

When assignee of mortgage notes takes subject to defenses, see *Ray v. Baker* (Ind.), 74 N. E. 619.

See second preceding note herein.

¹¹ *Cornish v. Wolverton* (Mont., 1905), 81 Pac. 4, 9, per Brantley, C. J.

¹² *Barker v. Barth*, 88 Ill. App. 23. See also second last preceding note herein.

¹³ *Arkansas.*—*Cagle v. Lane*, 49 Ark. 465, 5 S. W. 790 (failure without fraud no defense).

California.—*Splivallo v. Patten*, 38 Cal. 138, 99 Am. Dec. 358. (Simple failure in whole or in part no defense in suit by *bona fide* assignee

§ 239. **Transfer after maturity.**—As a general rule, in all cases where a note overdue is indorsed, the indorsee takes it subject to all

before maturity against maker, even though assignee had full knowledge of original consideration on which note given prior to purchase and receiving transfer. Citing Story on Prom. Notes, § 191.)

Colorado.—Parsons v. Parsons, 17 Colo. App. 154, 67 Pac. 345 (failure); Hand v. Pantagraph Co., 1 Colo. App. 270, 28 Pac. 661 (failure of consideration without notice no defense).

Connecticut.—Middletown Bank v. Jerome, 18 Conn. 443 (want).

Delaware.—McCreedy v. Cann, 5 Harr. (Del.) 175 (want or failure); Waterman v. Barratt, 4 Harr. (Del.) 311 (want); Bush v. Peckard, 3 Harr. (Del.) 385 (want).

Florida.—White v. Camp, 1 Fla. 109 (want; compare McKay v. Belows, 8 Fla. 31, as to failure, partial failure and want).

Georgia.—Parr v. Erickson, 115 Ga. 873, 42 S. E. 240 (*bona fide* holder for value before maturity protected against defense of want of consideration); Keith v. Fork (Ga., 1898), 31 S. E. 169 (failure without notice or reasonable ground to suspect defects); Smith v. Rawson, 61 Ga. 208 (failure); Faulkner v. Ware, 34 Ga. 498 (failure); Scott v. Cooper, Ga. Dec., pt. 2,163 (failure).

Illinois.—Matson v. Alley, 141 Ill. 284, 31 N. E. 419 (failure); Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240 (want); Kepley v. Schmidt, 21 Ill. App. 402 (want); Cassell v. Morrison, 8 Bradw. (Ill.) 175 (want); Taylor v. Thompson, 3 Bradw. (Ill.) 109 (failure in whole or part).

Indiana.—First Nat. Bank v. Ruhl,

122 Ind. 279, 23 N. E. 766 (want); Proctor v. Baldwin, 82 Ind. 370 (want); Bremmerman v. Jennings, 61 Ind. 334 (failure); Kline v. Spahr, 56 Ind. 296 (failure; note payable in bank); Hankins v. Shoup, 2 Ind. (2 Cort.) 342 (holding that pleas of want or failure of consideration are insufficient under the law merchant unless they allege that the indorsement was made without consideration or after the maturity of the note or bill, and that the statute did not intend to alter the law as to these pleas. Rev. Stat. (843, pp. 577, 578); Midland Steel Co. v. Citizens' Nat. Bank, — Ind. App. 1904, 72 N. E. 290. (In an action by a *bona fide* purchaser the defense of want or failure of consideration is not available unless want of notice of such defense is negatived; there should be a denial of want of notice or some equivalent averment.) Voris v. Harshbarger, 11 Ind. App. 555, 39 N. E. 521 (want); Potter v. Sheets, 5 Ind. App. 506, 32 N. E. 811 (want).

Iowa.—Council Bluffs Iron Works v. Cupper, 41 Iowa 104 (want, note without defalcation); Mornyer v. Cooper, 35 Iowa 257 (failure, case of second indorsee).

Kentucky.—Spencers v. Biggs, 2 Metc. (Ky.) 123 (total or partial failure, without notice. Rule not altered by Civ. Code, § 31, or Rev. Stat., Ch. 22, § 6); Kelly v. Smith, 1 Metc. (Ky.) 313 (same as last case); Luckett v. Triplett, 2 B. Mon. (Ky.) 39 (failure); Bement v. McClarlen, 1 B. Mon. (Ky.) 296 (want); Grey v. Kentucky Bank, 2 Litt. (Ky.) 378 (want, note to

the equities of the maker, and it is always competent for the defendant in such cases, whether as against the payee or holder, to prove

bank); *Tuggle v. Adams*, 3 A. K. Marsh. (Ky.) 429 (want).

Louisiana.—*Morris v. White*, 28 La. Ann. 855 (failure); *Battalora v. Earth*, 25 La. Ann. 318 (want).

Maine.—*Burrill v. Parsons*, 71 Me. 282 (want); *Hascall v. Whitmore*, 19 Me. 102, 36 Am. Dec. 738 (want, purchaser from indorsee); *Lewis v. Hodgdon*, 5 Shep. (Me.) 267.

Michigan.—*Polhemus v. Ann Arbor Sav. Bank*, 27 Mich. 44 (cannot inquire into or contest consideration).

Minnesota.—*Wilderman v. Donnelly*, 86 Minn. 184, 90 N. W. 366, 367, per Collins, J. (of course such a defense cannot be asserted against a remote holder of a negotiable promissory note who is a *bona fide holder* for value); *Daniels v. Wilson*, 21 Minn. 530 (want).

Mississippi.—*Davis v. Blanton*, 71 Miss. 821, 15 So. 132 (failure); *Harrison v. Pike*, 48 Miss. 46 (as to a Louisiana note).

Missouri.—*First Nat. Bank v. Skeen*, 101 Mo. 683, 14 S. W. 732 (failure); *Merrick v. Phillips*, 58 Mo. 436; *Clark v. Potter*, 90 Mo. App. 143 (failure); *First Nat. Bank v. Skeen*, 29 Mo. App. 115.

Nebraska.—*Blue Valley Lumber Co. v. Smith*, 48 Neb. 293, 67 N. W. 159 (want).

New Hampshire.—*Trask v. Wingate*, 63 N. H. 474, 3 Atl. 926 (want).

New York.—*Farwell v. Hibner*, 15 Hun (N. Y.) 280 (failure); *Vallett v. Parker*, 6 Wend. (N. Y.) 615 (want, except where note void by statute); *Brooks v. Christopher*, 5 Duer (N. Y.) 216; *Baker v. Arnold*, 2 Cal. Cas. (N. Y.) 279.

Pennsylvania.—*Bullock v. Wilcox*, 7 Watts (Pa.) 328 (failure).

Tennessee.—*Stone v. Bond*, 2 Heisk. (Tenn.) 425 (want of consideration for guaranty).

Texas.—*Stone v. Wright*, 83 Tex. 345, 18 S. W. 615 (want); *Herndon v. Bremond*, 17 Tex. 432.

Virginia.—*Payne v. Zell*, 98 Va. 297, 36 S. E. 379 (failure); *Robertson v. Williams*, 5 Munf. (Va.) 381 (valuable consideration passed).

Vermont.—*Powers v. Ball*, 1 Williams (Vt.) 662.

Wisconsin.—*Stillwell v. Kellogg*, 14 Wis. 461 (failure).

Federal.—*Pease v. McClelland*, 2 Bond (U. S.) 42, Fed. Cas. No. 10,882 (failure); *Union Bank v. Crine*, 33 Fed. 809 (accommodation note and agreement for non-ability not available against *bona fide* indorsee); *Mobile Sav. Bank v. Board of Sup'rs*, 22 Fed. 580; *Fogg v. Stickney*, Fed. Cas. No. 4898 (want).

See *Mississippi*.—*Robertson v. Britton*, 74 Miss. 873, 21 So. 523 (as to want or failure of consideration and false representations or fraud under code 1892, § 3503); *Etheridge v. Gallagher*, 55 Miss. 458 (Code 1871, § 2228, changes law merchant so as to enable defense by promisor before notice of assignment against remote holder by indorsement before maturity, same as could have been made against payee.)

Vermont.—*Ellis v. Watkins*, 73 Vt. 371, 50 Atl. 1105 (lack of consideration based upon immoral or illegal consideration may be shown against indorsee); *Baker-Boyer Bank v. Hughson*, 5 Wash. St. 100, 31 Pac. 423 (where want of consideration

either a want or failure of consideration.¹⁴ If a note is taken after maturity by an assignee of the payee such note is subject to all de-

was averred and answer held insufficient defense against payee, and therefore that plaintiff need not prove that he was innocent purchaser).

Federal.—McCullough v. Houston, 1 Dall. (U. S.) 441, 11 L. ed. 214, decided 1789, holding that indorsee of promissory note takes it subject to all equitable consideration to which subject in original indorser or payee's hands).

Washington.—Allen v. Chambers, 13 Wash. 327, 43 Pac. 57 (want).

¹⁴ *Maryland*.—Renwick v. Williams, 2 Md. 336, 363, per Mason, J.

California.—Risley v. Gray, 98 Cal. 40, 32 Pac. 884 (note was purchased after maturity, at sheriff's sale); Folsom v. Bartlett, 2 Cal. 163.

Delaware.—McCready v. Cann, 5 Harr. (Del.) 175 (want or failure of consideration or other equities may be set up against indorsee after maturity).

Georgia.—Carter v. Christie, 30 Ga. 813; Scott v. Cooper, Ga. Dec. pt. 2, 163 (holding that failure of consideration, in a negotiable note, is no defense to an action, in favor of a *bona fide* holder without notice, unless he took the note after it became due).

Illinois.—Stafford v. Fargo, 35 Ill. 481 (assignee after maturity, held subject to defense of want of consideration); Root v. Irwin, 18 Ill. 147 (statute allowing defenses against indorsee after maturity); Sargeant v. Kellogg, 5 Gilm. (Ill.) 273 (where note is assigned after due maker is permitted to interpose same defense against assignee as he might make in action brought in name of payee); Griffin v.

Ketchum, 8 Peck (Ill.) 392 (failure of warranty is good defense against *mala fide* assignee); Hayes v. Gorham, 2 Scam. (Ill.) 429 (want of consideration).

Iowa.—Freittenberg v. Rubel, 123 Iowa 154, 98 N. W. 624 (failure of considerations is available); Barlow v. Scott, 12 Iowa 63 (consideration may be inquired into as a defense where plaintiff takes it, even for value, after it is due).

Louisiana.—Clement v. Sigur, 29 La. Ann. 798 (consideration may be inquired into the hands of payee or of any third person who has taken it after maturity).

Maryland.—Wyman v. Gray, 7 Harr. & J. (Md.) 409.

Massachusetts.—Fish v. French (Mass.), 15 Gray 520 (indorsee of note secured by mortgage, without notice of want of consideration, who takes it from payee when overdue is subject to all defenses); Thompson v. Hale, 23 Mass. 259 (6 Pick.) (note was held taken subject to all equities existing against it in the payee's hands).

New York.—Chester v. Door, 41 N. Y. 279, rev'g 26 N. Y. Super. Ct. (3 Rob.) 275 (defenses of want of consideration available against any person into whose hands note comes after maturity); Wiltzie v. Northam, 3 Bosw. (N. Y.) 162 (rule applied where facts show either want or failure of consideration in action by one receiving note after maturity).

Pennsylvania.—Barnet v. Offerman, 7 Watts (Pa.) 130 (want or failure of consideration may be shown).

South Carolina.—Bell v. Wood, 1

fenses against the assignor.¹⁵ Knowledge by an assignee of notes that they were past due when he took the assignment, even though the notes are negotiable instruments, precludes a recovery by him, as he is not an innocent purchaser without notice, and the same defenses are available against him as though the action had been prosecuted in the name of the original payee, especially so when the assignee also knew at the time that the consideration for the note had wholly failed; and knowledge may be imputed to such holder where another instrument, a mortgage securing the note, was also purchased, and said mortgage by its very terms showed that the paper was past due and dishonored.¹⁶ But where one has acquired a negotiable note after its maturity he is entitled to protection if the immediate party who transferred the note to him took it by indorsement *bona fide* before it was due.^{16*}

Bay (S. C.) 249 (indorsement after note due permits parties to go into consideration); McNeill v. McDonald, 1 Hill L. (S. C.) 1 (note transferred after due is subject to all equities between original parties, and true consideration may be inquired into, though expressed to be for value received).

Texas.—Kalamazoo Nat. Bk. v. Sides (Tex. Civ. App., 1894), 28 S. W. 918 (indorsee against maker; after maturity; conditions unperformed; failure of consideration a defense where evidence exists to impeach due and regular indorsement of note).

Federal.—Lipsmier v. Vehslage, 29 Fed. 175 (want of consideration not enforced by indorsee after maturity).

See *Georgia*.—Camp v. Matheson, 30 Ga. 170, 172.

Indiana.—Thomas v. Ruddell, 66 Ind. 326 (case of negligence in maker and plea *non est factum* and transfer after maturity on note recovered).

Massachusetts.—Perkins v. Gilman, 25 Mass. (8 Pick.) 229 (holding that a covenant by the payee of

a promissory note not to sue the maker within a limited time cannot be pleaded in bar to an action brought within the time by a person to whom the note was indorsed after due. But see chap. — herein as to conditions).

Texas.—Branch v. Traylor (Tex. Civ. App., 1896), 36 S. W. 592 (question of fraud was also involved). Preston v. Breedlove, 36 Tex. 96 (notes were assigned after maturity with notice of dishonor, and defense was held good *pro tanto*); Rhode v. Lodge, 15 Tex. 446 (held note subject to plea of failure of consideration).

¹⁵ May v. First Nat. Bank of Mendota (Neb., 1905), 104 N. W. 184.

¹⁶ Stoy v. Bledsoe, 31 Ind. App. 643, 68 N. W. 907.

^{16*} Howell v. Crane, 12 La. Ann. 126, 68 Am. Dec. 765. See Chapter herein as to *bona fide* holders. See Jones v. Caswell, 3 Johns. Cas. (N. Y.) 29, 2 Am. Dec. 134 (second indorsee took note after maturity and with knowledge; consideration was permitted to be inquired into, but it was against public policy, and note was held void).

§ 240. **Rule as to payment of value, its basis and qualifications—Bona fide indorsees or holders.**—By his contract the indorser of a note warrants the instrument's genuineness in every respect and engages that it may be recovered upon and collected in accordance with its terms.¹⁷ And it is a legal presumption that all indorsements are for value and for a proper purpose,¹⁸ and that one who is a purchaser for value of a note holds it *bona fide*.¹⁹ It is also another general rule that mere possession of a negotiable paper is *prima facie* sufficient evidence of ownership of title.²⁰ In other words, the mere

¹⁷ *Cannon v. Serrel*, 15 Colo. App. 99, 61 Pac. 187. See Neg. Inst. Law, §§ 114–117, appendix herein.

¹⁸ *Geisreiter v. Sevier*, 33 Ark. 522 (where the maker was not allowed to question the consideration paid in purchasing the note from the assignee of the bankrupt payee, although it was thought that he could have shown the bankruptcy assignment to have been fraudulent); *Luning v. Wise*, 64 Cal. 410, 1 Pac. 485, 874 (raises a presumption of value.) *Lafayette Sav. Bank v. St. Louis Stoneware Co.*, 4 Mo. App. 276, 283 (holding also that this rule applies to paper indorsed by a corporation in the prosecution of its business and the regular course of its affairs); *Cotton v. Graham*, 84 Ky. 672, 2 S. W. 647 ("value received" and in "consideration of love and affection" imports a consideration). See *Frederick v. Winans*, 51 Wis. 472, 8 N. W. 301; *McClintick v. Johnston*, 1 McLean (U. S.) 414, Fed. Cas. No. 8,700. (For "if the indorsement of a bill should be held not to import a consideration it must shake the credit of commercial paper and produce injurious consequences in commercial transactions. And we think the principle has been too long and too beneficially settled to be now questioned.")

¹⁹ *Duncan v. Gilbert*, 29 N. J. L.

521 (holder is not bound to prove value where no other defense is raised than that of its being originally accommodation paper). See *Hunter v. Parsons*, 22 Mich. 96. But examine *Prentice v. Zane*, Fed. Cas. No. 11,383 (decided 1846), goes to support *Citizens' Bank v. Strauss*, 26 La. Ann. 736 (holding that while one is in the attitude of a *bona fide* holder before the court he can legally object to any inquiry into the consideration of a note).

²⁰ *Colorado*.—*Gumaer v. Sowers*, 31 Colo. 164, 71 Pac. 1103.

Connecticut.—*New Haven Mfg. Co. v. New Haven Pulp & Bond Co.*, 76 Conn. 126, 131, 55 Atl. 604, Gen. Stat., § 4221.

Illinois.—*Perry State Bank v. Elledge*, 109 Ill. App. 179, 184; *Ryan v. Illinois Trust & Sav. Bk.*, 100 Ill. App. 251, case aff'd, 64 N. E. 1085; *Mann v. Merchants' L. & T. Co.*, 100 Ill. App. 224; *Metcalf v. Draper*, 98 Ill. App. 399.

Kansas.—*Parker v. Gilmore*, 10 Kan. App. 527, 63 Pac. 20.

Massachusetts.—*Massachusetts Nat. Bk. v. Snow*, 187 Mass. 159, 72 N. E. 959.

Minnesota.—*Huntley v. Hutchinson*, 91 Minn. 244, 97 N. W. 97, Gen. Stat. 1894, § 5751.

Missouri.—*Lowry v. Danforth*, 95 Mo. App. 441, 69 S. W. 39.

Nebraska.—*Gandy v. Bissells' Est.*

possession of a negotiable note imports, *prima facie*, that the holder acquired it *bona fide*, for value, in the usual course of business, without notice of any circumstances impeaching its validity, and that he is the owner thereof, entitled to receive the contents of the same from all prior parties thereto.²¹ Therefore, it constitutes no defense in be-

(Neb., 1904), 100 N. W. 803, rev'g 97 N. W. 632; Michigan Mut. L. Ins. Co. v. Klatt (Neb., 1902), 92 N. W. 325.

New York.—Poess v. Twelfth Ward Bank, 43 Misc. 45, 86 N. Y. Supp. 857, Neg. Inst. Law 1897, p. 719, c. 612.

North Dakota.—Brynjolfson v. Osthus, 12 N. D. 42, 96 N. W. 261.

Oklahoma.—Price v. Winnebago Bank, 14 Okla. 268, 79 Pac. 105.

South Carolina.—Watford v. Windham, 64 S. C. 509, 42 S. E. 597.

See *Illinois*.—Gilmore v. German Sav. Bk., 89 Ill. App. 442.

Compare *Kansas*.—James v. Blackman, 68 Kan. 723, 75 Pac. 1017.

Kentucky.—Turner v. Mitchell, 22 Ky. L. Rep. 1784, 61 S. W. 468.

New York.—Manawaring v. Keenan, 86 N. Y. Supp. 262.

²¹ *Federal*.—Bank of British North America v. Ellis, 6 Sawy. (U. S.) 96, Fed. Cas. No. 859, 8 Amer. L. Rec. 460, citing 1 Daniel on Neg. Inst., § 812, 1 Parsons' Notes & Bills 184; Collins v. Gilbert, 94 U. S. 754.

Illinois.—Perry State Bank v. Ellidge, 109 Ill. App. 179, 184; Mann v. Merchants' L. & T. Co., 100 Ill. App. 224.

Indiana.—Thomas v. Ruddell, 66 Ind. 326 (a note that has been transferred by indorsement imports a consideration).

Kansas.—Parker v. Gilmore, 10 Kan. App. 527, 63 Pac. 20.

Kentucky.—Beattyville Bank v. Roberts (Ky. Ct. App. 1904), 25 Ky. L. Rep. 1796, 78 S. W. 901, 902 ("the law presumes a consideration for the execution of bills of exchange and

negotiable notes placed upon the footing of bills of exchange by the statute, for the benefit of the holder, in an action against the maker or indorser of such paper," per Burnham, C. J.).

New York.—Heuertematte v. Morris, 101 N. Y. 63, 4 N. E. 1 (acceptor cannot show acceptance without consideration by indorsee).

Oklahoma.—Price v. Winnebago Bank, 14 Okla. 268, 79 Pac. 105.

Pennsylvania.—Gray v. Bank of Kentucky, 29 Pa. St. 356 (indorsee of negotiable paper is presumed to have received it *bona fide* and for a valuable consideration).

Wisconsin.—Frederick v. Winans, 51 Wis. 472, 8 N. Y. W. 301 (where there is an indorsement of a note before delivery no consideration for the indorsement need be averred by payee against the maker and indorser).

The transfer of a promissory note by indorsement furnishes a sufficient consideration for a promise by the indorsee to pay the indorser an equivalent sum. Litchfield v. Allen, 7 Ala. 779, 782.

Negotiable notes in the hands of a third person are presumed until the contrary appears to have been acquired in good faith and for value before maturity. Hillard v. Taylor (La. 1905), 38 So. 594.

Every person whose signature appears thereon is deemed *prima facie* to have become a party thereto for value. Neg. Inst. Law, § 50, see also id., § 96, Eng. Bills of Exch. Act,

half of the maker and he has no concern with the fact whether or not the holder of commercial paper paid value, or that it was indorsed without consideration, unless he has thereby been deprived of his rights or has been defrauded or has lost some defense of which he might have had against the original holder or payee had he retained it.²² The preceding rule has been applied, even though the purchaser of the note has paid less than its face value,²³ or one-half thereof,²⁴ for if value has been given it is immaterial as a defense what amount was actually paid except as far as notice is concerned.²⁵ So it is held

§ 30. See also *id.*, § 27. See Appendix herein.

²² *Georgia*.—*Ray v. Anderson*, 119 Ga. 926, 47 S. E. 205; Civ. Code, § 3698. (The defendant in a suit on a note cannot inquire into the title of the holder, unless it is necessary for his protection, or to let in the defense which he seeks to make.)

Illinois.—*Burnap v. Cook*, 32 Ill. 168 (or that there was a failure of consideration).

Michigan.—*Vinton v. Peck*, 14 Mich. 287 (a purchaser of a note at less than its face is not the less a *bona fide* holder and is entitled to recover the full amount).

Missouri.—*Powers v. Nelson*, 19 Mo. 190 (or that it was indorsed without consideration and after due to plaintiff); *Bannister v. Kenton*, 46 Mo. App. 462.

New York.—*Forestville Society v. Farnham*, 15 Hun (N. Y.) 381; *Aspinwall v. Meyer*, 2 Sandf. (N. Y.) 180 (unless maker has been defrauded or has lost some defense against payee which he might have had, had he retained it).

Oregon.—*Brown v. Feldwert* (Ore. 1905), 80 Pac. 414 (failure of consideration cannot be availed of as against an innocent purchaser).

South Carolina.—*Stoney v. Joseph*, 1 Rich. Eq. (S. C.) 352.

See *Middlebury v. Case*, 6 Vt. 165.

Wisconsin.—*Holden v. Kirby*, 21

Wis. 149 (as against indorsee no defense by maker that indorsee paid no consideration).

Federal.—*In re Great Western Tel. Co.*, 5 Biss. 363, Fed. Cas. No. 5740.

Examine further *Illinois*.—*Jones v. Nellis*, 41 Ill. 482, 89 Am. Dec. 389 (as to statute not changing common-law rule as to *bona fide* holders); *Lord v. Favorite*, 29 Ill. 149 (as to statute allowing defenses against indorsee).

Georgia.—*Grooms v. Oliff*, 93 Ga. 789, 20 S. E. 655 (code as to § 2785, protecting *bona fide* purchaser except as to fraud in procurement).

Virginia.—*Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 22 S. E. 487, 29 L. R. A. 827 (Code 1887, § 2818, as to defenses, *bona fide* holder).

²³ *Lay v. Wissman*, 36 Iowa 305; *Sully v. Goldsmith*, 32 Iowa 397; *Daniels v. Wilson*, 21 Minn. 530; *United States Nat. Bank v. McNair*, 116 N. C. 550, 21 S. E. 389 (except where note is void in whole or part from its inception and except as to limited recovery when original consideration is illegal or fraudulent or it is taken as collateral security). Examine §§ 188–196 herein.

²⁴ *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903 (Sess. Laws 1899, p. 350, § 57).

²⁵ *Gould v. Sigel*, 5 Duer (N. Y.) 260.

that evidence is inadmissible to show that the amount paid by the indorsee was a certain amount of about one-twentieth of the face value of the note.²⁶ But it is decided that a maker of a note not governed by law merchant, by selling his note for less than its face cannot, except in case of estoppel, preclude himself from setting up want of consideration to the amount of the discount.²⁷ And it is also determined that where a *bona fide* holder purchases a note for a sum less than its face he is only entitled to recover to the extent of the consideration paid by him or some prior holder from whom he obtained title.²⁸ Generally, however, some value in money or property must have been given, or some responsibility or liability have been incurred, or some right parted with, to preclude equitable defenses on the ground of being a *bona fide* holder.²⁹ So in a New York case the court, per Andrews, J., says: "It has been the established law of this state that to constitute an indorsee of negotiable paper a holder for value, so as to exclude the equities of antecedent parties, it is not sufficient that the transfer should be valid as between the indorser and indorsee, but in addition the latter must have relinquished some right, incurred some responsibility, or parted with value upon the credit of the paper at the time of the transfer."³⁰ Again it has also been decided that all defenses against the original holders may also

Defense of failure of consideration is admissible against a holder where there is evidence which tends even slightly to impeach the due and regular indorsement of the note. *Kalamazoo Nat. Bank v. Sides* (Tex. Civ. App. 1894), 28 S. W. 918.

If an indorsee take a bill with notice of failure of consideration his right to recover cannot be superior to that of his indorser. *Davis v. Wait*, 12 Ore. 425, 428, 8 Pac. 356.

²⁶ *Ellis v. Watkins' Estate*, 73 Vt. 371, 50 Atl. 1105. Compare §§ 188-196 herein.

²⁷ *Musselman v. McElhenny*, 23 Ind. 4, 85 Am. Dec. 445.

²⁸ *Holcomb v. Wycoff*, 35 N. J. L. 35, 10 Am. Rep. 219; *Noble v. Carey*, 64 Hun (N. Y.) 635 (Mem.), 19 N. Y. Supp. 58 (the purchaser is a *bona*

fide holder to the extent of the amount paid).

²⁹ *McQuade v. Irwin*, 39 N. Y. Super. Ct. (7 J. & S.) 396; *Phoenix v. Church*, 56 How. Pr. (N. Y.) 29, 493 *id.*, 81 N. Y. 218, 59 How. Pr. (N. Y.) 293. Compare §§ 188-196, 241, 242, 246 herein.

The rule is well settled that a valid consideration is necessary to support the liability of an indorser of a negotiable note. *Peabody v. Munson*, 211 Ill. 324, 326, 71 N. E. 1006, per Boggs, J. "It is a general rule that an indorsement is a contract and that, like every other contract, it requires a consideration." *Farmers' Savings Bank v. Hausmann*, 114 Iowa 49, 51, 86 N. W. 31, per Sherwin, J.

³⁰ *Phoenix Ins. Co. v. Church*, 81 N. Y. 218, 222, 37 Am. Rep. 284.

be available against one who is not a purchaser of the notes for value.³¹ The consideration must, however, have been paid before notice of any defenses.³² And as against an innocent holder who, upon inquiry of the maker, had been informed that the note was good and that it would be paid at maturity, the maker cannot set up failure of consideration, even though the latter was ignorant of such failure of consideration at the time he gave such assurance of payment, since the fact of making such inquiries of the drawer was sufficient to put him on his guard.³³ Again, knowledge of an agreement constituting the consideration of a note, without knowledge of the breach thereof, does not make such breach available as a defense against an indorsee for value in due course.³⁴ And it is held that defenses and equities based upon a want or failure of consideration are available against a holder without indorsement.³⁵

§ 241. Rule as to value continued—Payment of pre-existing debt—Bona fide indorsees or holders.—It is a well settled rule that where the essentials constituting one a *bona fide* holder exist, want or failure of consideration between the original parties cannot be successfully set up against him to defeat a recovery on negotiable paper taken in payment of a pre-existing debt. This rule also extends to and includes, as against such holder, all defenses and equities generally existing as between original parties.³⁶ And one who has given

³¹ *Sturges v. Miller*, 80 Ill. 241; *Harpham v. Haynes*, 30 Ill. 404; *Baily v. Smith*, 14 Ohio St. 396, 402; *Martindale v. Hudson*, 25 Mo. 422 (paper was fraudulently assigned by indorsement not for value but to prevent set-off of demand against payee). See *Clark v. Gallagher*, 20 How. Pr. (N. Y.) 308 (check was transferred for debt due to indorser). See §§ 188-196 herein.

³² *Haescig v. Brown*, 34 Mich. 503 (a case of purchaser of securities not delivered to him and nominal payment only was made before delivery); *Colby v. Parker*, 34 Neb. 510, 52 N. W. 693; *De Mott v. Starkey*, 3 Barb. (N. Y.) 403 (some part of purchase money must have been paid or something of value been parted with before notice of prior right or equity to make one a

bona fide purchaser without notice); *How.* 698.

³³ *Hamer v. Johnston*, 5 Miss. (6 How.) 698.

³⁴ *Black v. First Nat. Bank*, 96 Md. 399, 54 Atl. 88.

³⁵ *Ingram v. Morgan*, 23 Tenn. (4 Humph.) 66, 40 Am. Dec. 626.

³⁶ *Alabama*.—*Gates v. Morton Hardware Co.* (Ala., 1906), 40 So. 509; *Marks v. First National Bank*, 79 Ala. 550, 58 Am. Rep. 620; *Mobile R. Co. v. Heirath*, 67 Ala. 189; *Mayberry v. Morris*, 62 Ala. 113; *Mobile Bank v. Hall*, 6 Ala. 639, 41 Am. Dec. 72.

his note for a legal and valuable consideration cannot avoid payment because the payee has transferred it in payment of a debt which the

Arkansas.—*Evans v. Speer Hardware Co.*, 65 Ark. 204, 67 Am. St. Rep. 919, 45 S. W. 370; *Tabor v. Merchants' Nat. Bank*, 48 Ark. 454, 3 S. W. 805; *Bertrand v. Bankman*, 13 Ark. 150.

California.—*Sackett v. Johnson*, 54 Cal. 107 (not an open question in this state, Civ. Code, § 14, Subd. 28 as originally adopted did not change former rule).

Connecticut.—*Rockville National Bank v. Citizens' Gas Light Co.*, 72 Conn. 576, 45 Atl. 36 (negotiable bonds); *McCasky v. Sherman*, 24 Conn. 605.

Delaware.—*Bush v. Peckard*, 3 Harr. (Del.) 385.

District of Columbia.—*Leach v. Lewis*, 1 McArthur (D. C.) 112 (there was also additional consideration).

Georgia.—*Atlanta Bottling Co. v. Hutchinson*, 109 Ga. 550, 35 S. E. 124; *Bond v. Central Bank*, 2 Kelly (Ga.) 92.

Illinois.—*Mix v. Bloomingdale Bank*, 91 Ill. 20, 33 Am. Rep. 44; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Manning v. McClure*, 36 Ill. 490; *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246; *Bemis v. Horner*, 62 Ill. App. 38.

Indiana.—*Fulton v. Loughlin*, 118 Ind. 286, 20 N. E. 796; *Proctor v. Baldwin*, 82 Ind. 370. The authorities are not quite agreed as to whether the purchase of a note for a previously existing debt is such a consideration as protects the indorsee or holder of commercial paper, purchased against existing equities. "It is now quite well settled," says Parsons, "that where negotiable paper is received in payment and

extinguishment of a pre-existing debt, the holder is entitled to protection."

Iowa.—*Robinson v. Lair*, 31 Iowa 9 (received in part payment).

Kansas.—*Draper v. Cowles*, 27 Kan. 484.

Kentucky.—*Frank & Sons v. Quast*, 86 Ky. 649, 6 S. W. 909, 9 Ky. L. Rep. 781; *May v. Quimby*, 3 Bush (Ky.) 96.

Louisiana.—*Citizens' Bank v. Gilman*, 18 La. Ann. 222, 89 Am. Dec. 650 (but recovery limited to debt and not face value of note).

Maine.—*Breckenridge v. Lewis*, 84 Me. 349, 30 Am. St. Rep. 353, 24 Atl. 864; *South Boston Co. v. Brown*, 63 Me. 139; *Norton v. Waite*, 20 Me. 175; *Hascall v. Whitmore*, 19 Me. 102, 36 Am. Dec. 738; *Lewis v. Hodgson*, 17 Me. 267 (difference between decisions in New York and Maine explained in *Homes v. Smyth*, 16 Me. 177. If a negotiable note be transferred to an indorsee before it becomes payable, without notice of a defense, in payment of a pre-existing debt, want of consideration on the failure of it cannot be given in evidence in defense); *Dudley v. Littlefield*, 8 Shep. (Me.) 418; *Homes v. Smyth*, 4 Shep. (Me.) 177, 33 Am. Dec. 650.

Maryland.—*Buchanan v. Mechanics' Loan & Savings Institution*, 84 Md. 430, 35 Atl. 1099; *Cecil Bank v. Held*, 25 Md. 562 (in part payment).

Massachusetts.—*Woodruff v. Hill*, 116 Mass. 310; *Ives v. Farmers' Bank*, 84 Mass. 236, 241 (by the settled law of Massachusetts, a party who takes a negotiable instrument in payment of a pre-existing debt is regarded as entitled to the same pro-

tection as any other taker for a valuable consideration); *Blanchard v. Stevens*, 57 Mass. (3 Cush.) 162, 50 Am. Dec. 723.

Michigan.—*Outhwite v. Porter*, 13 Mich. 533; *Bostwick v. Dodge*, 1 Doug. (Mich.) 413, 41 Am. Dec. 584.

Minnesota.—*Stevenson v. Hyland*, 11 Minn. 198 (Gil. 128).

Mississippi.—*Carridine v. Wilson*, 61 Miss. 573; *Emanuel v. White*, 34 Miss. 56, 69 Am. Dec. 385.

Missouri.—*Fitzgerald v. Barker*, 96 Mo. 661, 9 Am. St. Rep. 375, 10 S. W. 45 (there was also an additional consideration); *Clark v. Loker*, 11 Mo. 97.

Montana.—*Yellowstone National Bank v. Gagnon*, 19 Mont. 402, 61 Am. St. Rep. 520, 48 Pac. 762, 44 L. R. A. 243 (to extent of claim).

Nebraska.—*Lashmett v. Prall* (Neb. 1902), 96 N. W. 152. (An indorsee of paper taken as collateral security for another existing or antecedent debt is, by the weight of authority in this country and England, a *bona fide* holder for value within the intent of the law merchant where he has so accepted it without notice of defenses. ("In *Martin v. Johnson*, 34 Neb. 797, 52 N. W. 819, it was held that one who accepted a negotiable note, without notice of defenses, in payment of an antecedent debt, was a *bona fide* holder for value and precisely the same principles must apply to one who receives such an instrument as collateral security. Such is also, we think, the weight of authority in this country and in England. *Colebrook on Collat. Securities*, § 18, *et seq.* and notes," per Ames, C.); *Barker v. Lichtenberger*, 41 Neb. 751, 60 N. W. 79.

New Hampshire.—*Williams v. Little*, 11 N. H. 66.

New Jersey.—*Mechanics' Bank &c.*,

v. Chardavoyne, 69 N. J. L. 256; *Armour v. McMichael*, 36 N. J. L. 92; *Allaire v. Hartshorne*, 21 N. J. L. 665, 47 Am. Dec. 175.

New York.—*Ward v. City Trust Co.*, 102 N. Y. Supp. 50; *Milms v. Kauffman*, 93 N. Y. Supp. 669; *Brown v. Leavitt*, 31 N. Y. 113 (received in payment of note overdue); *Magee v. Badger*, 30 Barb. (N. Y.) 246, aff'd 34 N. Y. 247, 90 Am. Dec. 691 (case of second note given in settlement of action brought to recover amount due on original note); *Yungs v. Lee*, 18 Barb. (N. Y.) 187, aff'd in 12 N. Y. 551; *Purchase v. Mattison*, 13 N. Y. Super. Ct. (6 Duer) 310; *Brookman v. Metcalf*, 18 N. Y. Super. Ct. (5 Bosw.) 429; *New York, etc., Works v. Smith*, 11 N. Y. Super. Ct. (4 Duer) 362; *White v. Springfield Bank*, 5 N. Y. Super. Ct. (3 Sandf.) 222; *Scott v. Betts*, 1 Hill & Den. Supp. (Lalor, N. Y.) 363 (if the transfer of a check works a payment of a pre-existing debt, or causes some new responsibility to be incurred, or some valuable benefit to be relinquished by the person to whom it is made, the check is to be deemed as purchased for value); *St. Albans Bank v. Gulliland*, 23 Wend. (N. Y.) 311, 35 Am. Dec. 566 (receiving a note for a precedent debt is receiving it for value within the law merchant, if it be taken in satisfaction of such precedent debt and the indebtedness be cancelled);

North Carolina.—*Singer Mfg. Co. v. Summers* (N. C., 1906), 55 S. E. 522; *United States National Bank of N. Y. v. McNair*, 116 N. C. 550, 21 S. E. 389 (rule applies with certain exceptions); *Reddick v. Jones*, 6 Ired. (N. C.) 107, 44 Am. Dec. 68.

North Dakota.—*Dunham v. Peterson*, 5 N. D. 414, 67 N. W. 293, 57 Am. St. Rep. 556, 36 L. R. A. 232.

Ohio.—*Carlisle v. Wishart*, 11 Ohio

172; *White v. Francis*, 5 Ohio Dec. 323.

Pennsylvania.—*Bardsley v. Delp*, 88 Pa. St. 420, 6 Wkly. Notes Cas. (Pa.) 479, rev'g 6 Wkly. Notes Cas. (Pa.) 366.

South Dakota.—*Iowa Nat. Bank of Ottumwa v. Sherman & Bratager* (S. D. 1903), 97 N. W. 12.

Tennessee.—*Sugg v. Powell*, 38 Tenn. (1 Head) 221.

Texas.—*Raatz v. Gordon* (Tex. App. 1899), 51 S. W. 651; *Herman v. Gunter*, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632. See *Rowe v. Gohlman* (Tex. Civ. App., 1907), 98 S. W. 1077.

Vermont.—*Russell v. Splater*, 47 Vt. 273; *Dixon v. Dixon*, 31 Vt. 450, 76 Am. Dec. 129.

Virginia.—*Payne v. Zell*, 98 Va. 294, 36 S. E. 379.

West Virginia.—*Mercantile Bank v. Boggs*, 48 W. Va. 289, 37 S. E. 587. (Pre-existing debt is a valuable consideration *prima facie* in hands of *bona fide* holder.)

Wisconsin.—*Knox v. Clifford*, 38 Wis. 651, 20 Am. Rep. 28; *Stevens v. Campbell*, 13 Wis. 375.

Federal.—*Brooklyn City R. Co. v. Republic Bank*, 102 U. S. 14, 26 L. ed. 61; *Swift v. Tyson*, 16 Pet. (U. S.) 1, 10 L. ed. 865; *Drexler v. Smith*, 30 Fed. 754 (transferred by one of payee firm in payment of individual debt); *Riggs v. Hatch*, 16 Fed. 838.

English.—*M'Lean v. Clydesdale Banking Co.*, 9 App. Cas. 95, 50 L. T. Rep., N. S. 457.

See *Connecticut*.—*Waters v. White*, 75 Conn. 98, 52 Atl. 401.

Federal.—*Safe Deposit & Trust Co. v. Wright*, 105 Fed. 155, 44 C. C. A. 421.

New York.—*Bookheim v. Alexander*, 64 Hun (N. Y.) 458, 19 N. Y. Suppl. 776.

A moral obligation to pay a pre-existing legal debt is a good consideration for the execution of a note in its payment: *Fourth National Bank of Cadiz v. Craig* (Neb. 1901), 96 N. W. 185.

"The current and weight of authority sustain the doctrine that a *bona fide holder*, taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between antecedent parties." *Jewett v. Home*, 1 Woods (U. S. C. C.) 530, 534, Fed. Cas. No. 7311, per Woods, Cir. J.

If the transfer is made without delivery or indorsement, and without notice to the maker, an antecedent debt or existing liability is sufficient to support the assignment. *Planters' Ins. Co. v. Tunstall*, 72 Ala. 142.

Antecedent debt or liability as a valid consideration. Neg. Inst. Law, § 51, Eng. Bills of Exch. Act, § 27.

Pre-existing debt of maktr is sufficient consideration for note. *Gates v. Morton Hardware Co.* (Ala. 1906), 40 So. 509.

Holder of note taken before maturity in payment of indebtedness, largely in excess, is not holder for value in due course of trade so as to cut off the maker's equities and defenses, where the transactions involved occurred prior to the passage of the Negotiable Inst. Law, which provides that "an antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time." *Bank v. Johnston*, 105 Tenn. 521, 59 S. W. 131; Negotiable Inst. Law, Art. II, § 25; *Shannon's Supp. Code Tenn.*, p. 579.

Transferee taking in part payment of pre-existing debt is *bona*

law would not have compelled him to pay.³⁷ It is also decided that the indorsee of a negotiable promissory note, to whom the same is transferred by the maker in payment of a pre-existing debt, is entitled to enforce payment of the same against the indorser, irrespective of the equities existing between the original parties.³⁸ Again, the fact that an assignee receives a bond in payment of a pre-existing debt due him by a corporation can make no difference in his rights to a recovery upon it, where he is the assignee for a valuable consideration and so entitled to all rights as such.³⁹ But whether the giving of notes for an existing indebtedness shall be regarded as an absolute payment or treated as evidence of the original debt, which shall continue in force, is within the control of the parties, and the effect of the transaction is to be determined by their intention and agreement. The common law rule is that a promissory note made by the debtor does not discharge a pre-existing debt for which it was given unless it be the express agreement of the parties.⁴⁰

§ 242. **Same subject—Decisions contra or qualificative.**—Notwithstanding the weight of authority sustaining the preceding rule, the contrary rule has been asserted in numerous cases. Many of these determinations, however, cannot be relied on as establishing a controlling arbitrary rule, since they rest rather upon the circumstances than upon principle, even though upon their face they assert the doctrine of availability of defenses, and in addition they do not all of them positively or in terms negative the general rule first stated, but may be deemed to be exceptions or qualifications thereof.⁴¹ So where the

fide holder. *Smith v. Thompson* (Neb. 1903), 93 N. W. 678.

³⁷ *Gould v. Leavitt*, 92 Me. 416.

³⁸ *Blanchard v. Stevens*, 57 Mass. 1 (3 Cush.) 162, 50 Am. Dec. 723.

³⁹ *Fox v. Blackstone*, 31 Ill. 538.

⁴⁰ *Topeka Capital Co. v. Merriam*, 60 Kan. 397, 56 Pac. 757.

⁴¹ *Alabama*.—*Jordon & Son v. Thompson*, 117 Ala. 468, 23 So. 157.

Illinois.—*Forbes v. Williams*, 13 Bradw. (Ill.) 280.

Michigan.—*Ingerson v. Starkweather*, Walk. Ch. (Mich.) 346.

Mississippi.—*Woodsen v. Owens* (Miss., 1892), 12 So. 207; *Holmes v. Carman*, 1 Freem. Ch. (Miss.) 408.

New York.—*Phoenix Ins. Co. v. Church*, 81 N. Y. 218, 37 Am. Rep. 284 (Andrews, J., says: "It is the settled law of this state, that prior equities of antecedent parties to negotiable paper transferred in fraud of their rights will prevail against an indorsee who has received it merely in nominal payment of a precedent debt, there being no evidence of an intention to receive the paper in absolute discharge and satisfaction beyond what may be inferred from the ordinary transaction of accepting or receipting it in payment, or crediting it on account. The law regards the pay-

holder, who had a claim against the drawer for the conversion of certain bonds, took a bill in satisfaction thereof, it was decided that there was a precedent liability and as, at the time it was delivered, nor at any time afterwards, the holder had surrendered nothing held by him for the bill, he was not such a *bona fide* holder as to preclude a defense of want or failure of consideration.⁴² And if no valuable security or lien is relinquished by the holder of negotiable paper,

ment under such circumstances as conditional only, and the right of the creditor to proceed upon the original indebtedness after the maturity of the paper is unimpaired"); *Lawrence v. Clark*, 36 N. Y. 128; *Scott v. Ocean Bank*, 23 N. Y. 289; *Tredwell v. Lincoln*, 52 Hun (N. Y.) 614, 5 N. Y. Suppl. 341, aff'd, 127 N. Y. 674, 28 N. E. 255; *Rochester Co. v. Loomis*, 45 Hun (N. Y.) 93; *Burham v. Baylis*, 14 Hun (N. Y.) 608; *Bright v. Judson*, 47 Barb. (N. Y.) 29. (Accepting a bill or note in payment of a precedent debt is not parting with value, so as to make the holder a *bona fide* holder for value); *White v. Springfield Bank*, 1 Barb. (N. Y.) 225; *Philbrick v. Dallett*, 34 N. Y. Super. Ct. 370, 43 How. Pr. (N. Y.) 419, 12 Abb. Pr. N. S. (N. Y.) 419 ("our courts held at quite an early day that the receipt of commercial paper, fraudulently put in circulation or diverted from the purpose for which it was originally issued, merely as payment or security for a precedent debt, no new credit or other thing of legal value being given on the faith thereof, and no security being relinquished or discharged, nor any new responsibility incurred on the credit thereof, is not parting with value, such as to enable the holder to enforce such commercial paper against an accommodation party, or to hold it against the true owner, or to hold

it free of equities existing upon it against the transferer at the time of the transfer. This rule has been firmly maintained, both at law and in equity, by a long and uninterrupted series of adjudications, and is beyond question the settled law of this state," *id.* 387, per Freeman, J.); *Bell v. McNiece*, 17 N. Y. Suppl. 846. (Note was received subject to defenses where it does not appear that anything of value was parted with or relinquished); *Stalker v. McDonald*, 6 Hill (N. Y.) 93, 40 Am. Dec. 389; *Ontario Bank v. Worthington*, 12 Wend. (N. Y.) 593.

Tennessee.—*Bank v. Johnston*, 105 Tenn. 521, 59 S. W. 131; *Vatterlieve v. Howell*, 37 Tenn. (5 Sneed) 441; *Rhea v. Allison*, 40 Tenn. (3 Head) 176; *King v. Doolittle*, 38 Tenn. (1 Head) 77; *Ingram v. Morgan*, 23 Tenn. (4 Humph.) 66, 40 Am. Dec. 626; *Ferress v. Tavel*, 87 Tenn. (3 Pick.) 386, 11 S. W. 93, 3 L. R. A. 414.

That one who takes a draft in payment of pre-existing debt is not a *bona fide* holder for value, no release having been given and nothing of value having been relinquished. See: *Webster v. Howe Machine Co.*, 54 Conn. 394, 8 Atl. 482. See *Credit Co., Ltd., v. Howe Machine Co.*, 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123.

⁴² *Linden v. Beach*, 6 Hun (N. Y.) 200.

who has taken it for an antecedent indebtedness, the fact that he takes the note in good faith is held not to protect him either in law or equity against the true owner.⁴³ So, where a note is taken for a subsisting indebtedness, it is decided that the holder cannot recover thereon where he is not a holder for a valuable consideration.⁴⁴ And payments made to an assignor of a note for a pre-existing debt may operate to reduce the amount of recovery.⁴⁵ So the defense of want or failure of consideration is held to be available against a creditor who takes a note originally signed in blank, although filled up before delivery to such holder, especially where he has not incurred loss by giving credit to the paper or by paying a fair equivalent for it and the notes were not received in the usual course of trade for a valuable consideration.⁴⁶

§ 243. **Banks—Distinction between crediting amount of note on undrawn deposit and credit on pre-existing indebtedness—Bona fide holder.**—An indorsee bank is a *bona fide* holder of a note given for past indebtedness.⁴⁷ And if a note is given to a bank for a pre-existing debt the bank is a *bona fide* holder to the extent of the debt due and not to the amount of the note.⁴⁸ Again after a note has been negotiated in a bank the consideration thereof, whilst the note is the property of the bank, cannot be questioned by the payor.⁴⁹ And where a bank receives and discounts negotiable paper, places the proceeds to the credit of the holder, and charges over against him and cancels other notes upon which are responsible parties, but which are overdue and lie under protest, such cancellation is equivalent to paying value at the time, and precludes all defenses existing as between the original parties.⁵⁰ A distinction exists, however, between a case where a bank gives a depositor credit on a pre-existing indebtedness, such as for

⁴³ *Clark v. Ely*, 2 Sandf. Ch. (N. Y.) 166.

⁴⁴ *Petrie v. Clark*, 11 Serg. & R. (Pa.) 377, 14 Am. Dec. 636.

⁴⁵ *Bond v. Fitzpatrick*, 72 Mass. (6 Gray) 536.

⁴⁶ *Riley v. Johnson*, 8 Ham. (Ohio) 526 (decided 1838).

⁴⁷ *Mechanics' Bank v. Chardavoyne*, 69 N. J. L. 256, 55 Atl. 1080. But the note was indorsed in blank and given to another to get discounted who indorsed it to the bank

in payment of his debt then due to the bank. The question, however, was determined under the law of New York as the *lex loci contractus*.

⁴⁸ *Citizens' Bank v. Payne*, 18 La. Ann. 222, 89 Am. Dec. 650.

⁴⁹ *Tuggle v. Adams*, 3 A. K. Marsh. (Ky.) 429.

⁵⁰ *Salina Bank v. Babcock*, 21 Wend. (N. Y.) 499 (the contention was that no value had been given and diversion).

money loaned, or for an overdraft of his account, or the like, and a case where a bank discounts paper for a depositor, and gives him credit upon its books for the proceeds thereof, since in the latter case the bank is not a *bona fide* holder for value so as to be protected against infirmities of the paper, unless in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor, and so long as that relation continues and the deposit is not drawn out, the bank stands in the same position as the original party to whom the paper was made payable, even though the bank took the paper before maturity and without notice. By giving credit to the indorser of the note on his deposit account, the bank in effect agrees to pay him that amount of money on demand by check or order, and parts with nothing of value. When it receives notice of defenses to the note, it is still in a situation, provided the amount thus credited has remained undrawn by the depositor, to return the note to him and cancel the credit.⁵¹ So it is decided in New York that the mere crediting to a depositor's account, on the books of a bank, of the amount of a check drawn upon another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course within the law merchant, as that term is now defined in the negotiable instruments law so as to render its title superior to the defenses which the drawer of the check may have against the payee.⁵² So in another case in that state it is held that a bank is not a holder of a note in due course, when the proceeds of the note are simply credited to the person from whom it was purchased, and not paid out until the bank has notice of an infirmity in the instrument or defect in the title of the person from whom the note was purchased. The negotiable instruments law seems declaratory of the law as uniformly stated in the decisions of New York and other states, and notice to the bank of an infirmity in

⁵¹ City Deposit Bank of Columbus v. Green (Iowa 1905), 103 N. W. 96, per McClain, J., also charge of trial court affirmed.

⁵² Citizens' State Bank v. Cowles, 180 N. Y. 346, 348, 349, 73 N. E. 33; Neg. Inst. Law, 1897, ch. 612, § 91; case reversed 89 N. Y. App. Div. 281, 86 N. Y. Supp. 38. In the principal

case the court, per Werner, J., cites Albany County Bank v. People's Co-Operative Ice Co., 92 App. Div. N. Y. 47; Dykman v. Northbridge, 80 Hun (N. Y.) 258; Central Nat. Bank v. Valentine, 18 Hun (N. Y.) 417; Thompson v. Sioux Falls Nat. Bk., 150 U. S. 231, 244.

the instrument in suit or of defect in the title, before it has paid out the full amount agreed to be paid therefor, entitles the maker to avail himself of the defense of failure of consideration.⁵³ Where a bank has notes of an individual on which he was indebted and it becomes expedient for a corporation to purchase his personal property and the bank desiring that adequate provision should be made for the payment of its debts an agreement was reached between the parties whereby, with the bank's consent, the individual's notes were retired with new notes of the corporation, such notes were based upon a sufficient consideration.⁵⁴ Again, the partial or total failure of consideration or fraud, in the execution and negotiation of a note made payable at an incorporated bank, which had been discounted before maturity by a bank of the commonwealth of Kentucky or organized under the laws of the United States, is not available as a defense to it, if purchased in good faith by the bank without notice of such infirmity; especially so where there is nothing in a written contract executed simultaneously with the execution of the note which suggests any lack of consideration for the execution of the note.⁵⁵

§ 244. Parting with value—Surrender by creditor of debtor's own note—Receiving negotiable note of third person.—When a creditor

⁵³ Albany County Bank v. People's Co-Operative Ice Co., 86 N. Y. Supp. 773, 777, 92 N. Y. App. Div. 47 (Chester, J., dissented), per Chase, J., quoting from New York County Bank v. Massey (U. S.), 24 Sup. Ct. 199, 48 L. Ed. 138, N. Y. Law Jour., Jan. 14, 1904; Ætna National Bank v. Fourth National Bank, 46 N. Y. 82, 7 Am. Rep. 314; Thompson v. Sioux Falls National Bank, 150 U. S. 231, 14 Sup. Ct. 94, 37 L. Ed. 1063; Central National Bank v. Valentine, 18 Hun (N. Y.) 417; Dykman v. Northbridge, 80 Hun (N. Y.) 258, 30 N. Y. Supp. 164; Sixth National Bank v. Lorillard Brickworks Co., 18 N. Y. Supp. 861; Clark National Bank v. Bank of Albion, 52 Barb. (N. Y.) 592; Negot. Inst. Law 1897, p. 732, c. 612, §§ 93, 96; Daniel on Neg. Inst. (5th ed.), §§ 779b, 782; Eaton & Gilbert on Commercial Pap.,

p. 306; 7 "Cye," p. 929; 4 Amer. & Eng. Ency. of L. 298. The court, in the principal case, said, however: "Whether notice of dishonor of a note is alone sufficient in all cases to constitute notice of an infirmity or defect in the title of the person negotiating the same is not necessary now to determine," per Chase, J.

⁵⁴ Flour City National Bank v. Shire, 84 N. Y. Supp. 810, 88 App. Div. 401.

⁵⁵ Beattyville Bank v. Roberts (Ky. Ct. App. 1904), 25 Ky. L. Rep. 1796, 78 S. W. 901, 902, citing Ky. Stat. 1903, § 483; Clark v. Tanner, 100 Ky. 275, 38 S. W. 11; Moreland v. Citizens' Savings Bank, 97 Ky. 211, 30 S. W. 637; Harigs v. Louisville Trust Co. (Ky.), 30 S. W. 637; Kelly v. Smith, 58 Ky. 313.

takes from his debtor the note of a third person before maturity, in good faith, in payment of, or as collateral security for the debt, and in consideration thereof gives up collateral securities held therefor, he becomes, to the extent of the collaterals surrendered, a holder for value of the paper, and takes it free from the defenses of antecedent parties, and it is regarded as the settled doctrine of the state of New York, that the surrender by a creditor of the past due notes of a debtor, upon receiving from him, in good faith before maturity, the note of a third person in place of the note surrendered, constitutes the creditor a holder for value of the note thus taken, and protects him against the defenses and equities of the antecedent parties, and it is immaterial whether the note surrendered was given to the creditor for goods sold, or money loaned, or under circumstances which would leave the original debt represented by the note in existence, enforceable against the debtor, or whether by surrendering the note, the creditor parted with his entire right of action. The surrender of a prior note to the maker may be under certain circumstances an unequivocal evidence of an intention, on the part of the parties to the transaction, to extinguish the note surrendered, and so be equivalent to an express agreement to that effect. The actual extinguishment and discharge of a prior debt, upon the transfer of a note of a third person by the debtor to the creditor, is a parting with value by the former. But there is little ground for holding that the surrender by a creditor of a past due note of a debtor, especially when his remedy upon the original debt remains, is a parting with value.⁵⁶

§ 245. Joint note of husband and wife—Outlawed debt of husband—Indorsee for past indebtedness—Indorsement by president payee to bank.—A wife joined with her husband in the execution of a negotiable note secured by mortgage and the only consideration therefor was a past indebtedness of the husband which, had an action been brought therefor, would have been barred by the statute of limitations. The note was regularly indorsed and delivered long before its maturity by the payee to a banking company to which the payee was indebted in an amount much larger than the amount of the note and it, with the mortgage, was received by said indorsee as part payment of the indebtedness and the full amount of the note was credited. The court below found that the indorsee purchased the note and mort-

⁵⁶ *Phoenix Ins. Co. v. Church*, 81 *dr*ews, J. See *Taylor's Appeal*, 45 N. Y. 218, 37 *Am. Rep.* 294, per *An-* Pa. St. 71. See §§ 233-235 herein.

gage, in good faith, in the ordinary course of business and for value before its maturity, and in ignorance of the fact that it was given without consideration or for a debt barred by the statute of limitations. The payee was the president of the bank and knew of the consideration of the note. The note and mortgage were accepted at a meeting of the board of directors of the bank at which the president was not present, and none of those present knew that the consideration of the note was an outlawed indebtedness. It was held that the finding should not be disturbed; that when the president procured the bank to take the note as part payment of his indebtedness, he was acting individually and his knowledge was not the knowledge of the bank; that the further fact that some of the directors knew, or should have known, that shortly before the making of the note and mortgage the property covered by the mortgage had been conveyed by the husband to the wife, it formerly having been community property, and that the conveyance had been recorded, was of no significance. The action was brought by the wife to cancel her note and mortgage for want of consideration, and it was held that it could not be maintained.⁵⁷

§ 246. Rule as to value—Collateral security for pre-existing debt—*Bona fide indorsees or holders*.—The right to show a want or failure of consideration, or the availability of defenses and equities generally, existing between the original parties, as against a transferee or indorsee who takes commercial paper as collateral security for a pre-existing debt, has been a subject of constant controversy. In many of the states such transferee or indorsee is held to be a *bona fide* holder for value where the other essentials constituting one a *bona fide* holder exist.⁵⁸ So in a West Virginia case⁵⁹ it is held that where a negotia-

⁵⁷ McDonald v. McDonald, 139 Cal. 246, 72 Pac. 997, Beatty, C. J., dissented.

As to constructive notice to bank, see also, Iowa Nat. Bank of Ottumwa v. Sherman & Bratager (S. D. 1903), 97 N. W. 12.

⁵⁸ California.—Robinson v. Smith, 14 Cal. 94 (note taken as collateral security is not subject to defenses existing between original parties).

Colorado.—Merchants' Bank v. Cleveland, 9 Colo. 608, 13 Pac. 723.

One who takes in payment or security of pre-existing debt is purchaser for value); Murphy v. Gumaer, 12 Colo. App. 472, 55 Pac. 951 ("the law has been followed in this state, and it is the law of Colorado, as in most other state jurisdictions, that the taker of notes as collateral security as amply and abundantly protects the rights of the holder as though

⁵⁹ Hotchkiss v. Fitzgerald Co., 41 W. Va. 357, 23 S. E. 576.

bie instrument is transferred as collateral to secure a valid pre-existing debt, by being properly indorsed and delivered, or by delivery only

he had bought and discounted the paper in the usual and ordinary course of business," per Bissell, J.).

Connecticut.—Rockville Nat. Bank v. Citizens' Gas Light Co., 72 Conn. 576, 581, 45 Atl. 361 (rule applies both to payment and collateral security. A case of negotiable bonds); Bridgeport Bank v. Welch, 29 Conn. 475.

Georgia.—Kaiser & Brother v. United States National Bank, 99 Ga. 258, 25 S. E. 620 (syllabus cites Colebrook on Collateral Securities, § 18, I Morse Banks and Banking, § 600); University Bank v. Tuck, 96 Ga. 456, 23 S. E. 467 (to extent of debt due); Laster v. Stewart & Co., 89 Ga. 181, 15 S. E. 42.

Illinois.—First National Bank of Joliet v. Adam, 138 Ill. 483, 28 N. E. 955. (In this case the pledger of notes, who was the maker and also the payee, was allowed possession of the notes to sell them, but he did not do so and pledged them as collateral to another creditor and they were received *bona fide* and without notice); Mix v. National Bank of Bloomington, 91 Ill. 20, 24, 33 Am. Rep. 44.

Indiana.—Spencer v. Sloan, 108 Ind. 183, 58 Am. St. Rep. 35, 9 N. E. 100; Proctor v. Baldwin, 82 Ind. 370.

Kansas.—Best v. Krall, 23 Kan. 482, 33 Am. Rep. 185. (Quoting from Daniel on Neg. Inst., § 824, as follows: "When a note or bill of a third party, payable to order, is indorsed as collateral security for a debt contracted at the time of such indorsement, the indorsee is a *bona fide* holder for value in the usual course of business, and is entitled

to protection against equities, offsets, and other defenses, available between antecedent parties, provided, of course, that the bill or note transferred as collateral security is itself, at the time, not overdue").

Louisiana.—Levy v. Ford, 41 La. Ann. 873, 6 So. 671; Saloy v. Bank, 39 La. Ann. 90, 1 So. 657 (for overdrawn bank account); Giavanovitch v. Citizens' Bank of Louisiana, 26 La. Ann. 15.

Maryland.—Buchanan v. Mechanics' Loan & Savings Institution, 84 Md. 430, 35 Atl. 1599 (holding this to be the settled law of the state since Maitland v. Citizens' National Bank, 40 Md. 540, 17 Am. Rep. 620); Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620. (Indorsee of paper to whom transferred as collateral security by payee in excess of his authority is entitled to protection unless he had knowledge that payee exceeded his authority).

Massachusetts.—National Revere Bank v. Morse, 163 Mass. 383, 40 N. E. 180.

Minnesota.—Haugan v. Surwall, 60 Minn. 367, 62 N. W. 398 (following and applying Rosemond v. Graham, 54 Minn. 323, 40 Am. St. Rep. 336, 56 N. W. 38).

Nevada.—Fair v. Howard, 6 Nev. 304 (note and mortgage were executed for antecedent debt).

New Jersey.—Armour v. Mitchell, 36 N. J. L. 92.

New York.—Continental Nat. Bk. v. Townsend, 87 N. Y. 8 (indorsee for collateral security for antecedent debt is holder for value and entitled to protection as such).

North Carolina.—Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822 (so

when indorsed in blank or made payable to bearer, so that the transferee becomes a party to the instrument, and he takes the same before maturity in good faith, and without notice of equities, he thereby be-

under "Negotiable Instruments" statute, Acts 1899, Chap. 733, §§ 25-27, to extent of debt, but the law was previously otherwise).

Rhode Island.—Cobb v. Doyle, 7 R. I. 550.

South Carolina.—Bank of Charleston v. Chambers, 11 Rich. (S. C.) 657.

Tennessee.—Gosling v. Griffin, 85 Tenn. 737, 744, 3 S. W. 642.

Texas.—Wright v. Hardie & Co., 88 Tex. 653, 32 S. W. 885 (innocent holder is protected only to extent of his interest or amount of debt for which held as collateral); Bruce v. First Nat. Bank of Weatherford, 25 Tex. Civ. App. 295, 60 S. W. 1006 (citing Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865).

Vermont.—People's Nat. Bank v. Clayton, 66 Vt. 541, 546, 29 Atl. 1020.

Virginia.—Prentice & Weissinger v. Zane, 2 Gratt. (Va.) 262 (qualified to the extent, however, that if the party from whom the holder received it took it for value without notice, the holder is entitled to recover, but also holding that the holder of a negotiable note taken as collateral security holds it subject to all the equities of the maker against the party from whom the holder received it).

Washington.—Peters v. Gay, 9 Wash. 383, 37 Pac. 325.

Federal.—American File Co. v. Garrett, 110 U. S. 288, 28 L. Ed. 149, 4 Sup., etc., 40 (bonds were taken as collateral security for pre-existing debt).

English.—Currie v. Misa, L. R. 10 Exch. 153 (title of *bona fide* holder,

without notice, to negotiable security for pre-existing debt is indefensible whether the security be payable at a future time or on demand). Lord Coleridge, C. J., dissented).

Canadian.—Canadian Bank of Commerce v. Gurley, 30 U. C. C. P. 583.

See *District of Columbia*.—Leach v. Lewis, 1 MacArthur (D. C.) 112 (a case of payment and additional security, although there was a contention that the paper passed as security for an antecedent debt).

Louisiana.—Pavey v. Stauffer, 45 La. Ann. 353, 12 South. 512, 19 L. R. A. 716 (assignee; collateral security for a running account of the maker with the payee held not liable to equities between parties).

Holder of note as collateral security for debt is *bona fide* holder for value. Randall v. Rhode Island Lumber Co., 20 R. I. 625, 40 Atl. 763, citing Cobb v. Doyle, 7 R. I. 550; Bank v. Carrington, 5 R. I. 515.

Pre-existing debt constitutes value for the transfer of negotiable paper, whether the instrument is payable on demand or at a future time. This is so under the Virginia statute, although the question may not have been previously settled in that state; and one who is a holder in good faith, before maturity, without notice of infirmities, even though the transfer is made merely as collateral, is a holder for value to the extent of the amount due him. Payne v. Zell, 98 Va. 294, 36 S. E. 379; Acts 1897, 1898, pp. 896, 918, §§ 25, 27.

comes without more, a holder for value in the usual course of business. And in a Kansas decision it is determined that an indorsee of a negotiable note taken as collateral security for a pre-existing debt, there being no extension of time of payment or other new consideration, except such as may be deemed to arise from acceptance of the paper, is a holder for value and in due course of business, and in the absence of any circumstance charging him with notice, is protected against a claim of payment made to the original payee. The court, per Mason, J., said: "The rule in the federal courts, as well as in those in England and Canada, is that the holder of a negotiable note taken as collateral security for a pre-existing debt is a holder for value in due course of business, and, as such, is protected against all latent equities of third parties. The state courts that have passed upon this question are in irreconcilable conflict."⁶⁰ Although it would seem that the above rule ought to be deemed the true and better one, nevertheless, as stated in the above extract from the opinion of Mason, J., there is an "irreconcilable conflict" in the state courts and a number of states have held to the contrary.⁶¹ But the courts asserting this

⁶⁰ *Birket v. Edward* (Kan. 1904,) 74 Pac. 1100. The case of *Bank v. Dakin*, 54 Kan. 656, is stated to have been wrongly placed among the states committed to the rule, and that case is explained. The state decisions, as well as certain codes, are also considered at length.

Alabama.—*Thompson v. Maddox*, 117 Ala. 468, 23 So. 157. (One who takes negotiable paper as collateral security for the payment of a pre-existing or antecedent debt is not a purchaser for value in the usual course of trade; such paper is open in the hands of the assignee to all defenses which could have been made against it, while in the hands of the assignor or original owner. But one who honestly receives a negotiable bill or note before maturity, as collateral security for a debt contracted simultaneously, or in pursuance of a previous agreement, made at the time the debt was contracted, is entitled to protection

against secret equities or defects of which he had no notice, per *Haeralson, J.*); *Vann v. Marbury*, 100 Ala. 438, 46 Am. St. Rep. 70, 14 So. 273, 23 L. R. A. 325; *Haden v. Lehman*, 83 Ala. 243, 3 So. 528.

Arkansas.—*Bertrand v. Barkman*, 13 Ark. 150.

Iowa.—*Keokuk County Bank v. Eunice Hall*, 106 Iowa 540, 76 N. W. 832; *Noteboom v. Watkins*, 103 Iowa 580, 72 N. W. 766.

Kentucky.—*May v. Quimby & Co.*, 3 Bush (Ky.) 96 (distinction is made between receiving bill in absolute payment of antecedent debt and receiving it as collateral security only).

Michigan.—*Maynard v. Davis*, 127 Mich. 571, 36 N. W. 1051, 8 Del. L. N. 46.

Mississippi.—*First National Bank of Meridian v. Strauss*, 66 Miss. 479, 14 Am. St. Rep. 579, 6 So. 232 (the court said that the reason of the rule that one who accepts negotia-

opposing rule are evidently bound by the rule *stare decisis* which precludes the probability of a change except such as may be brought about by statute. Thus it is said by Libbey, J., in a Maine case:⁶² "The rule which requires some new consideration to protect the indorsee who takes the note as collateral for a pre-existing debt, against such a defense as is set up here, is admitted as the settled law of this state when the note in suit was made."⁶³ But it is claimed by counsel for the plaintiff that it is in conflict with the rule established by the federal courts, court of Massachusetts and many of the other states, which

ble paper before maturity as security merely for a pre-existing debt is a holder for value, is the sanctity of negotiable paper and the policy of leaving it unfettered in commercial transactions. "But it can find no application in this state where by express legislative provision negotiability (in the sense in which the word is used in the law merchant) is withdrawn from all bills of exchange and promissory notes except those payable to bearer").

Nebraska.—*Smith v. Kinney*, 32 Neb. 162, 49 N. W. 341 (note was indorsed to mortgagee as collateral and had passed to plaintiff with the mortgage; may show note without consideration).

New Hampshire.—*Rice v. Raitt*, 17 N. H. 166.

New York.—*Potts v. Mayer*, 74 N. Y. 594; *Comstock v. Hier*, 73 N. Y. 269, 273, 29 Am. St. Rep. 142 (per Allen, J., who says: "This is the well-established rule in this state").

North Dakota.—*Porter v. Andrus*, 10 N. D. 558, 88 N. W. 567 (held not to be holders for value or holders in due course under §§ 4884, 5130, Rev. Codes).

Ohio.—*Roxborough v. Messick*, 6 Ohio St. 448, 67 Am. Dec. 346 (transferee of note as collateral, without any new consideration, etc., is not holder for value).

Pennsylvania.—*Altoona* Second

National Bank v. Dunn, 151 Pa. St. 228, 232, 25 Atl. 80, 31 Am. St. Rep. 742; *Appeal of the Liggett Spring and Axle Co., Ltd.*, 111 Pa. St. 291, 2 Atl. 684 (applied to pledge to bank of negotiable securities).

Tennessee.—*Vatterlein v. Howell*, 37 Tenn. (5 Sneed) 441 (if paper is taken in payment of or as collateral security for a pre-existing debt, it is not negotiated in due course of trade, and the holder stands in no better position than the payee and would be subject to all defenses available against the payee).

Wisconsin.—*Burnham v. Merchants' Exchange Bank*, 92 Wis. 277, 281, 66 N. W. 510.

See *Ohio*.—*Secor v. Witter*, 39 Ohio St. 218, 232, 233 (this case, however, is only a qualified authority, as the notes were taken with actual notice of that which made them a fraudulent transfer); *Pitts v. Foglesong*, 37 Ohio St. 676, 680, 41 Am. Rep. 540 (where the court said it was not disposed to question the proposition, but the principle was not applicable to the case before it).

Virginia.—*Prentice & Weissinger v. Zane*, 2 Gratt. (Va.) 262 (rule qualified, however).

⁶² *Smith v. Bibber*, 32 Me. 34, 19 Atl. 89, 17 Am. St. Rep. 464.

⁶³ Citing *Nutter v. Stover*, 48 Me. 169; *Smith v. Hiscock*, 14 Me. 449.

is well shown by the many authorities cited on their brief; and they urge the court to overrule the cases in this state, and establish here the rule held by them which requires no new consideration, and thereby bring this state in accord, upon the question of commercial law, with what is claimed to be the rule established by the greater weight of authority. If the question were an open one here we should be inclined to adopt the federal rule as the one best sustained by principle and authority, but it has been so long settled the other way and acted upon in this state, we do not feel we should be justified in reversing it." So in a Missouri decision⁶⁵ the court admits that the first stated rule "seems to be in accord with the decided weight of authority," but adheres to its own state decisions. In a New York case it is decided that as against a holder in due course a note which is unrestricted in its terms is not subject to the defense of want or failure of consideration, even though it was taken as collateral security for an antecedent debt, as such holder is a holder for value;⁶⁶ especially so when there is also an agreement to forbear action on the existing indebtedness founded upon a consideration which was the delivery of the security.⁶⁷ In a North Dakota case the court, per Morgan, J., says: "Upon the question of the rights of holders of negotiable paper taken in due course before maturity as collateral security for a pre-existing debt, there is a radical conflict of authority. The courts sustaining the rights of the holders to recover in such cases as against equities or defenses in favor of the holders, do so, generally, upon the ground that by becoming holders of such negotiable paper through indorsement, they become parties to it, and as such assume obligations in reference to the enforcement of the same. Those courts denying the rights of such holders to recover as against defenses in favor of the makers do so upon the ground that the holders parted with nothing in the nature of a new consideration when they acquired such note or other negotiable paper; that merely accepting the note as collateral security for a pre-existing debt, without any agreement for extension of time or for-

⁶⁵ *Loeween v. Forsee*, 137 Mo. 29, Am. Rep. 231; *McSpedon v. Troy*, 38 S. W. 712, 59 Am. St. Rep. 489. Bank, 41 N. Y. 35; *Grandin v. Le*

⁶⁶ *Milius v. Kauffmann*, 93 N. Y. Roy, 2 Paige (N. Y.) 509; *Tinsdale* Supp. 669, citing *Neg. Inst. Law*, v. *Murray*, 9 Daly (N. Y.) 446; *Furniss v. Gilchrist*, 1 Sandf. (N. Y.) 1897, p. 729, c. 612; *First National Bank v. Wood*, 128 N. Y. 35, 27 N. E. 53.

1020; *Continental National Bank v. Townsend*, 87 N. Y. 8; *Grocers' Bank v. Penfield*, 69 N. Y. 502, 25

⁶⁷ *Milius v. Kauffmann*, 104 N. Y. App. Div. 442, 93 N. Y. Supp. 669.

bearance of some kind, and without making any new promise, so far as the original debt is concerned, or any new obligation, is not receiving the collateral for anything of 'value' within the meaning of that term as laid down in the statute of the law merchant."⁶⁸

§ 247. **Same subject—Particular decisions.**—A pre-existing debt is not such a valuable consideration as will protect the holder of a negotiable note wrongfully pledged as collateral security by the payee.⁶⁹ If notes are assigned by a separate instrument, but are not indorsed, as security for a pre-existing indebtedness, the assignee is not a *bona fide* holder and is subject to all defenses available against the payee had they remained in his hands.⁷⁰ And where a note, payable to a person named, or bearer, was transferred by the payee to his creditor as collateral security for a debt due from the payee to him, and a suit was brought by the creditor in his own name against the maker, it was held that it furnished no defense, if the latter could show that the payee had paid his own debt to the plaintiff, and so was entitled to have the note returned to him before the commencement of the suit.⁷¹ If a note is transferred to secure a pre-existing debt in consideration of an extension of time of payment of a debt there is a valuable consideration.⁷² So the fact that the *bona fide* holder of a note, with whom it was deposited before maturity as collateral security for a debt, knew that it was accommodation paper and that the indorsement was without consideration, does not preclude recovery against the indorser, even though the debt secured was that of the husband of the maker of the note.⁷³ Again, where a suit was brought in Mississippi on a note made in Tennessee the *lex loci contractus* was held to govern and it being taken as collateral was therefore subject to all defenses between the maker and the payee.⁷⁴

⁶⁸ Porter v. Andrus, 10 N. D. 558, 562, 563, 88 N. W. 567, per Morgan, J. v. Hanna, 124 Iowa 374, 100 N. W. 57.

⁶⁹ Union Trust Co. v. McClellan, 40 W. Va. 405, 21 S. E. 1025. ⁷⁴ Woodson v. Owens (Miss., 1892), 12 So. 207.

⁷⁰ Sathre v. Rolfe (Mont., 1904), 77 Pac. 431.

⁷¹ Silbley v. Robinson, 10 Shep. (Me.) 70.

⁷² First National Bank v. Johnson, 97 Ala. 655, 11 So. 690.

⁷³ German-American Savings Bank

As to *lex loci contractus* and note transferred as collateral security for antecedent debt, see National Bank of Commerce v. Kenney (Tex. Sup. Ct., 1904), 83 S. W. 368, rev'g 80 S. W. 555. See also §§ 258, 277, 284, and chapter on collateral herein.

§ 248. **Same subject—Specific exceptions.**—The following exceptions have been noted: (1) A note or bill negotiated in security for a debt not yet due, is not upon sufficient consideration, ordinarily, unless the creditor wait in faith of the collateral after his debt becomes due. (2) If the holder is notoriously insolvent before the note or bill is negotiated as collateral security, it is said the creditor can only stand upon the rights of his debtor. (3) If a note or bill is taken merely to collect for the debtor, to apply when collected, the creditor not becoming a party by indorsement so as to be bound to pursue the rules of the law merchant in making demand of payment and giving notice back, the holder is merely the agent of the owner. (4) So, too, probably, if it were shown positively that the holder gave no credit to the indorsed bill and did, in no sense, conduct differently on that account, he could not be regarded as a holder for value.⁷⁵ In an action by an indorsee before maturity against the payee it may be shown that the note was given as security merely and that this was known to the indorsee and so let in all the equities between the maker and the payee.⁷⁶

§ 249. **Security for pre-existing debt—Additional consideration.** Although one who takes a note as security for an antecedent debt is a holder for value, yet, in addition, an agreement to forbear action on the existing indebtedness for a time, founded upon a good consideration, such as the delivery of security, would make the holder one in good faith for value, and such note not having been diverted, but being unrestricted as to its use, would not be subject in such holder's hands to the defense of want or failure of consideration.⁷⁷

§ 250. **Intermediary party—Holder from bona fide holder.**—The want of consideration, in whole or in part, cannot be insisted on, if the plaintiff or any intermediary party between him and the defendant took the bill or note *bona fide* and upon a valid consideration.⁷⁸

⁷⁵ Atkinson v. Brooks, 26 Vt. 569, 584, 62 Am. Dec. 592.

⁷⁶ Grew v. Burditt, 26 Mass. (9 Pick.) 265.

⁷⁷ Millus v. Kauffmann, 93 N. Y. Supp. 669; Court, per McLaughlin, J., cites, on the first proposition above stated, Negotiable Inst. Law, § 91, Laws 1897, p. 729, C. 612; First National Bank v. Wood, 128 N. Y.

35, 27 N. E. 1020; Continental National Bank v. Townsend, 87 N. Y. 8; Grocers' Bank v. Penfield, 69 N. Y. 502, 25 Am. Rep. 231; McSpedon v. Troy Bank, 41 N. Y. 35; Grandin v. Le Roy, 2 Paige (N. Y.) 509; Tinsdale v. Murray, 9 Daly (N. Y.) 446; Furniss v. Gilchrist, 1 Sandf. (N. Y.) 53.

⁷⁸ Mallard v. Aillet, 6 La. Ann. 92.

If negotiable notes are traded before maturity to one who has no notice of any defect, such as failure of consideration, that defense cannot be availed of as against an innocent holder who subsequently takes such notes without knowledge.⁷⁹ And a holder from a *bona fide* holder of title to a note is entitled to recover thereon, even though he has notice or knowledge of defenses available as against the payee.⁸⁰

§ 251. Paper issued by corporation—Bona fide holder.—The consideration of negotiable paper issued by a corporation with authority to issue the same cannot be inquired into in an action by a *bona fide* indorsee for value before maturity as against the maker,⁸¹ and the rule has been held to apply, even though the note was issued for an unauthorized purpose.⁸²

§ 252. Want or failure of consideration subsequent to transfer—Bona fide holder.—Failure of consideration subsequent to the transfer of a negotiable note, such transfer being made before maturity, is no defense to an action by the indorsee; and, in the absence of evidence to contrary, the presumption is that the note was not transferred after maturity.⁸³ If notes are exchanged by the parties, a *bona fide* holder, for a good consideration, without notice, cannot be defeated by a showing of want of consideration or a failure of consideration subsequent to the transfer.⁸⁴

§ 253. Suit in name of original party—Bona fide holder.—Want or failure of consideration is a defense against an indorsee or holder of a note or bill when the action can be treated as one against the original parties to the note.⁸⁵

⁷⁹ Burch v. Pope (Ga., 1902), 40 S. E. 227.

⁸⁰ Holliman v. Karger (Tex. Civ. App., 1902), 71 S. W. 299. See also Prentiss v. Strand, 116 Wis. 647, 93 N. W. 816. See also Neg. Inst. Law N. Y., § 97.

⁸¹ Cooks v. Pearce, 23 S. C. 239; Blair v. Rutherford, 31 Tex. 465; Pas. Dig. Art. 222, Note 285; Cornell v. Hichens, 11 Wis. 353. See Wright v. Pipe Iron Co., 101 Pa. St. 204, 47 Am. Rep. 701.

⁸² Dexter Sav. Bank v. Friend, 90 Fed. 703.

⁸³ Bearden v. Moses, 75 Tenn. (7 Lea) 459.

⁸⁴ Trustees v. Hill, 12 Iowa 462.

⁸⁵ Hartwell v. McBeth, 1 Harr. (Del.) 363; Quincy Union Bank v. Tutt, 8 Mo. App. 342; Sutherland v. Whitaker, 50 N. C. 5 (the indorsement was in blank by the payee, without any value, and could not be recovered in the name of the payee or his indorsee for the want of consideration).

§ 254. *Lex fori*.—In determining the form of pleas of want of consideration and trial the *lex fori* will control.⁸⁶ And this rule has been applied where the distinction between simple contracts and contracts under seal has been abolished by statute.⁸⁷ So the form of pleading and trial and the quality and degree of the evidence, and the mode of redress will be according to the *lex fori*.⁸⁸

§ 255. *Indorsement for transfer merely or to pass title*.—That the indorsement was wholly and entirely without consideration and was merely for transfer of title in accordance with a bank custom is a good defense in an action by the indorsee against the indorser.⁸⁹ The court, in sustaining this rule, said: "In the case of Doolittle v. Ferry,"⁹⁰ Mr. Justice Brewer, in speaking for the court of the indorsement of negotiable paper, said: 'Where the law furnishes such apt, brief, and well-known expressions for the making the indorsement accomplish exactly what the parties may desire, wise policy demands that each form of indorsement should conclusively carry with it the liability which it implies.' Again, 'that these implications should be

⁸⁶ Williams v. Haines, 27 Iowa 251, 1 Am. Rep. 268. See Stevens v. Norris, 30 N. H. 466; Green v. Sarmiento, 3 Wash. (C. C.) 17, Fed. Cas. No. 6760.

⁸⁷ Williams v. Haines, 27 Iowa 251, 1 Am. Rep. 268.

⁸⁸ Harrison v. Edwards, 12 Vt. 648, 36 Am. Dec. 364.

Lex fori—Lex loci contractus—Equitable defenses. "The principle is that whatever relates merely to the remedy and constitutes a part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract. * * * So, if by the law of the place of a contract equitable defenses are allowed in favor of the maker of a negotia-

ble note, any subsequent indorsement will not change his rights in regard to the holder. The latter must take it *cum onere*' (citing Pritchard v. Norton, 106 U. S. 124, 129, 133, 1 Sup. Ct. 102, 27 L. Ed. 104; Story Conflict of Laws, § 332).

* * * Where the statute where the contract is made and to be performed operates to extinguish the contract or debt itself, the case no longer falls within the law in respect to the remedy, and when such a contract is sued upon in another state, the *lex loci contractus*, and not the *lex fori*, governs." Creston National Bank v. Salmon (Mo. App. 1906), 93 S. W. 288, 289, per Ellison, J. Compare Kaufman v. Barbour (Minn. 1906), 107 N. W. 1128; Barry v. Stover (S. D. 1906), 107 N. W. 672.

⁸⁹ Lovejoy v. Citizens' Bank, 23 Kan. 331.

⁹⁰ Doolittle v. Ferry, 20 Kan. 230.

as conclusive upon all the parties as though the full contract were reduced to writing.' While the general rule applicable to such cases has been stated so strongly and clearly, yet certain limitations and exceptions are noted in the opinion,—as where the indorsement was without consideration, or upon trust for some special purpose, or where there was an equity arising from an antecedent transaction, including an agreement that the note should be taken in sole reliance upon the responsibility of the maker, and that it was indorsed in order to transfer the title in pursuance of such agreement, and where the attempt to enforce it would be fraud. We think these limitations and decisions are justly and wisely recognized in the authorities."⁹¹ So upon a *bona fide* sale of a note the vendor may indorse it in order to pass title and he does not in such case become liable for its payment.⁹² And it is competent for the indorser of a negotiable note in blank to show that he indorsed such paper merely to pass title, and that he assumed no liability conditional or otherwise and that this was in accordance with the understanding between the parties.⁹³ Again, if the plaintiff's right to sue as the *bona fide* holder of an indorsed note is contested, and it is shown that he became possessed of it as agent and not in the usual course of business, the indorsers may show that they indorsed it only as agents and without ultimate responsibility.⁹⁴ So where one acting in a fiduciary capacity indorses in blank and the circumstances so show, such indorsement must be regarded as nothing more than a mere transfer of the right of action on the notes.⁹⁵ But it is also held that words clearly expressing such intention must be inserted in the contract to relieve one who indorses paper from his liability on his indorsement, and that where the facts of the case do not so warrant the position cannot be sustained that the form of the indorsement is one for the mere purpose of transferring title and such as to preclude the idea of assuming liability as an indorser.⁹⁶ And it is further decided that in an action by an indorsee against his indorser, *prima facie* the face of the note fixes the sum to be received, and it is no defense to the action that the note was delivered to the plaintiff and then, at his request and solely for the purpose of parting with any apparent title thereto, defendant indorsed the note.⁹⁷ As

⁹¹ Lovejoy v. Citizens' Bank, 23 Kan. 331, 333, per Horton, C. J.

⁹² Cowles v. McVickar, 3 Wis. 725.

⁹³ Patten v. Pearson, 57 Me. 428.

⁹⁴ McDonough v. Goule, 8 La. 472.

See Byers v. Harris, 56 Tenn. (9

Heisk.) 652, as to necessity of intent of agent to bind himself personally in making indorsement.

⁹⁵ Wade v. Wade, 36 Tex. 529.

⁹⁶ Fassen v. Hubbard, 55 N. Y. 485.

⁹⁷ Lee v. Pile, 37 Ind. 107.

against the maker an indorsement and transfer by the payee for collection is sufficient, even though without consideration.⁹⁸

§ 256. **Same subject—Instances.**—Where the payee indorsed on the note the receipt of a certain part of the amount and also the words "Pay the within note to" the plaintiff, it was held that the payee was neither an indorser nor a guarantor, but that his indorsement merely passed the property in the note to the person to whom it was thus made payable.⁹⁹ In a Pennsylvania case the affidavit of defense was: that the defendant at the urgent request of a member of the firm, who were the makers of the note, and without any consideration whatever wrote his name upon the back of the note for the sole accommodation of the firm and upon the agreement that they would see that it was paid, that said indorsement was irregular and not a negotiable instrument and said note was made by said firm payable to their own order as payees, and it was first indorsed by defendant and subsequently transferred by indorsement by the payees. It was held that the reason of the rule, that unless the payee is the first indorser there can be no recourse against him, did not apply because the payees were also the makers of the note, and the defendant, though entitled to the position of second indorser, was deprived of no valuable rights, as he could sue the payees as makers of the note, and that their responsibility to him was precisely the same as if they had indorsed the note as payees before he placed his indorsement upon it; therefore the defense was insufficient.¹⁰⁰ Under another decision, the form of the instruments made them checks and not bills of exchange, being orders drawn upon a bank, signed by one as agent, indorsed in blank, and upon presentment were paid by the bank. It was determined that no obligation could be inferred on the part of the indorser to repay the bank in default of repayment by the drawer.¹⁰¹ So where the defendant's indorsement was intended only to transfer to another, with whom he stood in known confidential relations, the legal right to receive money and not to become responsible for the ultimate payment of a draft, such indorser is not liable.¹⁰²

⁹⁸ *McPherson v. Weston*, 64 Cal. 275, 30 Pac. 842.

⁹⁹ *Crawford v. Lyttle*, 70 N. C. 385.

¹⁰⁰ *Central Nat. Bank v. Dreydoppel*, 134 Pa. St. 499, 19 Atl. 689, 19 Am. St. Rep. 713. Followed in *First*

Nat. Bank of Lebanon v. Bachman, 3 Pa. Dist. 460.

¹⁰¹ *Westminster Bank v. Wheaton*, 4 R. I. 30.

¹⁰² *Kimmell v. Bittner*, 62 Pa. St. 203.

§ 257. **Purchase price notes—Original parties.**—In an action upon purchase price note, between the original parties thereto, an inquiry may be made into the consideration, and a want or failure thereof constitutes a good defense.¹⁰³ So a due bill cannot be collected where it recites that the consideration is for a certain share in a store and the payee fails to deliver the goods.¹⁰⁴ There are, however, decisions which are opposed to the general rule, or which are exceptions to or qualifications thereof, or which perhaps fall within the rule, but by reason of the circumstances the defense of want or failure of consideration is not available.¹⁰⁵ If the purchaser of a note had no notice of the al-

¹⁰³ *Ohio Thresher and Engine Co. v. Hensel*, 9 Ind. App. 326, 36 N. E. 716 (total want of consideration is a defense; buyer entitled to defense of failure of warranty); *Snyder v. Hargue*, 26 Kan. 416 (want of consideration is good defense); *Key-stone Mfg. Co. v. Forsythe*, 126 Mich. 98, 85 N. W. 262 (warranty had failed and total failure of consideration was permitted to be shown. Examine same case, 123 Mich. 626, 82 N. W. 521—115 Mich. 51—72 N. W. 1109).

As to warranty, see §§ 264, 265, herein.

As to the value of property being fraudulently misrepresented and constituting a total failure of consideration under the Negotiable Instruments Act, §§ 9, 10, see *Taft v. Myerseough*, 197 Ill. 600, 64 N. E. 711, rev'g 92 Ill. App. 560.

Failure of consideration by misconduct of the payee, without the fault of the maker, will discharge the latter from his obligation. *Kernion v. Jumonville de Villier*, 8 La. 547.

Examine *Swain v. Ewing*, 1 Morris (Iowa) 344, a case of total want of consideration. The notes were given to secure a part of the purchase money for a certain lot of land purchased at a public sale, and

by fraud or mistake of the acting commissioner a receipt was given for a different lot, and the one actually purchased was sold to another person.

¹⁰⁴ *Burns v. Ross*, 17 Ky. L. Rep. 181, 30 S. W. 641; *Shoe and Leather Bank v. Wood*, 142 Mass. 563, 8 N. E. 753; under Ky. Genr. Stat., C. 22, §§ 6, 21, notes in hands of indorsee are subject to any defense maker has against payee before notice of transfer. So that failure of consideration in purchase-price note by non-delivery of goods is a defense to note not negotiable by law of state where made.

¹⁰⁵ *McNeel v. Smith*, 106 Ga. 215, 32 S. E. 119 (plea thereby set up an agreement and condition, not only not contained in the note, but in direct contradiction of the written contract); *Heard v. De Loach*, 105 Ga. 500, 30 S. E. 940 (there was no evidence that the notes were in fact given as claimed); *McCormick Harvesting Mach. Co. v. Yoeman*, 26 Ind. App. 415, 59 N. E. 1069 (no evidence showing the claimed breach of warranty was offered); *Wright v. Benjamin*, 5 La. Ann. 179 (note was given for purchase of certain charter rights, but although causes of forfeiture were claimed to exist at date of purchase, yet there had been

leged failure of consideration before paying the purchase price such defense is not available to preclude his recovery.¹⁰⁶ Again, if performance of conditions or a tender by defendant is a prerequisite, compliance therewith is necessary in order that a defense of want or failure of consideration may be of avail.¹⁰⁷

§ 258. **Purchase price notes—Acceptor.**—If an article is unconditionally sold by the payee to the drawer with a warranty super-added, want or failure of consideration is not available as a defense in an action for the purchase price. The remedy is for a breach of the warranty or by way of recoupment or counterclaim, so that a breach of warranty cannot be set up by the acceptor as a defense to an action against him, upon his acceptance of the purchase price draft.¹⁰⁸ But where the purchaser accepts a draft on him by the vendor before the goods arrive and on arrival receives and retains the goods, he is obligated to pay, even though the goods are not merchantable or in accord with contract.¹⁰⁹ In an action by the payee, who was the holder of a draft against the drawee, who was the acceptor, it constitutes a good defense that the draft was drawn and accepted in payment of good sound merchantable goods, which the drawer, through his agent, sold and had agreed to deliver, but that said goods were not delivered and those which were delivered were worthless and unmerchantable.¹¹⁰

§ 259. **Purchase price notes—Guarantors.**—A breach of warranty by the principal in a transaction cannot be set up by a guarantor when sued on his contract of guaranty, and this rule applies where the defenses interposed do not arise upon a failure of the consideration of the contract on which the plaintiff's action is founded, but are to be regarded as the setting off of distinct causes of action one against the other; and the non-performance of the plaintiff's engagement to the makers of the note is not to be regarded as a failure of consideration, but as an independent cause of action which the makers of the note and they only can assert.¹¹¹ And where, before the note is delivered or accepted by the payee, the payment of the purchase price note is

no judicial decree of forfeiture); *Ind. 168; Acme Co. v. Erne, 83 Kan. 858, 66 Pac. 1004; Hoag v. Parr, 13 Hun (N. Y.) 95.*

Dickson v. Tingstall, 3 C. P. Rep. (Pa.) 128 (given for property which third party was bound to deliver).

¹⁰⁸ *Marsh v. Low, 55 Ind. 271.*

¹⁰⁹ *Walton v. Black, 5 Houst. 149.*

¹⁰⁶ *Burt v. Bennett, 116 Ga. 430, 42 S. E. 740.*

¹¹⁰ *Frence v. Gordon, 10 Kan. 370.*

¹⁰⁷ *Howard v. Higgins, 137 Cal. 227, 69 Pac. 1060; O'Kane v. Kiser, 25*

¹¹¹ *Osborne v. Brice, 23 Fed. 171.*

guaranteed by the guarantor in writing, the consideration to the makers would support the guaranty. And even if the guaranty was given in accordance with the contract between the vendor and vendee reserving title in the vendor until payment of the note, there would exist a sufficient consideration to support it.¹¹² But the writing of a guaranty for the payment of the mortgage only, upon the mortgage only and not upon the notes, is not an indorsement of the notes. And if the guaranty were written upon the notes themselves the guaranty would not be negotiable, and there is no consideration for such a guaranty as that first stated, and the guaranty not being a negotiable contract the guarantor could set up against a *bona fide* purchaser a want of consideration for the guaranty.¹¹³

§ 260. **Purchase price notes—Bona fide holder or assignee.**—The defense of want or failure of consideration is not available against one who is, within the rule as to essentials, a *bona fide* holder of a purchase price note.¹¹⁴ And where a vendor of land took several negotiable

¹¹² *Winans v. Manufacturing Co.*, 48 Kan. 777; *Stanley v. Miles & Adams*, 36 Miss. 434.

¹¹³ *Briggs v. Latham*, 36 Kan. 205.

¹¹⁴ *California*.—*Siebe v. Joshua Handy Mach. Works*, 86 Cal. 390, 25 Pac. 14 ("it is contended that there was a failure of consideration for this note * * * But findings show that the plaintiff was an innocent purchaser of the note for value before maturity").

Iowa.—*Whittaker v. Kuhn*, 52 Iowa 315, 3 N. W. 127 (note here was given for amount of assessment of capital stock subscribed).

Nebraska.—*Stedman v. Rochester Loan and Banking Co.*, 42 Neb. 641, 60 N. W. 890 (note given for stock in milling corporation); *Coakley v. Christie*, 20 Neb. 509, 31 N. W. 73 (note for purchase price of personal property, and claim of non-compliance with warranty); *Western Cottage Organ Co. v. Boyle*, 10 Neb. 406, 6 N. W. 473 (proof of worthless character of property as defense was not permitted).

New Hampshire.—*Green v. Bickford*, 60 N. H. 159 (a note given for a worthless patent or for an article not patented is good in the hands of a *bona fide* indorsee for value, without knowledge or notice of such facts or of any infirmity in the note).

North Carolina.—*Blackmer v. Phillips*, 67 N. C. 340 (failure; purchase money negotiable notes in hands of *bona fide* indorsee before maturity are taken free from all equities or drawbacks except indorser's payments).

South Carolina.—*Bank v. Anderson*, 32 S. C. 538, 11 S. E. 379 (innocent indorsee and holder of purchase-price note takes free from any defense of the maker against the payee).

Vermont.—*Brockway v. Mason*, 3 Williams (Vt.) 519.

See *Kansas*.—*Keith v. Thisler* (Kan., 1889), 61 Pac. 758 (note was for horses warranted to be sound, but it was not). But see:

Pennsylvania.—*Hawley v. Hirsch*,

notes for the payment of the purchase money, one of which was negotiated in the usual course of trade and the others were not; it was held that, although the holder of the note so negotiated was not subject to an equity existing against the vendor, such equity could be enforced against the holders of the other notes and that the vendor could not be required to apportion the loss.¹¹⁵ The general rule especially applies, where the maker has been fully indemnified against loss by the payee;¹¹⁶ or where some consideration, no matter what the sum,¹¹⁷ or a valuable one at the time of the transfer is shown;¹¹⁸ or where the maker had knowledge at the time of purchase of the character and condition of the vendor's title and of the facts alleged in defense;¹¹⁹ or where the vendee had knowledge of the transfer of the note to the holder and of the facts relied on as a failure of consideration.¹²⁰ Again, if a note is written for value received, negotiable and payable without defalcation, it is no defense against a *bona fide* holder, that it was without consideration.¹²¹ Nor is it a defense to a purchase price note for land, having a lawful consideration, that the property was estimated in a depreciated or unlawful currency, or that a previous holder was willing to take an unlawful currency in payment.¹²² An assignee, however, even though a *bona fide* purchaser without notice, has been held subject to such a defense,¹²³ especially where the law governing mercantile paper has no application;¹²⁴ or where the circumstances are such that he was obligated to use such precaution and make such inquiry as would be expected from men of ordinary prudence.¹²⁵ But an assignee for value has, nevertheless, been brought within the general rule.¹²⁶ Under the Civil Code of Georgia the as-

2 Woodw. Dec. (Pa.) 158 (a purchase-price note for real estate, and misrepresentations of the vendor were allowed against the indorsee upon the ground that where a case of fraud is made out between the original parties, the assignee or indorsee is put upon proof that he is an innocent purchaser for value).

¹¹⁵ Andrews v. McCoy, 8 Ala. 920, 42 Am. Dec. 669.

¹¹⁶ Myer v. Hettinger, 94 Fed. 370 (note was given in payment of stock; defense of failure of consideration not allowed).

¹¹⁷ Howe v. Potter, 61 Barb. (N. Y.) 356.

¹¹⁸ Rees v. Sessions, 41 Ohio St. 234.

¹¹⁹ Green v. McDonald, 21 Miss. (13 S. & M.) 445. See also Myer v. Hettinger, 94 Fed. 370.

¹²⁰ Wiggins v. McGimpsey, 21 Miss. (13 S. & M.) 532.

¹²¹ Smith v. Giegrich, 36 Mo. 369 (under Rev. Code 1855, p. 320-3).

¹²² Crosby v. Tucker, 21 La. Ann. 512. See Conwell v. Pumphrey, 9 Ind. 135, 68 Am. Dec. 611 (depreciated bank bills).

¹²³ Lucas v. Kernodde, 2 Ala. 199.

¹²⁴ Linville v. Savage, 58 Mo. 248.

¹²⁵ Sims v. Bice, 67 Ill. 88.

¹²⁶ Dye v. Grover, 17 Ky. L. Rep.

signee or holder of a note given for the purchase money of land, may, in appropriate proceedings, subject the land to the payment of his debt; so that in a suit brought on a promissory note of such a character and payable to named persons or bearer, it is not a good defense that title to the notes (since the act of 1894 codified as above) has been transferred without indorsement to other persons; and an amendment to a plea seeking to set up this defense, and claiming that the alleged owners of the notes would not, in a suit against the defendant, be entitled to a lien upon the land for the purchase money of which the notes were given was properly allowed.¹²⁷ In a recent Connecticut case a defense to an action on a note was that the note was delivered to the payee on an express condition that its payment should be contingent on the acceptance of certain engines, which it had delivered to defendant, with a warranty that they should work satisfactorily—and they had proved unsatisfactory. Certain machinery was furnished and guaranteed but was found not to work satisfactorily; subsequently there was a compromise agreement whereby a certain amount of money and a note were to be given and certain new parts of the machinery were to be furnished, and the note in suit was given but with a reservation as to the machinery complying with requirements, but the note was a direct tender in payment for certain of the machines and the reservation was not put forward as a qualification of the tender but of the manner in which the note was to be held or used, the tender remained unqualified and unconditional. It was made to pay the debt and if accepted the debt would be extinguished and was in fulfillment of a contract duty, so that the defense would be unavailing even if the vendor could be considered as having, by accepting the note, assented to the proposed modification of the contract. The note was indorsed by the plaintiff before maturity to a bank and deposited with it for collection. It was protested and then returned to plaintiff. The bank received the title for the sole benefit of the plaintiff. When it returned the note protested, the plaintiff became an indorsee in possession and invested with the rights belonging to all holders of commercial paper and one of these was to cancel the indorsement which it had made, whether it exercised this right or not was immaterial. Its mere possession of the note was sufficient evidence of ownership to support a suit, and in an action by the indorsee against the maker a

685, 32 S. W. 294; *People's Bank of New Orleans v. Tredeau*, 38 La. S. E. 205. Ann. 898. ¹²⁷ *Ray v. Anderson*, 119 Ga. 926, 47

judgment was rendered for the plaintiff.¹²⁸ If one purchases a note and it is assigned to him he acquires the right to enforce the vendor's lien against the land for the balance of the purchase money by a suit in his own name. But if he purchases the note after its maturity he takes it subject to every legal or equitable defense that it was subject to in the hands of the payee.¹²⁹ Again, where the maker, when first applied to, refused to acknowledge the validity of the note, alleging that there was some difficulty about the consideration, but subsequently declared that the difficulty was removed and the note would be paid, he was held to have waived his right to set up failure of consideration against an assignee who had purchased the paper upon the faith of such assurance.¹³⁰

§ 261. Effect of judgment—Assignees.^{130*}—A judgment against a garnishee in an attachment proceeding against the payee is a good defense, to the extent of such judgment, to an action against the maker by an assignee upon such notes where the maker had no notice of the assignment at the date of the judgment.¹³¹ It is also a good reply to a defense of a breach of warranty pleaded to a suit upon a promissory note given for personal property, that a judgment has been recovered by the maker of a note for the damages sustained by such breach of warranty.¹³²

§ 262. Purchase price notes—Property useless or of no value.^{132*} It has been asserted as a rule that if the consideration utterly fails by reason of the thing for which the note is given being useless, or because the note is based upon a void consideration, such failure of consideration may be availed of as a defense in an action upon the note.¹³³

¹²⁸ *New Haven Mfg. Co. v. New Haven Pulp & Board Co.*, 76 Conn. 126, 55 Atl. 604 substantially the opinion of Baldwin, J.

¹²⁹ *Williams v. Baker* (Mo. App., 1903), 93 S. W. 339.

¹³⁰ *Land v. Lacoste*, 5 Miss. (6 How.) 471 (a purchase-money note).

^{130*} See §§ 236, 237, herein as to assignees generally.

¹³¹ *Canady v. Detrick*, 63 Ind. 485.

¹³² *Herod v. Snyder*, 48 Ind. 480.

^{132*} See §§ 210, 211, herein.

¹³³ *Arkansas*.—*Tilson v. Gatling*, 60 Ark. 114, 29 S. W. 35. (Act of April

9, 1891; *Sand & H. Dig.*, § 492, case was reversed and remanded because of error in excluding evidence which tended to show a total want of consideration, etc.).

District of Columbia.—*Hodge v. Mason*, 21 D. C. 181.

Illinois.—*Bailey v. Cromwell*, 3 Scam. (Ill.) 71; *Kinzie v. Chicago*, 2 Scam. (Ill.) 187, 33 Am. Dec. 443 (in this case a lease was null and void and a plea setting up such facts was held good).

Indiana.—*New v. Walker*, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep.

The consideration of a contract is always open to inquiry in a suit for its enforcement; and where the answer sets up that the note sued on was for the purchase price of certain saw-mill timber, and that part of the land conveyed had no timber on it at all, that as to other portions a paramount outstanding title existed in other parties, and that the defendants had never been in possession thereof, such answer is good as a plea of failure of consideration.¹³⁴ So the sale of an absolutely void chose in action will not form any consideration for a promise. If void, no legal obligation is created by it; and it is, in the view of the law, as if it did not exist. The principle is the same, notwithstanding the chose in action is salable in market for even the full value that would attach to it if valid. If the law does not recognize it as having some binding force, and will not enforce it, a note given upon the sale of it will be invalid for want of consideration.¹³⁵ Again, if upon the sale of property the vendor receives a note with an indorsement for a greater amount than the purchase money and gives his own note to the vendee for the payment of the excess at a day certain, the vendor, when sued upon his note, may show in defense to the action

40 (void as to a purchaser with notice unless he shows that his indorser was a good purchaser in good faith); *Mulliken v. Latchen*, 7 Blackf. (Ind.) 136; *Huggins v. Strong*, 4 Blackf. (Ind.) 182.

Kansas.—*First Nat. Bank v. Peek*, 8 Kan. 660.

Massachusetts.—*Aldrich v. Stockwell*, 91 Mass. (9 Allen) 45; *Bierce v. Stocking*, 77 Mass. (11 Gray) 174; *Dickinson v. Hall*, 31 Mass. (14 Pick.) 217, 25 Am. Dec. 390.

Minnesota.—*Slater v. Foster*, 62 Minn. 150, 64 N. W. 160.

Missouri.—*Harker v. Brown*, 81 Mo. 68 (consideration had wholly failed); *Fenwick v. Bowling*, 50 Mo. App. 516 (but chattel must be worthless for all purposes); *Joliffe v. Collins*, 21 Mo. 338; *Rowe v. Blanchard*, 18 Mo. 441, 86 Am. Dec. 783.

Nebraska.—*Schroeder v. Nielson*, 39 Neb. 335, 57 N. W. 993.

New Hampshire.—*Green v. Bick-*

ford, 60 N. H. 159 (defense of want of consideration or that the article purchased was worthless—a patent —cannot be made against a *bona fide* indorsee without notice or knowledge; *Dunbar v. Marden*, 13 N. H. (Patent).

New York.—*Sill v. Rood*, 15 John. (N. Y.) 230 (there was, however, the element of fraud); *Hand v. Feld*, Anth. N. P. (N. Y.) 87 (so, where the fact of worthlessness was fraudulently concealed.

Vermont.—*Smith v. Smith*, 30 Vt. 139 (consideration was for a partnership interest which was worth nothing).

Wisconsin.—*Rowe v. Blanchard*, 18 Wis. 441, 86 Am. Dec. 783.

¹³⁴ *Butler & Co. v. McCall*, 119 Ga. 503, 46 S. E. 647. See also *Wells v. Gress*, 118 Ga. 566, 45 S. E. 418; Civ. Code, § 3555, considered in § 265 herein.

¹³⁵ *Sherman v. Barnard*, 19 Barb. (N. Y.) 291.

that the maker of the indorsed note was insolvent and that a suit against him would have been unavailing and this, although no action was brought.¹³⁶ But it is also decided that it is no defense as between the original parties to a purchase price note for goods that the goods turned out to be of no value, by reason of which the consideration wholly failed without proof of an express and fraudulent warranty of the goods.¹³⁷ And it is held that a *bona fide* indorsee of a note is not subject to defense of want of consideration, although the note was given for a worthless article, such indorsee having no knowledge of the facts.¹³⁸ So a person who has bargained with one in possession for a license to dig and carry away minerals, cannot, after enjoying the privilege, refuse to pay on the ground that somebody else had a better right to the possession. In these cases the title to land is not involved.¹³⁹ And the interest of a retiring partner in the good will of a business is a good consideration for a note and it constitutes no failure of consideration that the business, which is purchased afterward, proves not so successful as before.¹⁴⁰

§ 263. Vendor or seller without title or interest—Loss of title.

The general rule permitting a defense of want or failure of considera-

¹³⁶ *Litchfield v. Allen*, 7 Ala. 779.

¹³⁷ *Delaware*.—*O'Neal v. Bacon*, 1 Houst. (Del.) 215.

Illinois.—*Myers v. Tumer*, 17 Ill. 179 (even though patent practically of no value recovery may be had on note given therefor).

Indiana.—*Kerwodle v. Hunt*, 4 Blackf. (Ind.) 57 (no defense that patent right sold was not useful and valuable).

Massachusetts.—*Gilmore v. Allen*, 118 Mass. 94 (where part of consideration valid as to several patents, note valid, even though reissue of one of the patents invalid); *Nash v. Lull*, 102 Mass. 60, 3 Am. Rep. 435 (valid patent without regard to its pecuniary value is good consideration).

New Hampshire.—*Reed v. Prentiss*, 1 N. H. 174, 8 Am. Dec. 50 (it is as between original parties, no

defense that the article for which the note was given was of no value. But had the property never passed, or had fraud been practiced or an express warranty broken, the action might be defeated).

North Carolina.—*Fair v. Shelton*, 128 N. C. 105, 38 S. E. 290 (cannot set up as total failure of consideration that patent worthless).

Vermont.—*Bryant v. Pembrer*, 45 Vt. 487 (it is no defense to an action upon a note given for the price of personal property that it was worthless at the time of the sale if the sale was without fraud or warranty on the part of the vendor).

¹³⁸ *Green v. Bickford*, 60 N. H. 159.

¹³⁹ *Rhoades v. Patrick*, 27 Pa. St. 323.

¹⁴⁰ *Smock v. Pierson*, 68 Ind. 405, 34 Am. Rep. 269.

tion has also been applied, as between original parties, where the vendor or seller had no title and could convey none.¹⁴¹

¹⁴¹ *California*.—Fisher v. Salmon, 1 Cal. 413, 54 Am. Dec. 297 (vendor had no title or color of title or possession).

Illinois.—Davis v. McVickers, 11 Ill. (1 Peck) 327 (there is a failure of consideration where vendor has no title and can acquire none); French v. Carr, 7 Ill. (2 Gil.) 664 (sale was made after bankruptcy and after title was gone and the promise was therefore wholly without consideration and precluded recovery on note).

Indiana.—Kernodle v. Hunt, 4 Blackf. (Ind.) 57 (sale of patent right of which payee had no ownership or authority to sell).

Kansas.—Vickroy v. Pratt, 7 Kan. 238 (note for title to Indian lands and vendor did not own or possess except by virtue of an unlawful claim).

Kentucky.—Crawford v. Beard, 4 J. J. Marsh. (Ky.) 187 (a sale of personal property).

Massachusetts.—Rock v. Nichols, 85 Mass. (3 Allen) 343 (shares sold were not owned by payee when he undertook to sell them).

Minnesota.—Durment v. Tuttle, 50 Minn. 426, 52 N. W. 909 (title to part of land failed, a case of partial failure of consideration).

Missouri.—Hacker v. Brown, 81 Mo. 68 (consideration wholly failed as represented and taken at time of exchange); Wellman v. Dismukes, 42 Mo. 101 (where contract remains executory purchaser may demand clear title and vendor to recover must show an ability to comply with stipulations of covenants).

Texas.—Garrison v. King, 35 Tex. 183 (notes were for house and lot

and vendor had no title and acquired none and made no deed. Held a good defense); Roehl v. Pleasants, 31 Tex. 45, 98 Am. Dec. 514 (administrator sold land without good title; plea of failure of consideration sustained); Richardson v. McFadden, 13 Tex. 278 (that title to personal property not in seller a good defense).

But see *Iowa*.—Findley v. Richardson, 46 Iowa 103 (holding that a purchaser having acquired all the interest of the owner in the land he cannot defend on the ground of failure of consideration, the land being purchased at a guardian's sale).

Minnesota.—Lough v. Bragg, 18 Minn. 121 (Gil. 106). Holding that the vendor's want of title is not a ground of want of failure of consideration of a purchase price note given for the agreed price.

Texas.—Ward v. Williams, 45 Tex. 617 (a case of purchase at administrator's sale the rule *caveat emptor* applying).

Examine further the following cases:

Alabama.—Stark v. Anderson, 30 Ala. 438 (note for land purchased at administrator's sale held to be without consideration).

Connecticut.—Clark v. Sigourney, 17 Conn. 511.

Illinois.—Linton v. Porter, 31 Ill. 107.

Indiana.—Mullen v. Hawkins, 141 Ind. 363, 40 N. E. 797 (failure of title no defense where there are no covenants of warranty).

Louisiana.—Byrd v. Craig, 1 Mart. N. S. (La.) 625 (failure of consideration and failure to make title).

§ 264. **Purchase price notes—Land—Warranty.**—A breach of warranty of title may be set up as a defense to a purchase price note for land.¹⁴² So it is decided in a federal case that a loss of title under a contract of bargain and sale may constitute a partial failure of consideration.¹⁴³ And in North Dakota a total or partial failure of consideration or want of consideration may be shown as a complete or partial defense in an action on a note given for the purchase price of land sold with covenants where the title has failed or partially failed; and in case of a breach of covenant against incumbrances the purchaser is entitled to a credit on a note given for the purchase price of real estate of the amount paid by him to protect his title against such incumbrance by paying such incumbrance.¹⁴⁴ For a long time a rule prevailed in Maine to the effect that a partial failure of title constituted no defense to a suit given on a note given for real estate. This doctrine became so firmly established and was reiterated in so many decisions that the state legislature in 1897 deemed it wise and expedient to abrogate it by legislation which appears in Rev. Stat. C. 84, § 40, as follows: "In any proceeding in law or in equity in which the amount due on a promissory note given for the price of land conveyed, is the question, and a total failure of consideration would be a good defense, a partial failure of consideration may be shown in reduction of damages." But this rule has never prevailed in respect to a note given for another consideration. The rule then in that state is this: whenever a promissory note is given for two or more independent con-

Mississippi.—Billingsley v. Niblett, 56 Miss. 537 (trust deed and note; no defense that title worthless).

Missouri.—Hudson v. Busby, 48 Mo. 35.

Montana.—First Nat. Bk. v. How, 1 Mont. 604 (a failure of consideration does not exist where the maker delivered over the property without legal necessity to a claimant).

New Hampshire.—Perkins v. Bumford, 3 N. H. 522.

Ohio.—Chaffee v. Garrett, 6 Ham. (Ohio) 421 (where the consideration of a note is a lease of lands within an Indian reservation, and

the lessor makes title under an Indian, plaintiff cannot recover).

Texas.—Earnest v. Moline Plow Co., 8 Tex. Civ. App. 159, 27 S. W. 734.

As to coverture affecting the consideration in action by husband of deceased wife against maker, see Campbell v. Moulton, 30 Vt. 667 (in this case the legal title was not passed at the time but subsequently.

¹⁴² Williams v. Baker (Mo. App. 1903), 73 S. W. 339.

¹⁴³ American National Bank v. Watkins (U. S. C. C. A., Wis.) 119 Fed. 545.

¹⁴⁴ Dahle v. Starke (N. D. 1903), 96 N. W. 353.

siderations, and there is a failure of consideration as to one, as where the title to the articles sold is not in the vendor at the time of the sale, or where there is a breach of warranty or a misrepresentation as to quality, for the purpose of avoiding circuity of action, the law will allow the defendant, in an action between the original parties, or between others standing in no better position, to show such partial failure of consideration in reduction of damages.¹⁴⁵ Again, under a Missouri decision, a failure or partial failure of consideration for the purchase price of land on warranty may be interposed to defeat a suit to enforce a vendor's lien for the balance of the purchase price evidenced by a note.¹⁴⁶ But an outstanding title in a stranger is held to be no defense where the purchaser of land is in possession under a deed with covenants of warranty.¹⁴⁷ Nor is it any defense that land was not free from but was subject to incumbrances contrary to covenant.¹⁴⁸

§ 265. **Purchase price notes—Personal property—Warranty.**—The plea of failure of consideration of the purchase price for personal property sold on a warranty is available as a defense in a suit to recover such price.¹⁴⁹ And a breach of warranty for goods sold constitutes a good defense to an action upon it by the payee of a promissory note for the price.¹⁵⁰ So where the plea of total failure of considera-

¹⁴⁵ *Hathorn v. Wheelwright*, 99 Me. 351, 59 Atl. 517, per Wiswell, C. J.

¹⁴⁶ *Williams v. Baker*, (Mo. App. 1903), 73 S. W. 339.

¹⁴⁷ *Winstead v. Davis*, 40 Miss. 785.

¹⁴⁸ *Lattin v. Vail*, 17 Wend. (N. Y.) 188.

¹⁴⁹ *Williams v. Baker* (Mo. App. 1903), 73 S. W. 339 ("is the well-settled law of this state," per Bland, P. J.).

¹⁵⁰ *Aldrich v. Stockwell*, 91 Mass. (9 Allen) 45; *Sturges v. Miller*, 80 Ill. 241 (failure of consideration. In this case the notes were given for the purchase of a propeller with the title warranted and the vessel was libeled and sold for old debts which were liens upon it at the time of sale, and it was held that the consideration had wholly failed, the vessel having been wholly lost to

defendant); *Hoopes v. Northern Nat. Bank*, 102 Fed. 448. (Failure of consideration; a note in part payment of machinery and failure of guaranty in respect thereto. The action was against the indorser on his irregular indorsement, so that the plaintiff was not the *bona fide* holder but sued thereon for the benefit of the payee and it was held that the case was to be treated as if the suit was by the payee, the nominal plaintiff standing upon the rights of the payee and the defendant being an original accommodation indorser and the case was held, therefore, to be subject to the rule that the consideration of every promissory note is open to inquiry between any of the immediate parties to the note.)

tion in that the article is worthless is available as a defense to a purchase price note given for the property, in a suit for a breach of warranty of personal property it is not error for the court to charge under the code to the effect that in ordinary sales there is an implied warranty that the article sold is merchantable and suitable for the use intended.¹⁵¹ In Kentucky, upon an executed sale, the purchaser of personal property has a right to retain it and make defense by way of recoupment, and if a warranty be proven, credit should be given on the purchase price note for the difference between the agreed price and the actual value of the property at the time it was received. If the claim has been assigned, the assignee, where the statute so provides, is subject to the same defenses as might have been used against the original payee.¹⁵² Again, where a defense was set up that a note was given in part payment of a machine purchased upon a contract of warranty which had wholly failed a judgment was rendered for defendant.¹⁵³ So one of two partners, the other having defaulted, may plead the defense of breach of contract of warranty.¹⁵⁴ And where goods were warranted but were deficient in quality and the defects were not discoverable until after delivery and use, it was held that plaintiff acquired title after maturity with full notice, and the defense was held good.¹⁵⁵ But the maker of a promissory note executed and delivered in renewal of one previously given for the purchase of personal property, cannot defeat a recovery thereon because of alleged failure of consideration based on the ground that the property was defective, when it appears that such maker had full and complete knowledge of the defects in the property at the time of signing the note.¹⁵⁶ If, however, a renewal note is given in consideration of a promise by a seller of a warranted article to repair defects, and such promise is not performed, the breach of such promise and the damage sustained in consequence of said breach, may properly be alleged in an action against the maker on the note.¹⁵⁷

¹⁵¹ *Wells v. Gress*, 118 Ga. 566, 45 S. E. 418; Civ. Code, § 3555. See § 262 herein.

¹⁵² *Harrigan v. Advance Thresher Co.*, 26 Ky. L. Rep. 317, 81 S. W. 261, Ky. Rev. Stat. 1903, § 474.

¹⁵³ *Wardner, Bushnell & Glessner Co. v. Myers* (Neb. 1903), 96 N. W. 992.

¹⁵⁴ *Braley v. Goff*, 40 Iowa 76.

¹⁵⁵ *Hays v. Kingston* (Pa. 1899), 16 Atl. 745, 23 Wkly. Not. Cas. 277.

¹⁵⁶ *Atlanta R. Co. v. American Car Co.*, 100 Ga. 254, 28 S. E. 40.

¹⁵⁷ *Atlanta City Street Ry. Co. v. American Car Co.*, 103 Ga. 254, 29 S. E. 925; distinguishing *Electric Co. v. Blount*, 96 Ga. 272, 23 S. E. 306. See also *Blount v. Edison Co.*, 106 Ga. 197, 32 S. E. 113.

§ 266. **Where property for which note is given is of some value—No failure of consideration.**—In the absence of fraud a party will not be allowed to interpose as a defense, to an action for the purchase price, the fact that the property was not pecuniarily worth what he supposed it to be. And when the consideration of a promissory note consists of the payee's agreement to transfer to the maker certain stock in a corporation, the agreement is no less valid because the value of the stock becomes depreciated by subsequent events. Such a depreciation no more gives the defendant a right to avoid his obligation to pay the stipulated price than an enhanced value would avail the plaintiff as an excuse for the non-fulfillment of his agreement.¹⁵⁸ Again, the fact that the property for which the note was given is not as valuable as the purchaser hoped or believed and he received what he contracted for and there is no fraud on the vendor's part and the representations are as to the value of property to ascertain which the usual methods of business men would have been sufficient and the representations were, if relied on, at the purchaser's risk, there is no want or failure of consideration.¹⁵⁹ So where a note is given as a part of the entire consideration for the purchase by one partner of his co-partner's interest in the partnership, the contract is entire and it not being disputed that the stock and accounts mentioned in the contract were valuable, there exists a good and valuable consideration for the note which precludes sustaining a defense of failure of consideration.¹⁶⁰ If a note is admitted to have been given for certain goods and it is not denied that such goods are of value, the fact that they are not such goods as to meet the demands of the defendant's trade as represented by plaintiff's agent, such representations being nothing more than the expression of such agent's opinion, does not constitute a failure of consideration.¹⁶¹ It is also decided that if the article, for the price of which the note was given, is not wholly worthless the payee may recover the full amount thereof.¹⁶² So where a note is given for land it is held that the defect of title must be entire so that nothing valuable passes by the conveyance. If anything valuable does pass it becomes a case for unliquidated damages, the remedy for which is by action for covenant broken.¹⁶³ Again, defendants entered

¹⁵⁸ *Furber v. Fogler*, 97 Me. 585, 55 Atl. 514.

¹⁵⁹ *Harness v. Home*, 20 Ind. App. 134, 50 N. E. 395.

¹⁶⁰ *Taylor v. Ford* 131 Cal. 440, 63 Pac. 770.

¹⁶¹ *Shiretzki v. Kessler* (Ala. 1904), 37 So. 422.

¹⁶² *Clark v. Peabody*, 9 Shep. (Me.) 500.

¹⁶³ *Jenness v. Parker*, 11 Shep. (Me.) 289.

into an agreement to pay a stated price for each share of stock in a specified company then being formed, and a note was given pursuant to the terms of the agreement; that is, the note was accessory to said written agreement. The company was never formed and no shares of stock in such company were ever issued and it was decided that the note never became a binding obligation between the makers and payee, and one not an innocent purchaser of such notes was bound by the facts and could not recover.¹⁶⁴ But where in a suit by the payee of a promissory note, against the makers, the defendants pleaded that the note was given in consideration for part of the purchase money of an insurance-agency business, sold by him to them, and the consideration of the contract had failed to an extent equal to the amount of the note, because the plaintiff "represented to defendants that he had made certain profits out of said business for the three years previous to said purchase, and said purchase was based upon the amounts alleged to have been made, but said representations as defendants have since discovered were untrue" a demurrer to the plea upon the ground that it "failed to set forth how much profits plaintiff represented he had made * * * or how much damage had resulted to defendants," by reason of the alleged misrepresentations of the plaintiff, should be sustained.¹⁶⁵

§ 267. Rights of holder where prior indorsee held note as collateral security and for continuing credit—Lien.—One who is an indorsee and who is holder of a note and the owner of the indebtedness which it was indorsed to secure, has all the rights of a prior indorsee or party through whom he holds, whether the holder is in due course or not and where such prior indorsee held the note as collateral security for such indebtedness to "it" as the payee might incur upon a continuing credit extended to him for property sold and to be sold it became a lien holder and as such was both originally and at the maturity of the note a holder for value to the extent of the lien and to that extent a holder in due course.¹⁶⁶

§ 268. Purchase price notes—Instances in general of want or failure of consideration.—A person who has given his promissory note

¹⁶⁴ *Howe v. Raymond*, 74 Conn. 68, 49 Atl. 854.

¹⁶⁶ *Mersick v. Alderman*, 77 Conn. 634, 635, 60 Atl. 109, per Prentice, J.

¹⁶⁵ *McCrary v. Pritchard*, 119 Ga. 876, 47 S. E. 341.

for the purchase price of personal property cannot avoid payment because of the alleged failure of consideration by reason of the fact that such property has been taken on a judgment in replevin where it appears that the purchaser of such property has permitted judgment to be entered by default and it does not appear that the seller had knowledge of the suit or notice to defend.¹⁶⁷ If one party to an exchange of lands refuses to deliver the deed unless notes are given for a claimed equivalent in value of an excess in quantity over that understood to be conveyed, and the grantee, being obliged to have the land to fulfill a contract of his own, executes the notes under protest and takes the deed; in an action on the note evidence of such facts is admissible to prove or as tending to show want of consideration.¹⁶⁸ A failure of consideration also exists as to a note given for the conveyance of title to land where it is to be reconveyed if the maker fails to perform certain acts for the payee and they are not performed.¹⁶⁹ Again, where the consideration of a note was the conveyance of land which was fully tendered at the date of the deed, and the note was secured by a trust deed, a subsequent sale of the land under the trust deed does not constitute a failure of consideration, as there could be no failure otherwise than for some defect or deficiency in the consideration at the time of its rendition and such effect is not given by a sale subsequently made in accordance with an agreement between the parties.¹⁷⁰

§ 269. Accommodation paper—Consideration as between original or immediate parties.—As between the original or immediate parties the want of consideration of an accommodation note may be shown;¹⁷¹ that is, as between such parties the maker may set up as a defense that he signed the note for accommodation merely;¹⁷² or merely as surety for accommodation and upon no other consideration;¹⁷³ or that the notes were for accommodation merely and that there was no consideration, and that the notes were given for the purpose of increasing the apparent assets of a bank;¹⁷⁴ or that the indorsement was for the ac-

¹⁶⁷ *Moul v. Pfeiffer*, 23 Pa. Super. Ct. 280.

¹⁶⁸ *Holland v. Hoyt*, 14 Mich. 238.

¹⁶⁹ *Holmes v. Farris*, 97 Mo. App. 305, 71 S. W. 116.

¹⁷⁰ *Thurgood v. Spring* (Cal. 1903), 73 Pac. 456.

¹⁷¹ *Batterman v. Butcher*, 95 App. Div. 213, 88 N. Y. Supp. 685.

¹⁷² *Tuggle v. Adams*, 3 A. K. Marsh. (Ky.) 429.

¹⁷³ *Day v. Billingsly*, 66 Ky. (3 Bush) 157; holding that there was no binding consideration in this case.

¹⁷⁴ *Chicago Title and Trust Co. v. Brady* (Mo., 1901), 65 S. W. 303. Defense held good as against receiver.

accommodation of a bank and defendant received no benefit whatever from the note.¹⁷⁵

§ 270. **Bona fide holders—Assignees—Notice or knowledge.**—A benefit accruing to the person accommodated is a sufficient consideration to sustain the liability of an accommodation maker or indorser.¹⁷⁶ As a rule, therefore, it constitutes no defense, in an action by a *bona fide* holder who took the note before maturity and for value in due course, to show the accommodation character of a note or indorsement, or that the defendants were accommodation makers, even though said note was received by plaintiff with a knowledge of the character of the paper.¹⁷⁷ So where the payee indorses a non-negotiable note for

¹⁷⁵ *Higgins v. Ridgway*, 153 N. Y. 130, 132, 47 N. E. 32, aff'g 90 Hun 398, 35 N. Y. Supp. 944.

¹⁷⁶ *First National Bank of St. Cloud v. Lang* (Minn. 1905), 102 N. W. 700.

¹⁷⁷ *Alabama*.—*Rudolph v. Brewer*, 96 Ala. 189, 11 South. 314 (one signing a note after delivery to enable the payee to negotiate it cannot set up in a suit on the note that there was no consideration for his signature); *Marks v. First National Bank*, 79 Ala. 550, 58 Am. Rep. 620 (an accommodation indorser of a note is liable to the holder, who has taken the note for value *bona fide* before maturity, even though the holder knew at the time that the indorsement was for accommodation merely); *Connerly v. Planters & Merchants' Ins. Co.*, 66 Ala. 432 (holding also that maker cannot show that he could have protected himself from loss if he had been notified that notes were unpaid, the payee being solvent at their maturity).

Colorado.—*Pendleton v. Smissart*, 1 Colo. App. 508, 29 Pac. 521 (the defendant testified that he delivered the note as accommodation paper for the purpose of saving the

credit of the payee under a promise that it should not be used in any way except to show it, and this was held no defense).

Delaware.—*Maher v. Moore* (Del. 1898), 42 Atl. 721 (the fact that a note was made for the payee's accommodation and on his representation that defendant would never be held liable upon it does not relieve the maker from liability thereon to a *bona fide* indorsee for value before maturity).

District of Columbia.—*Willard v. Crook*, 21 App. D. C. 237; Code D. C., § 1333. (The defense in an action by an indorsee against the maker that he was an accommodation maker within the knowledge of the indorsee and holder is in direct opposition to the Negotiable Securities Act of the District of Columbia and is therefore not available.

Georgia.—*Jones v. Bank of New York*, 90 Ga. 334, 17 S. E. 88.

Illinois.—*Hodges v. Nash*, 43 Ill. App. 638; *Dawson v. Tolman*, 37 Ill. App. 134; *Waite v. Kalurisky*, 22 Ill. App. 382; *Miller v. Larned*, 103 Ill. 562, 570, 571 (it is no defense as against the maker in an action by a holder into whose hands an ac-

accommodation note may have come in the usual course of business for a valuable consideration that said holder may have taken the notes with knowledge that it was accommodation paper, per Scott, J.); Harlow v. Boswell, 5 Peck (Ill.) 56; Hall v. Bank, 13 Ill. 234, 24 N. E. 546.

Iowa.—Bankers Iowa State Bank v. Mason Hand Lathe Co. (Iowa 1902), 90 N. W. 612; Winters v. Home Ins. Co., 30 Iowa 172.

Maryland.—Maitland v. Citizens' National Bank of Baltimore, 40 Md. 540, 562, 17 Am. Rep. 620.

Massachusetts.—Kenworthy v. Sawyer, 125 Mass. 28; Davis v. Randall, 115 Mass. 547 (no defense that draft was accepted for accommodation); Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322.

Michigan.—Van Etten v. Hemann, 35 Mich. 513 (cannot defend against new notes in *bona fide* holder's hands. The factor of knowledge also entered into the decision); Thatcher v. West River Nat. Bank, 19 Mich. 196 (holding also that agreement between maker and payee no defense).

Minnesota.—First Nat. Bank of St. Cloud v. Lang (Minn. 1905), 102 N. W. 700 (that a note was made solely for the accommodation of a third person, for no valid consideration passing to the maker, is no defense in an action by the holder thereof with notice of those facts at the time of delivery, who has in the regular course of business and for value taken it before maturity); Tourtelot v. Bushnell, 66 Minn. 1, 68 N. W. 104.

Mississippi.—Hawkins v. Neal, 60 Miss. 256 (no difference in this respect between a promissory note and bill of exchange).

Missouri.—Edwards v. Thomas, 66 Mo. 468 (a case of paper indorsed by an unauthorized agent); Chaffe v. Memphis, C. & N. W. R. Co., 64 Mo. 193; Macy v. Kendall, 33 Mo. 164.

New Jersey.—National Bank of Republic v. Young, 41 N. J. Eq. 531, 7 Atl. 488 (unless paper was taken with actual knowledge, mere notice of facts to put holder on inquiry not sufficient); Duncan v. Gilbert, 29 N. J. L. 521.

New York.—National Bank of North America v. White, 19 N. Y. App. Div. 390, 46 N. Y. Supp. 555; Arnson v. Abrahamson, 30 N. Y. St. R. 657, 16 Daly 72, 9 N. Y. Supp. 514; Moynihan v. McKeon, 74 N. Y. St. R. 316, 16 Misc. 343, 38 N. Y. Supp. 61; First National Bank of Portland v. Schuyler, 39 N. Y. Super. Ct. (7 J. & S.) 440; Lincoln Nat. Bank v. Butler, 74 N. Y. St. R. 116, 16 Misc. 566, 38 N. Y. Supp. 776. See Grant & Cary v. Ellicott, 7 Wend. (N. Y.) 227 (there being no fraud); Brown v. Mott, 7 Johns (N. Y.) 361 (there being no fraud) Mechanics' Banking Assoc. v. New York & Saugerties White Lead Co., 35 N. Y. 505; Holland Trust Co. v. Waddell, 75 Hun (N. Y.) 104, 26 N. Y. Supp. 980 (certificate of deposit); Pierson v. Boyd, 2 Duer (N. Y.) 33. (Suit was against maker and indorser); Pettigrew v. Chave, 2 Hilt. (N. Y.) 546 (rule applied where note given without restriction as to its use); Bridgeport City Bank v. Empire Stone Dressing Co., 19 How. Prac. (N. Y.) 51. (Rule applied to holder without notice of defenses).

Ohio.—Pitts v. Foglesong, 37 Ohio St. 676 (rule that accommodation indorser liable applied where note without restriction, and not induced by fraud).

Oregon.—White v. Savage (Or. 1906), 87 Pac. 1040.

Pennsylvania.—Philer v. Patterson, 168 Pa. St. 46, 32 Atl. 26, 36 Wkly. Notes Cas. 47 Am. St. Rep. 896; Newbold v. Boraef, 155 Pa. St. 227, 26 Atl. 305. (Where no consideration has passed from the maker to an accommodation indorser, it will not prevent a recovery by one who discounts the same before maturity); Garden City Nat. Bank v. Fitler, 155 Pa. St. 210, 26 Atl. 372, 35 Am. St. Rep. 874. (There was no allegation that plaintiff was not a *bona fide* holder); Ashton v. Sproule, 35 Pa. St. 492. Failure of consideration intended to be given an accommodation indorser for his becoming surety will not release him if the holder is not at fault); Halloway v. Quin, 18 Wkly. Notes Cas. (Pa.) 284; Laib v. Lanagan, 2 Leg. Chron. (Pa.) 386 (following Moore v. Baird, 30 Pa. St. 138).

North Carolina.—Norfolk Nat. Bank v. Griffin, 107 N. C. 173, 11 S. E. 1049, 22 Am. St. Rep. 868.

Federal.—United States v. Metropolitan Bank, 15 Pet. (U. S.) 377, 10 L. ed. 774; Earle v. Enos, 130 Fed. 467. (Even though the holder who discounts an accommodation note knew its character at the time such fact does not permit the maker to avail himself of the defense of want of consideration); Perry v. Crammond, 1 Wash. (C. C.) 100, Fed. Cas. No. 11005 (accommodation bill).

English.—Collins v. Martin, 1 Bos. & P. 651 (bills were indorsed in blank. Held, that trover could not be maintained for the bills); Mallett v. Thompson, 5 Esp. 178; Smith v. Knox, 3 Esp. 46.

As to knowledge or notice see also the following additional cases:

Illinois.—Diversy v. Moor, 22 Ill. 331, 74 Am. St. Rep. 157.

Indiana.—Reed v. Trentman, 53 Ind. 438.

Maryland.—Schwartz v. Wilmer, 90 Md. 136, 44 Atl. 1059; Yates v. Donaldson, 5 Md. 389, 61 Am. Dec. 283.

Massachusetts.—Lincoln v. Stevens, 7 Metc. (Mass.) 529.

New York.—Brown v. Mott, 7 Johns. (N. Y.) 361; Beall v. General Electric Co., 16 Misc. Rep. 611, 38 N. Y. Supp. 527.

Ohio.—Second Nat. Bank v. Morrison, 3 Ohio Dec. 534.

Pennsylvania.—Stephens v. Monongahela Nat. Bank, 7 Wkly. Notes (Pa.) Cas. 491. (Liable, although holder have notice of want of consideration); Bonsall v. Bauer, 2 Wkly. Notes (Pa.) Cas. 298.

Federal.—Perry v. Crammond, 1 Wash. (C. C.) 100; Fed. Cas. No. 11005; Israel v. Gale, 77 Fed. Rep. 532; Armstrong v. Scott, 36 Fed. 63.

But see: *Delaware.*—Nailor v. Daniel, 5 Houst. (Del.) 455.

Missouri.—Wagner v. Diedrich, 50 Mo. 484.

New York.—Prall v. Hinchman, 6 Duer (N. Y.) 351; Holbrook v. Mix, 1 E. D. Smith (N. Y.) 154; Small v. Smith, 1 Denio (N. Y.) 583; Powell v. Waters, 8 Cow. (N. Y.) 669, aff'g 17 Johns. N. Y. 176.

Ohio.—Stone v. Vance, 6 Ohio 246; Moulton v. Posten, 52 Wis. 169.

The making of an accommodation note is a loan of the maker's credit with no restriction as to its use, and in an action thereon by an indorsee for value before maturity, want of consideration, even though known to the indorsee on receiving the note, constitutes no defense. First National Bank v. Dick, 22 Pa. Super. Ct. Rep. 445; Penn. Safe De-

the maker's accommodation the assignor has been held bound as against a *bona fide* holder for value.¹⁷⁸ And as against a *bona fide* holder of an accommodation check the defense that no consideration passed to the drawer is not open to the latter.¹⁷⁹ Misapplication of the note may, however, affect the extent of the recovery.¹⁸⁰

§ 271. **Same subject—Particular decisions.**—The rule is thus stated in an Illinois case: Where a bill or note is given with no restriction as to the mode or time of using it by the party accommodated and the same has been transferred in good faith in the usual course of business, the holder for a valuable consideration is entitled to recover the full amount, although he had full knowledge that it was accommodation paper.¹⁸¹ And in another case in that state it is decided that one who takes negotiable paper before maturity and for value is not affected by the fact that it is accommodation paper, even if he knew such fact, unless notice is brought to him of restrictions placed upon its use by the maker.¹⁸² So in a Missouri case it is held that negotiable notes or indorsements in the hands of indorsees, though made simply for the accommodation of original debtors, may be enforced against such makers or indorsers, although procured by misrepresentations made by the debtor to such makers or indorsers, if the indorsees or holders were not privy to the misrepresentation or fraud or unfulfilled promise of the debtor.¹⁸³ And under a Georgia decision it is determined that a note payable to a named person or order and indorsed by a payee, though under seal, and therefore not negotiable according to the strict commercial law prevailing in Alabama, if made and indorsed for the accommodation of a person not a party thereto and by him put in cir-

posit Co. v. Kennedy, 175 Pa. 164, 34 Atl. 660, per the court.

¹⁷⁸ Macy v. Kendall, 33 Mo. 164. Examine Munson v. Cheesborough, 6 Blackf. (Ind.) 17. (Plea of notice held good.)

¹⁷⁹ Metropolitan Printing Co. v. Springer, 90 N. Y. Supp. 376; Neg. Inst. Law 1897, p. 728, c. 612, § 55.

¹⁸⁰ Williams v. Smith, 2 Hill (N. Y.) 301. See Weill v. Trosclari, 42 La. Ann. 171, 7 So. 232. A *bona fide* holder of accommodation paper without notice or knowledge of defenses or equities is entitled to pro-

tection. Held, however, that the defense that the note was executed as accommodation for the payee and suing holder must be clearly proved. Examine Bank v. Rider, 58 N. H. 512. Holding that an indorsee is bound by knowledge of such facts as should put him on inquiry.

¹⁸¹ Waite v. Kalurisky, 22 Ill. App. 382, citing Miller v. Larned, 103 Ill. 562.

¹⁸² Holmes v. Bemis, 25 Ill. App. 232, affd. 124 Ill. 453, 17 N. E. 42.

¹⁸³ Whittemore v. Obear, 58 Mo. 280.

ulation for value, is not without consideration between the holder, who paid value, and the accommodation maker or indorser. The consideration which the parties contemplated when the note was executed and indorsed was realized and the plea of want of consideration will not prevail in such case.¹⁸⁴ It is also decided in Massachusetts that the cases which hold that knowledge of a consideration by one putting his name on a note for the accommodation of another is necessary to bind him, are where a note had previously taken effect as a contract, and a new and independent consideration is required for the new contract.¹⁸⁵ Where a note indorsed by the cashier of defendant corporation was discounted by plaintiff, who was informed at the time by the cashier that the money was not for the defendant, but for another corporation, it was held that as there was no evidence that the cashier had anything to indorse for accommodation, and the defendant was, therefore, not liable, in the absence of proof of authority or of proof that defendant could bind itself by such an indorsement.¹⁸⁶ A note of a private corporation in the hands of a *bona fide* holder who took the same before maturity without knowledge that the maker did not receive full consideration, can be enforced provided the corporation had power to make notes.¹⁸⁷ Again, if two parties exchange accommodation notes with the understanding that each shall take care of the notes received and hold the other harmless for notes discounted by him, one of them who has taken up the notes received is not a *bona fide* creditor of the other.¹⁸⁸ If a firm note is given generally for accommodation of another a partner who did not assent to the loan is not liable unless the holder shows that he paid value.¹⁸⁹ In case the holder of a note had notice at the time of its transfer to him that it was an accommodation note subscribed by the maker for the exclusive benefit of the payee, the maker must be regarded as a surety of the latter.¹⁹⁰ If an action is brought upon a note executed by two persons as makers it cannot be set up in defense by one of them that the payee knew him to be an accommodation maker, and that such payee obligated himself

¹⁸⁴ Farrar v. New York Bank, 90 Ga. 331, 17 S. E. 87; Jones v. New York Bank, 90 Ga. 334, 17 S. E. 87, 88.

¹⁸⁵ Robertson v. Rowell, 158 Mass. 94, 32 N. E. 898, 35 Am. St. Rep. 466.

¹⁸⁶ Fox v. Rural Home Co., 90 Hun 365, 35 N. Y. Supp. 896, aff'd 157 N. Y. 684.

¹⁸⁷ Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 332.

¹⁸⁸ Wolverton v. George H. Taylor & Co., 157 Ill. 485, 42 N. E. 49.

¹⁸⁹ Tobias v. Sadler, 5 N. Y. Leg. Obs. 100.

¹⁹⁰ Adle v. Metoyer, 1 La. Ann. 254.

with the other maker to give him time.¹⁹¹ An accommodation maker of non-negotiable paper may set up want of consideration as a defense against a *bona fide* holder who purchased it for value before maturity, even though the note was given to the payee to obtain money thereon.¹⁹² In Pennsylvania it is held that such maker can defend only on ground of actual payment.¹⁹³ Where a note made by one who was an infant at the time of its execution is indorsed to a third party for the accommodation of the maker to enable him to purchase a business, formerly conducted by him and his mother as co-partners, which she, without his consent, had sold to the payee of the note, the transfer thus acquired from the mother of her interest in such business (as it might ultimately be determined on an accounting between the partners) is a sufficient consideration to sustain the obligation of the accommodation indorser of the note.¹⁹⁴ Again, a defense of failure of consideration personal to the maker of a note cannot be availed of by an accommodation indorser.¹⁹⁵ If an indorser signs, for the accommodation of the maker, before the payee indorses the note, such indorser is liable to the first holder of the note after it takes effect and to all subsequent parties, and in such case defenses as to the legality or consideration are as open as they would be in a suit against the maker.¹⁹⁶

§ 272. Accommodation acceptor—General rules and illustrations.

If the drawee of a bill of exchange pays a consideration to the drawer its acceptance by another for the drawer's accommodation is supported thereby.¹⁹⁷ While the drawer and acceptor are immediate parties to the consideration, yet the payee holds a different relation; he is a stranger to the transaction between the drawer and acceptor, and is therefore in a legal sense a remote party. The payee or holder gives value to the drawer, and if he is ignorant of the equities between the drawer and acceptor, he is in the position of a *bona fide* indorsee.¹⁹⁸ An accommodation acceptor occupies precisely the same position as one who accepts with funds, as to all persons who receive the bill for

¹⁹¹ *Anthony v. Fritts*, 45 N. J. L. 1. 628, 65 N. E. 1116, aff'g 60 N. Y. App.

¹⁹² *Wetter v. Kiley*, 95 Pa. St. 461. Div. 201, 69 N. Y. Supp. 1099.

¹⁹³ *Philler v. Patterson*, 168 Pa. St.

468, 32 Atl. 26, 36 Wkly. Notes Cas. 416, 47 Am. St. Rep. 896.

¹⁹⁴ *Waterman v. Waterman*, 42 Misc. 195, 85 N. Y. Supp. 377.

¹⁹⁵ *Fleitman v. Ashley*, 172 N. Y.

¹⁹⁶ *Leonard v. Draper*, 187 Mass. 536, 73 N. E. 644; Rev. Laws, c. 73, § 81.

¹⁹⁷ *Meggett v. Baum*, 57 Miss. 22.

¹⁹⁸ *Lafin & Rand Powder Co. v. Simsheimer*, 48 Md. 411, 30 Am. Rep. 472.

value, whether they knew that it was an accommodation acceptance or not.¹⁹⁹ If the action is against the acceptor, he cannot defend against the payee on the ground that the acceptance was for accommodation merely, without consideration, and that the payee had knowledge thereof, and this rule also applies to an indorsee,²⁰⁰ for the acceptance of a drawee of a bill binds him, though the payee knew the acceptor had no funds of the drawer.²⁰¹ Knowledge at the time of indorsement that the acceptance was for accommodation will not preclude a recovery against an accommodation acceptor by an accommodation indorser of a bill who becomes a holder for value by meeting the obligation of the debt when legally charged therewith.²⁰² Thus, in an action

¹⁹⁹ *Cronise v. Kellogg*, 20 Ill. 11, 14, per Caton, C. J.

²⁰⁰ *Illinois*.—*Diversy v. Moore*, 22 Ill. 331, 74 Am. Dec. 157. (Holding also that acceptor for accommodation of drawer is principal debtor and the drawer a surety merely); *Diversy v. Loeb*, 22 Ill. 393. (Holds that accommodation acceptor cannot set up fact that he never received any consideration, even though the person receiving the instrument knew that he was accommodation acceptor, provided such holder gave a *bona fide* consideration for the paper); *Cronise v. Kellogg*, 20 Ill. 11.

Indiana.—*Spurgin v. Pheeters*, 42 Ind. 527.

Kentucky.—*Anderson v. Anderson*, 4 Dana (Ky.) 352. (No defense that acceptance was for accommodation since written acceptance implies a consideration.)

Massachusetts.—*Arpin v. Owens*, 140 Mass. 144, 3 N. E. 25.

Minnesota.—*Vanstrum v. Liljengren*, 37 Minn. 191, 33 N. W. 555.

Mississippi.—*Meggett v. Baum*, 57 Miss. 22; *Hamilton v. Catchings*, 58 Miss. 92.

New Jersey.—*Meyer v. Beardsley*, 30 N. J. Law (1 Vroom.) 236.

New York.—*First Nat. Bank v.*

Schuyler, 39 N. Y. Super. Ct. (7 Jones & S.) 440; *Iselin v. Chemical Nat. Bank*, 16 Misc. Rep. 437, 40 N. Y. Supp. 388; *Boiler Co. v. Foutham* (Sup.), 50 N. Y. Supp. 351; *Grant v. Ellicot*, 7 Wend. (N. Y.) 227.

Pennsylvania.—*Stewart v. Moore*, 12 Phil. (Pa.) 225.

South Carolina.—*Israel v. Ayer*, 2 Rich. (S. C.) 344.

Vermont.—*Arbold v. Sprague*, 34 Vt. 402.

Federal.—*Townsley v. Sumrall*, 2 Pet. (U. S.) 170; *Levy & Co. v. Kauffman*, 114 Fed. 170; *Jewett v. Hone*, 1 Woods (U. S.) 530, Fed. Cas. No. 7311.

See *Illinois*.—*Wineman v. Oberne*, 40 Ill. App. 269.

Colorado.—*Law v. Brinker*, 6 Colo. 555.

Georgia.—*Flournoy v. Bank*, 79 Ga. 810, 2 S. E. 547.

Illinois.—*Nowak v. Excelsior Stone Co.*, 78 Ill. 307.

²⁰¹ *Townsley v. Sumrall*, 2 Pet. (U. S.) 170, 183.

Defendants become simply sureties for payment of draft accepted for the accommodation of the drawer. *First National Bank of N. Y. v. Morris*, 1 Hun (N. Y.) 680.

²⁰² *Gillespie v. Campbell*, 39 Fed. 724, 5 L. R. A. 698; *Smith v. Knox*,

by two accommodation indorsers against an acceptor it is no defense, even though the plaintiffs were notified that the acceptance was an accommodation acceptance, to the claim of plaintiffs for payment of the bill that the proceeds of the original draft when discounted were applied in whole or in part by the drawer to the payment of paper on which the plaintiffs, or one of them, was an indorser.²⁰³ So an accommodation acceptor who pays or retires the bill may look for reimbursement or indemnity to the drawer accommodated.²⁰⁴ Again, if several drawees of a bill accept it jointly, they are jointly bound as between themselves and each is bound to the holder for the full amount, and one cannot defeat recovery on the ground that he accepted it for the accommodation of the drawer and that such fact was well known to him, and subsequent to the acceptance by the others.²⁰⁵ So a co-partner, even if his consent cannot be shown, will be obligated to a *bona fide* indorsee for value upon an accommodation acceptance made by another partner.²⁰⁶ And it is no defense to an action by a holder for value as against an acceptor or other person who received no consideration that at the time the plaintiff took the bill he knew that no value had been received; but an exception exists in a case where the paper was taken from a person who held it for a particular purpose and was therefore guilty of a breach of duty in transferring it to the plaintiff and the latter, at the time of taking it, was cognizant of the facts.²⁰⁷

§ 273. Same subject—Continued.—Although where a bill has been delivered to a *bona fide* holder for a valuable consideration and in ignorance of the circumstances he may sue the acceptor, notwithstanding any want of consideration received by him, yet where the acceptor of such accommodation bill delivers it to another for a special purpose and the latter, without performing his trust, commits an act of bankruptcy and is pursued by a creditor who obtains the bill from him in ignorance of the bankruptcy and of the circumstances of acceptance, such acceptor is not liable upon the bill at the suit of such

3 Esp. 46 (it is no defense to an action by a *bona fide* holder of a bill that the bill was an accommodation one, and that known to the holder).

²⁰³ Gillespie v. Campbell, 39 Fed. 724, 5 L. R. A. 698.

²⁰⁴ Martin v. Muncy, 40 La. Ann. 190, 3 So. 640.

²⁰⁵ McNabb v. Tally, 27 La. Ann. 640.

²⁰⁶ Beach v. State Bank, 2 Ind. 488.

²⁰⁷ Stewart v. Moore, 12 Phila. (Pa.) 225.

creditor.²⁰⁸ But where a bill of exchange is drawn and indorsed for the accommodation of the acceptors, upon the condition that it shall be discounted at a particular bank, a purchaser of the bill before maturity, without notice of the secret agreement, is not affected by it, and he may recover upon the bill in an action against the drawers,²⁰⁹ nor is the drawer of a bill entitled to the aid of equity to restrain a *bona fide* holder from collecting the bill of an accommodation acceptor on the ground of fraud in the payee.²¹⁰ The acceptor of a bill is the principal debtor and the drawer the surety and nothing will discharge the acceptor but payment or release, he is bound, though he accept without consideration and for the sole accommodation of the drawer;²¹¹ that is, the parties of a bill or note are bound by the character which they assume upon the face of the bill, if by that they are liable as primary debtors, or as principal, then, as to the holder, they are bound as such and his knowledge at the time when he takes the bill, that they or either of them are accommodation parties, will not vary the case.²¹² And if bills are received and discounted by holders before their maturity, without notice that they were for accommodation, such holders have a right to treat the acceptor as the principal debtor, and the drawer is liable only on his default. In such cases there is no difference between accommodation bills, and bills for value; in either case, a release of the drawer from any farther liability to the holder will have no effect, as a discharge of the acceptor from his primary liability on the bill; and this right, so to treat the parties on the bill, remains unaffected by any notice subsequently given, that the bill was for accommodation.²¹³ Where the payee is obligated to take up a bill and accept a renewal thereof, such payment by him constitutes a valu-

²⁰⁸ *Smith v. De Witts*, 6 Dowl. & Ry. 120, 16 Eng. Com. Law 256. As to misapplication or diversion of paper accepted for accommodation as defense and liability of acceptor, see *Gray v. Bank of Kentucky*, 29 Pa. St. (insufficient defense); *Gillespie v. Campbell*, 39 Fed. 724, 5 L. R. A. 698. (When no defense.)

²⁰⁹ *Frank v. Quast*, 86 Ky. 649, 6 S. W. 909. See § 199 herein.

²¹⁰ *Winn v. Wilkins*, 35 Miss. 186.

²¹¹ *Wilson v. Iabell*, 45 Ala. 142, 147, citing 3 Kent's Comm. 86 (Marg).

²¹² Citing *Montgomery Bank v. Walker*, 9 Serg. & R. (Pa.) 229, 12 Serg. & R. (Pa.) 382; *Farmers' and Mechanics' Bank v. Rathbone*, 26 Vt. 33, 58 Am. Dec. 200.

²¹³ *Farmers' and Mechanics' Bank v. Rathbone*, 26 Vt. 19, 33, 35, 36, 58 Am. Dec. 200, per Isham, J. As to liability of acceptor as principal debtor, see further, *Bradford v. Hubbard*, 8 Pick. (Mass.) 155; *Childs v. Eureka Powder Works*, 44 N. H. 354; *McKirdy v. Hare* (Pa.), 7 Atl. 172; *In re Babcock*, 3 Story (U. S.) 393, Fed. Cas. No. 696.

able consideration as between himself and the acceptor so as to constitute the latter who had accepted the first bill for the accommodation of the drawer the principal debtor and not a mere surety on the new bill.²¹⁴

§ 274. Same subject continued—Exceptions and qualifications.—

Although there is no doubt but that the acceptor of a draft is liable to an innocent *bona fide* holder, even though he made the note or accepted the draft for the accommodation of the payee or drawer, nevertheless the general rule has been qualified to the extent that it may be otherwise where the holder did not receive it in the ordinary course of business, and for a valuable consideration, or after notice of facts available as a defense as between the drawer and acceptor.²¹⁵ And notice to a bank which had discounted paper before acceptance that it is accepted only for accommodation affects the bank only in case it makes arrangements with some of the parties without consulting others, which will affect the acceptor's liability.²¹⁶ If the liability of an accommodation acceptor has not been changed by subsequent dealings to his prejudice or against his rights he may be sued. An accommodation acceptance stands upon its legal form if the drawee has not had notice that it is only for accommodation, but if he has had notice he cannot treat the maker as surety and the acceptor as principal for the purpose of choosing his form of action on the acceptance. So where paper drawn upon a bank, and accepted for accommodation and discounted by it has been taken up by the drawer, or some one for him, it cannot be sued as belonging to the bank, or sued on at all if known to be accepted for accommodation.²¹⁷ Again, if a bill is an accommodation bill or in the nature thereof, and is indorsed to the holder, and he has notice of the relations of the parties when he receives the bill and also of the fact of payment by the drawer, he cannot recover.²¹⁸ So, where the original consideration for the acceptance has failed, and the indorsee, having taken the draft before maturity, in due course and having notice, has funds of the

²¹⁴ *Israel v. Ayer*, 2 Rich. (S. C.) 344.

²¹⁵ *Boggs v. Lancaster Bank*, 7 Watts & S. (Pa.) 331, 332, per Huston, J. (notice to cashier of bank that draft would not be paid).

²¹⁶ *Canadian Bank v. Coumbe*, 47 Mich. 358, 11 N. W. 196.

²¹⁷ *Canadian Bank v. Coumbe*, 47 Mich. 358, 11 N. W. 196. See *Pease v. Horst*, 10 Barn. & Cr. 122, 21 Eng. Com. Law 61; *Field v. Carr*, 5 Bing. 13, 15 Eng. Com. Law 447.

drawer sufficient for payment of the bill, cannot recover.²¹⁹ And notice is held to be a good defense, upon the ground that if an indorsee takes a bill with notice of the failure, or partial failure of consideration, his right to recover cannot be superior to that of his indorser.²²⁰ So in a Kentucky case it is held that a bill drawn for the accommodation of the drawee and for the purpose of enabling him to sustain his credit and to aid him in his banking operations cannot be enforced against the drawer except at the suit of a holder who purchased it *bona fide* for a valuable consideration, and without notice of the purpose for which it was drawn.²²¹ But if the acceptor of a non-negotiated bill is not liable to the payee, because the latter knows that he was only an accommodation acceptor, then it follows that the drawer is liable.²²² And where the drawer of a bill accepted for his accommodation indorses for value to his bankers, and the latter have knowledge of its character, they cannot, to prevent circuity of action, recover from the acceptor more than the amount of their balance as between them and the drawer at the time the drawer becomes bankrupt.²²³ It is also declared that the exceptions to the general rule that an acceptor of a bill can never be discharged except by payment or release, are rare, and only when to enforce the payment by the acceptor, would be in violation of the agreement of the parties at the time of the acceptance, as where a bill is accepted for the accommodation of the indorser, who, after putting it in circulation, afterwards receives it in the course of business. There, as between the original parties to the bill, it was his primary duty to pay it, and he cannot collect it of the acceptor, and should he again put it in circulation it is probable that the acceptor would not be liable to any one who should receive it with notice.²²⁴ There are, also, other qualifications and exceptions existing by reason of circumstances, or the intervention of other legal or equitable rules generally or peculiarly applicable. Thus where a bill is accepted and indorsed for the accommodation of the drawer, with a knowledge of all the circumstances, and the indorser is fully indemnified by an assignment, and the assignee has sufficient funds, and the indorser pays the bill, he cannot resort to the

²¹⁸ Cook v. Lister, 13 C. B. N. S. 543, 106 Eng. Com. Law 543.

²¹⁹ Van Winkle Gin & Mach. Co. v. Citizens' Bank of Buffalo, 89 Tex. 147, 33 S. W. 862.

²²⁰ Davis v. Wait, 12 Or. 425, 8 Pac. 356.

²²¹ Thompson v. Poston, 62 Ky. 389.

²²² Lewis v. Parker, 33 Tex. 121.

²²³ Jones v. Hibbert, 2 Starkie 304.

²²⁴ Cronise v. Kellogg, 20 Ill. 11, 14, per Caton, C. J.

acceptor, but must resort to the funds in the assignee's hands, although the acceptor has protected himself by attaching other funds of the drawer.²²⁵ And if drafts are drawn and accepted for the payee's accommodation, under an express agreement between the payee and acceptors that the acceptors shall look to the payee for indemnity, the presumption that the drawee has funds will be rebutted.²²⁶ And where a partner, the maker of a note, procures the discount thereof by his own firm, after the maker's death, a recovery can only be had by the surviving partner, who had indorsed the note as accommodation payee by proving the insufficiency of such maker's interest in the firm's assets, after payment of debts of the firm, to satisfy the note.²²⁷

§ 275. **Bill payable to order.**—A purchaser for value, without indorsement, of a bill of exchange payable to order, can sue thereon in the name of the payee, and the acceptor in such case is liable although he accepted for the drawer's accommodation. But he can prove that being a surety he is released by the purchaser's contract of forbearance to the drawer, made by the purchaser with knowledge of the fact.²²⁸

§ 276. **Taking before acceptance.**—Where accommodation paper is drawn upon a manufacturing corporation not authorized to accept a bill for the accommodation of the drawer a holder who discounts it for the drawer before acceptance, notwithstanding he receives the bill and for value, expecting in good faith that it will be accepted, but in ignorance of its accommodation character cannot recover against the company thereon, even though it be afterwards accepted, as he is presumed to have discounted on the credit of the drawer and not of that of the acceptor.²²⁹

§ 277. **Accommodation paper—Conflict of laws—Acceptance.** Where a note was written and signed in Illinois by the makers and sent to the payee in Louisiana, and he indorsed and returned it to the makers for their accommodation, and they negotiated and delivered it in Illinois, before due, to the appellee, and he had no knowledge that the note had ever been elsewhere than in the hands of the appellant

²²⁵ *Bradford v. Hubbard*, 25 Mass. (8 Pick.) 155.

²²⁶ *Thurman v. Van Brunt*, 19 Barb. (N. Y.) 409.

²²⁷ *Patton v. Carr*, 117 N. C. 176, 23 S. E. 182.

²²⁸ *Meggett v. Baum*, 57 Miss. 22.

²²⁹ *Farmers' and Mechanics' Bank v. Empire Stone-Dressing Co.*, 18 N. Y. Super. Ct. (5 Bosw.) 275, 10 Abb. Prac. 47. See *Webster v. Howe Mach. Co.*, 54 Conn. 394, 8 Atl. 482.

and makers, it was held to be an Illinois contract; that the note being made there and indorsed in Louisiana for the accommodation of the makers, and delivered to them so indorsed in Illinois, the indorsement was governed by the laws of the state where delivered and negotiated.²³⁰ In another case a party was indebted to a person in Georgia who agreed to take the former's note with another, who resided in Alabama, as security; said note was drawn, dated at a place in Georgia, carried by the makers to the party intended to secure the same, who indorsed the note for accommodation and returned it to the maker, who delivered it to the creditor, and the indorsement was held a Georgia and not an Alabama contract, although the maker and indorser resided in Alabama when the suit on the note was brought.²³¹ But where a firm residing in New York accepted for the accommodation of the drawer a draft, drawn upon them by a corporation in Massachusetts, and said draft was subsequently discounted by a banking institution in the latter state, and it was thereafter transferred to the plaintiff, it was held that such plaintiff was entitled to recover, notwithstanding that, under the laws of the state where it was accepted and where by its terms the bill was payable, it would have been subject to disability. Daniels, J., said in this case: "By the acceptance of the draft for the accommodation of the drawer, the inference would seem to be natural and proper that it must have been intended that the drawer could use it in any manner which might be lawful at the place of its residence, for without that privilege it is obvious that the drawer could not be secured the full benefit of the paper accepted. Its business was in another state, and the presumption would be that the acceptance was procured to be used where it was transacted, and its ordinary corporate functions were exercised; and from such a design, a valid use of the paper there ought to be maintained by the courts of this state. * * * It was accepted to be used by the drawer, carrying on its operations there, and no restriction imposed as to what should be done with it. The drawer was entitled to make any lawful use which it could of the acceptance, and one mode of making such use of it was to render it available for the drawer's benefit, in any way in which that could be done consistent with the laws of the place under which, as a corporation, it existed."²³² And where a bill of exchange was drawn in another state,

²³⁰ *Gay v. Rainey*, 86 Ill. 221, 31 Am. Rep. 76.

²³¹ *Stanford v. Pruet*, 27 Ga. 243, 73 Am. Dec. 734.

²³² *First National Bank of N. Y. v. Morris*, 1 Hun (N. Y.) 680, criticizing and doubting *Jewell v. Wright*, 30 N. Y. 259, and approving *Bank of*

upon a person residing in New York, and the contract was between parties subject to the laws of the former state, and the whole transaction took place there and was performed there, so far as the drawer had anything to do with it, and the money was paid there under an agreement to transfer to the plaintiff funds which the drawer had in New York, the plaintiff's remedy would be according to the law of the place where the contract was made, and the acceptor in New York, having funds of the drawer, cannot refuse payment on the ground of the invalidity of the contract under the law of New York.²³³ There last two cases²³⁴ are, however, distinguished in the case of *Dickinson v. Edwards*,²³⁵ where the defense by the maker was that the note in suit was made for the accommodation of the payee named in it, that it was by him loaned to them, without any consideration received by him from them, and that they transferred it to the assignor of the plaintiff at a greater rate of discount than was lawful in New York. The note was signed in New York, was dated and made payable there and was put in the hands of the payees there, nor was there anything to show that the maker knew or intended that it was to be taken out of the state for its first use. But the facts were also set up that the note first passed into the holder's hands for a consideration and had its inception in Massachusetts, in which state the discount taken was lawful. The court, however, affirmed a judgment in favor of defendant and asserted the rule that a purely personal contract is to be governed by the law of the place where by its terms it is to be performed.²³⁶ In connection with the foregoing decisions it may be stated that the general rule as to acceptors generally

Georgia v. Lewin, 45 Barb. (N. Y.) 340; *Bowen v. Bradley*, 9 Abb. N. S. (N. Y.) 395.

²³³ *Bank of the State of Georgia v. Lewin*, 45 Barb. (N. Y.) 340.

²³⁴ *First National Bank v. Morris*, 1 Hun (N. Y.) 680; *Bank of the State of Georgia v. Lewin*, 45 Barb. (N. Y.) 340.

²³⁵ *Dickinson v. Edwards*, 77 N. Y. 573, cited in dissenting opinion of Vann, J., in *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 48, 82 N. Y. Supp. 843, 84 N. Y. App. Div. 565, 45 N. E. 390, 36 L. R. A. 664, to the general principle that the presumption is that a contract should be

governed by the law of the place of performance as to validity, nature and effect; cited also in discussion, in opinion of Haight, J., in *Wilson v. Lewiston Mills Co.*, 150 N. Y. 314, 323, 44 N. E. 959, 55 Am. St. Rep. 680, as to the difficulty if not impossibility of formulating a general rule upon the question of what law controls generally.

²³⁶ The court considered the case of *Jewell v. Wright*, 30 N. Y. 259, and said: "We are satisfied that the ground is stable on which the adjudication in that case rests. We follow it as an authoritative precedent and well decided." *Id.* 587.

is, that the liability of acceptors of a bill of exchange is regulated by the law of the place where the contract of acceptance is to be performed.²³⁷ So where a bill of exchange for the price of personal property was drawn and delivered in Louisiana, payable in Kentucky, and it was addressed to a party in the latter state, it must be presumed to have been accepted there in the absence of proof to the contrary, and the defenses to which it is liable in the hands of an innocent holder are to be controlled by the laws of the place of acceptance and performance.²³⁸ And where the drawer of a bill who indorsed it was a citizen of Ohio, and it was drawn for the accommodation of a New York firm, who accepted it upon its being transmitted to them, and they negotiated it with the plaintiffs, who were citizens of New York, it was decided that the laws of that state controlled the contract.²³⁹ Again, if a bill of exchange is drawn in one state upon a person in another state, and accepted by the latter for the drawer's accommodation and returned to the drawer in his state, where he negotiates the same, the validity of the contract is governed by the law of the latter state, as it had its origin there, was consummated there, the money loaned and the security delivered in that place, where it was also dated, and no other place of performance was designated. And an accommodation acceptor is not liable until the paper is transferred to a holder for value before it becomes due. It then becomes an enforceable contract.²⁴⁰ So bills of exchange drawn in New York upon a London house, and there accepted and paid, if, in connection with other circumstances, they create a claim by the acceptor against the drawer, are to be considered as creating one in London, which is the place of contract.²⁴¹ And the law of the state where a bill is verbally accepted and where it is drawn governs, although drawn upon a firm in another state.²⁴² So in an action in Illinois, upon the breach of a verbal

²³⁷ *Frazier v. Warfield*, 17 Miss. (9 S. & M.) 220. In this case the bill was placed in the payee's hands by the drawers as collateral security for the liabilities incurred by them. The payee indorsed the bill before maturity to a bank as security for a note discounted; the bill was drawn at New Orleans and directed to the acceptors at Lexington, Kentucky, and by them accepted generally. The firm of drawers was established at New Orleans, but one of the partners resided in Mississippi.

²³⁸ *Kelly & Co. v. Smith & Shotwell*, 1 Metc. (Ky.) 313, citing *Chitty on Bills*, §§ 131-158; *Story on Conflict of Laws*, § 286.

²³⁹ *Davis v. Clemson*, 6 McLean (U. S.) 622, Fed. Cas. No. 3630.

²⁴⁰ *Gallaudet v. Sykes*, 1 McArthur (D. C.) 489.

²⁴¹ *Lizardi v. Cohen*, 3 Gill (Md.) 430.

²⁴² *Scudder v. Union National Bank*, 91 U. S. 106, 23 L. Ed. 245.

agreement made in Missouri, to accept and pay, in Illinois, drafts drawn upon the promisor by the promisee, the contract being one upon which no action by a Missouri statute could be maintained in that state, but which was valid in Illinois, it was held that nothing in the case showed that the parties had in view, in respect to the execution of the contract, any other law than that of the place of performance, and therefore that law must determine the parties' rights.²⁴³ But it is also asserted as a rule that contracts are to be governed, as to their nature, their validity and their interpretation, by the law of the place where they were made, unless the contracting parties had some other law in view; and that a contract to accept drafts is governed by the law of the state where made where it is clearly apparent that the parties did not have in view, in respect to the execution of the contract, the law of another state.²⁴⁴ And it is held that a bill of exchange, payable in New York City and accepted in Indiana, is a contract to be performed in New York, and is governed by the laws of that state.²⁴⁵ Again, where a draft was made by a London company upon a manufacturing corporation of Connecticut, and it was accepted for the corporation, payable at its principal office in New York, the contract was held governed by the law of New York.²⁴⁶ It has also generally been held that the law of the state where a note is payable governs as to the maker's liability.²⁴⁷ In a recent decision it is declared that while the common law is presumed to be of force in most of the American states, if either party claims that the statute or common-law rule obtaining in such state is different from the law laid down in the code, he must, by pleading, evidence or a request to charge, call the attention of the court to such difference. As to this presumption, while there is a conflict in the authorities, according to many cases the "legal presumption is that the *lex loci* is the same as our own"; that is, that the law of another state as to warranty is substantially the same as that of the state where the case is tried.²⁴⁸

§ 278. **Accommodation check—Bank check.**—As against a *bona fide* holder for value, without notice, of an accommodation check, a

²⁴³ Hall v. Cordell, 142 U. S. 116, 35 L. Ed. 956, 12 Sup. Ct. 154.

²⁴⁴ Hubbard v. Exchange Bank, 72 Fed. 234, 18 C. C. A. 525.

²⁴⁵ Bright v. Judson, 47 Barb. (N. Y.) 29.

²⁴⁶ Webster & Co. v. Howe Machine Co., 54 Conn. 394, 8 Atl. 482.

²⁴⁷ Midland Steel Co. v. Citizens' Nat. Bank of Kokomo, 34 Ind. App. 107, 72 N. E. 290.

²⁴⁸ Wells v. Gress, 118 Ga. 566, 45 S. E. 418; Civ. Code, § 3555.

defense that would not be available had the drawer received value for the check when he delivered it cannot be set up by the drawer against such holder,²⁴⁹ it being declared that the drawer of such a check stands upon the same basis as the drawer of regular commercial paper.²⁵⁰ Again the defense of failure of consideration cannot be successfully availed of to preclude recovery by an indorser of a bank check for the payee's accommodation where he was ignorant of the drawer's equitable defenses, and payment had been enforced against him.²⁵¹ Nor is it any defense that the holder had delayed presentment for a month of a check, payable to bearer, which was drawn for the accommodation of the original payee, and the latter had failed before presentment, it appearing also that the holder was ignorant of the relation of the parties.²⁵²

§ 279. Accommodation indorsers—Availability of defenses—General rule.—A party who makes or indorses a note without consideration, and for the purpose of thereby lending his credit to another, is an accommodation maker or indorser, and after the note has passed into circulation, and the indorser's liability has become fixed, he cannot make the defense of a want of consideration against any one except the accommodated party. The note is supposed to be taken by third persons upon the credit given to him, and he is expected to pay it, and this rule seems to be applicable to other defenses.²⁵³ So under a Pennsylvania decision it is held that in that state, as well as in all other commercial countries, an indorser who gives credit to a note or bill by his indorsement, whether with or without consideration, is bound to make the paper good in the hands of any subsequent indorsee, who receives it for value and in the ordinary course of business.²⁵⁴ And in a Missouri case it is decided that it does not avail

²⁴⁹ *Harbeck v. Craft*, 11 N. Y. Super. Ct. 122. See *Davis v. Dayton*, 7 Misc. Rep. 488, 27 N. Y. Supp. 669. *Examine Charnoch v. Anderson*, 11 N. Y. Supp. 639.

²⁵⁰ *Deener v. Brown*, 1 MacArthur (D. C.) 350.

²⁵¹ *Andrews v. Meadows* (Ala.), 31 So. 971.

²⁵² *Stewart v. Smith*, 17 Ohio St. 83.

²⁵³ *Bank of British North America v. Ellis*, 6 Sawy. (U. S.) 96, Fed.

Cas. No. 859, 8 Am.-L. Rec. 460, per Deady, D. J.; *Archer v. Shea*, 14 Hun (N. Y.) 493. (It constitutes no defense by an indorser that as between maker and payee the paper was accommodation paper.) See *Hamburger v. Miller*, 48 Md. 317. (It was held that recovery may be had against the maker and first indorser.)

²⁵⁴ *Struthers v. Kendall*, 41 Pa. St. 214, 80 Am. Dec. 610.

as a defense except as between the indorser and the person to whom he grants the use of his name, that no consideration is received for lending his credit, nor that such fact is known to him when the paper is discounted; that it is sufficient to support the contract of indorsement that the accommodation party has lent his credit and upon the faith of that the money has been loaned or the discount effected.²⁵⁵ In the federal court it has also been determined that there can be no objection to the want of consideration in an action by the holder.²⁵⁶ If a corporation's indorsement of negotiable paper is *ultra vires*, and it incurs no liability thereby, its effect, nevertheless, is to pass the property therein; for whether or not a preceding indorser has the power to make an accommodation indorsement merely is a question of no importance, so far as the last indorser's liability under a subsequent indorsement is concerned, and it constitutes no defense to a subsequent indorser and the subsequent indorsement constitutes a warranty of the genuineness of the paper, of the indorser's title thereto, and of the capacity of all the preceding parties to the contract; so that such want of corporate power is no defense to a subsequent indorser.²⁵⁷

§ 280. **Same subject—Application of rule.**—The above rule has been applied to preclude showing that the indorsement was anything else than an ordinary one.²⁵⁸ And in a suit against the accommodation indorser the payee cannot set up a breach of warranty.²⁵⁹ Nor is it a good defense where plaintiff obtained title from a subsequent indorser before maturity and without notice.²⁶⁰ The rule also applies where a party has received and discounted a bill *bona fide* and there was nothing to put him on inquiry.²⁶¹ And where the proceeds of a note,

²⁵⁵ *Miller v. Meller*, 59 Mo. 388.

²⁵⁶ *Bank of Columbia v. French*, 1 Cranch (C. C.) 221, Fed. Cas. No. 867, rev'd 4 Cranch (U. S.) 141.

²⁵⁷ *Willard v. Crook*, 21 App. D. C. 237; Code D. C., §§ 1326, 1369, 1370. The court said also that it was unnecessary to consider whether an ordinary trading corporation, a prior indorser, had the implied power under the laws of the district to make an indorsement of negotiable paper for accommodation only. "Assuming the want of power, the defense is unavailable where the

party acting upon the faith of that indorsement had no notice of the fact. This was the situation of *Willard*" (the last indorsee), "as shown by his affidavit, and the same has not been denied," per Shepard, J.

²⁵⁸ *Thacher v. Stevens*, 46 Conn. 561, 33 Am. Rep. 39.

²⁵⁹ *Variscope Co. v. Brady*, 77 N. Y. Supp. 159.

²⁶⁰ *Meyers v. Kasten*, 9 Misc. Rep. (N. Y.) 221, 29 N. Y. Supp. 677.

²⁶¹ *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312.

which is afterwards discounted in bank, are applied to the maker's benefit, the accommodation indorser cannot, on non-payment of the note at maturity, plead a want of consideration for the indorsement.²⁶² So in a suit against an accommodation indorser, a payee who is an indorser may recover, even though his indorsement is, in form, subsequent to that of the payee.²⁶³ And recovery may be had by a subsequent indorsee from a prior indorsee where the note was in the hands of the maker before due.²⁶⁴ And even though an indorser purchased a note from the payee at a discount greater than the legal rate of interest, the indorsee may recover from the indorser.²⁶⁵ The rule has also been applied where a note was indorsed for the maker's accommodation for a premium, to be paid by the maker.²⁶⁶ And a bank has been held bound as against a purchaser in good faith, for value, before maturity, where the indorsement was made by the bank's cashier.²⁶⁷ So a breach of warranty as to chattels sold cannot be availed of by an accommodation indorser of a purchase-price note.²⁶⁸ Nor is want of consideration for such indorsement any defense, even though the plaintiff knew the purpose of the indorsement, nor does the circumstance that the note was not put in circulation make any difference.²⁶⁹ Nor can an accommodation indorser avail himself of the defense of want of consideration, even though the note was acquired with knowledge that the defendant was such accommodation indorser.²⁷⁰ And where a note was indorsed for the accommodation of a firm, mere notice to the transferee at the time he took such note that the indorser would not be liable therefor, or a notice that the makers had dissolved partnership, constitutes no defense.²⁷¹ So recovery may be had by a holder, for value, against an indorser for the payee's accommodation, even though he knew that the indorsement was for accommodation only.²⁷² The fact that an indorsement was

²⁶² *Union Bank v. Morgan*, 2 La. Ann. 418.

²⁶³ *Moore v. Cross*, 19 N. Y. 227, 75 Am. Dec. 326.

²⁶⁴ *Erwin v. Shaffer*, 9 Ohio St. 43, 72 Am. Dec. 613.

²⁶⁵ *Burpee v. Smoot*, 4 Wkly. Notes Cas. (Pa.) 186.

²⁶⁶ *Kitchel v. Schenck*, 29 N. Y. 515.

²⁶⁷ *Houghton v. First Nat. Bank*, 26 Wis. 663, 7 Am. Rep. 107.

²⁶⁸ *Gillespie v. Torrance*, 7 Abb.

Prac. 462; *Id.*, 17 N. Y. Super. Ct. 36; *Id.*, 25 N. Y. 306, Am. Dec. 355.

²⁶⁹ *Niles v. Porter*, 6 Blackf. (Ind.) 44.

²⁷⁰ *Bankers' Iowa State Bank v. Mason Hand Lathe Co.* (Iowa 1902), 90 N. W. 612.

²⁷¹ *Smith v. Mulock*, 24 N. Y. Super. Ct. 569, 1 Abb. Prac. N. S. 374.

²⁷² *Lincoln Nat. Bank v. Butler*, 16 Misc. Rep. 566, 38 N. Y. Supp. 776, rev'g 14 Misc. Rep. 464, 36 N. Y. Supp. 1112.

procured by false representations of the maker is no defense by an accommodation indorser where the note in suit was given in lieu and as part renewal of a former note, which was surrendered and on which such maker was liable, and which was presented to plaintiff in the usual course of business, with the name of such indorser written thereon, and plaintiff was without knowledge of any prior invalidating circumstances.²⁷³ Again, it is held in a New York decision that recovery may be had by an indorsee without knowledge or notice of defenses, notwithstanding an accommodation indorsement for the plaintiff. It was said in this case that if there had been any fraud or the plaintiff had not made any advances upon the note, the taking of it by him with knowledge of defenses would preclude a recovery.²⁷⁴ The general rule has always been applied, although the note was void for fraud and want of consideration in the hands of the maker.²⁷⁵ And knowledge of circumstances does not amount to a fraud.²⁷⁶ Nor is it any defense, in a suit brought against the maker by an accommodation indorser, who has been compelled to take up the note when due, that as between the maker and payee the paper is an accommodation one.²⁷⁷

§ 281. **Same subject—Qualifications of and exceptions to rule.**—It is decided that the position of an accommodation indorser is that of surety and that he is entitled to all defenses available to the principal,²⁷⁸ including subrogation to rights which the maker would have.²⁷⁹ An accommodation indorser may, by agreement, however, render himself liable to a subsequent holder, with knowledge, as an actual indorser.²⁸⁰ There are also other decisions which are contrary to, or at least not in harmony with the principal rule, or which are exceptions to or qualifications thereof. Thus it is held that in a suit between indorsers and their indorsee with notice, the consideration may be in-

²⁷³ *Cristy v. Campau*, 107 Mich. 172, 65 N. W. 12.

²⁷⁴ *Brown v. Mott*, 7 Johns. (N. Y.) 361.

²⁷⁵ *Codwise v. Gleason*, Fed. Cas. No. 2939 (Brunner, Col. Cas. 40).

²⁷⁶ *Powell v. Waters*, 17 John. (N. Y.) 176.

²⁷⁷ *Post v. Tradesman's Bank*, 28 Conn. 420.

²⁷⁸ *Gunnis Barrett & Co. v. Weig-*

ley, 114 Pa. St. 191, 6 Atl. 465. (The decision, however, rested largely upon the fact of the plaintiff below not being a *bona fide* holder and his failure to comply with the contract on which he received the note.)

²⁷⁹ *McDonald Mfg. Co. v. Moran*, 52 Wis. 203, 8 N. W. 864.

²⁸⁰ *Leeke v. Hancock*, 76 Cal. 127, 17 Pac. 937.

quired into.²⁸¹ And want of consideration may be shown in a case where the debtor's wife indorsed a note for the debtor's accommodation and without consideration, that the note might appear as regular business paper.²⁸² Again, in an action against the maker and indorser, it is held to be a good defense as against a demurrer that the defendant indorsed the note for the accommodation of the plaintiff.²⁸³ And it is decided that an accommodation indorser of a renewal note may defend on the ground that the note was without consideration, where such indorser was in ignorance of the fact that the debt had been discharged.²⁸⁴ So in an action by a receiver of a national bank, it is a valid defense that the note in suit, and former notes which were renewed by it, were given for the use of the bank, to be paid at maturity, and that the bank would retain and protect the note.²⁸⁵ And failure of consideration is available as a defense where the nominal plaintiff stood upon the rights of the payee.²⁸⁶ Want of consideration, and that the paper was indorsed to enable the plaintiff to carry out an agreement, may also be shown in an action by the indorsee against the indorser where the suit is not between an innocent holder and an indorser, but as between the parties, however, and others having notice, want of consideration may be shown.²⁸⁷ If a note is given in the name of a firm by one of its partners for the private debt of such partner, and it is known to be so by the partner taking the note, the other partners are not bound by such notes unless they have been previously consulted and consent to the transaction, and a person taking such note cannot recover on it against one who indorsed it without consideration, believing it to be the firm note.²⁸⁸ Again, where the maker upon an accommodation note becoming due, procures, with the knowledge of the accommodation indorser, from a stranger, without consideration, a note to the firm of which both the original maker and indorser are members, and the new note is indorsed by the firm and again by the original indorser, and is discounted and the proceeds ap-

²⁸¹ *Brown v. Fort*, 1 Mart. O. S. (La.) 34.

²⁸² *Produce Bank v. Bache*, 30 Hun (N. Y.) 351.

²⁸³ *Simms v. Field*, 1 Cleve. Law Rep. (Ohio) 337.

²⁸⁴ *Price County Bank v. McKenzie*, 91 Wis. 658, 65 N. W. 507.

²⁸⁵ *Simons v. Fisher*, 17 U. S. App. 1, 5 C. C. A. 311, 55 Fed. 905. The

action was against the indorser as maker.

²⁸⁶ *Hoopas v. Northern Nat. Bank*, 102 Fed. 448.

²⁸⁷ *National Bank of Rising Sun v. Brush*, 10 Biss. (U. S.) 188, 6 Fed. 132.

²⁸⁸ *Chaxournes v. Edwards*, 20 Mass. (3 Pick.) 5.

plied to the payment of the original note, such new note is not *prima facie* accommodation paper between the maker and indorser, although it is as to the maker of the old note. The new note being an independent security for the original accommodation note, no dealings short of payment and release would affect a claim against the maker of the new note, and a mortgage given to the indorser as security for the new note would be inadmissible as a defense to the note; and an agreement of two remaining partners to pay firm debts is not an assumption by one of the remaining partners of a note on which he became indorser for the accommodation of the retiring partner.²⁸⁹

§ 282. **Bona fide holder—Accommodation paper taken after maturity—Want of consideration.**—It seems by the evident weight of authority to be the rule that where there are no limitations or restrictions as to time, use or purpose, qualifying accommodation paper, and there is no fraud, the fact that defendant is an accommodation party, without consideration, is not of itself a defense as against a purchased after maturity and the character of the paper was known at the time of the purchase. So in an Alabama case the court, per Brickell, C. J., says: "Nor would the title of the holder be affected, because he may have acquired the paper after its maturity. When accommodation paper is not made for a specific purpose, when there is by the understanding of the parties no restriction upon its use, there can be no inference or presumption that it is to become valueless, or that the authority of the party intrusted with its use ceases, if it is not negotiated before maturity. Negotiation after maturity may serve the very purpose of its making—in that way only, it may be, the intended law of credit can be made effectual; and certainly, putting in circulation accommodation paper, after its maturity, cannot be esteemed fraudulent, or *mala fides* attributed to the party who has the right of using it."²⁹⁰ And in a comparatively recent Connecticut case, Prentice, J., asserts that: "The courts of England and of many of our states have adopted, and the text-writers with general unanimity have approved of, the doctrine which declares that, unless accommodation paper is shown to have been misappropriated by the accommodated party to some purpose other than that for which it was given, the accommodation makers may not set up the want of consideration in an action by one who has acquired it in good faith.

²⁸⁹ Mosser v. Criswell, 150 Pa. St. 409, 24 Atl. 618. ²⁹⁰ Connerly v. Planters' & Merchants' Ins. Co., 66 Ala. 432.

in the ordinary course of business and for value, although after maturity.”²⁹¹ It was also declared by the court asserting the above rule that: “The cases holding otherwise, in so far, at least, as the rule laid down by them is made to embrace situations where, as here, the holder for value parted with the consideration without notice of the accommodation character of the paper, do not have the support of sound reason or safe policy. We are not prepared to introduce into the commercial law a principle so repugnant to its spirit and so fraught with danger.” Again, in an Illinois decision, Scott, J., says that: “The very purpose of making accommodation paper is that the party favored may dispose of it, and unless restricted he may transfer it either before or after maturity, and the maker will be equally bound. The usage in this regard is sanctioned by the practice that has prevailed in mercantile transactions everywhere, in this country and in England. That usage now has the consistence of law. Any other rule would permit the maker of such paper to practice a fraud on persons who should take the paper he had put out to be negotiated in the usual course of business.”²⁹² In a Maryland case the rule is laid down that accommodation notes are an exception to the rule which lets in the defenses of want or failure of consideration in cases where a regular note is indorsed when overdue: “Cases of the highest authority recognize a wide distinction between accommodation notes or bills, and those which are wholly without consideration or fraudulent, and as such *nudum pactum* at law. Some of the cases go to the length of asserting that though the holder of a note, claiming by virtue of an indorsement made after the same was due, knew when

²⁹¹ *Connecticut*.—Mersick v. Alderman, 77 Conn. 634, 636, 60 Alt. 109, citing:

Illinois.—Miller v. Larned, 103 Ill. 570.

Maine.—Dunn v. Weston, 71 Me. 270, 36 Am. Rep. 510.

Maryland.—Maitland v. Bank, 40 Md. 540, 17 Am. Rep. 520.

New Jersey.—Seyfert v. Edison, 45 N. J. L. 343.

New York.—East River Bank v. Butterworth, 45 Barb. (N. Y.) 476; Harrington v. Dorr, 3 Rob. (N. Y.) 275.

Virginia.—Davis v. Miller, 14 Grat. (Va.) 1.

English.—Sturtevant v. Ford, 4 Man. & G. 102; Stein v. Yglesias, 1 Crompt. M. & H. 565; Charles v. Marsden, 1 Taunt. 223; Carruthers v. West, 11 Q. B. 143; Atwood v. Crowdie, 1 Stark. 485; Daniels on Neg. Inst., §§ 726, 786, 790; Story on Promissory Notes 194; Clutty on Bills 218; 2 Parsons on Notes & Bills 28; Byles on Bills 285; Eaton & Gilbert on Commer. and Paper (Ed., 1903), p. 312, § 55f; Redfield & Bigelows Lead. Cas. 216.

²⁹² Miller v. Larned, 103 Ill. 562, 570, 571, per Scott, J.

he received it that it was an accommodation paper, still such fact would not defeat his right to recover against the maker."²⁹³ So in a Maine decision²⁹⁴ it is declared that the fact that such a note "was indorsed after due, without some equity in the maker, will not defeat the rights of the holder. The maker of an accommodation note holds himself out to the public to be absolutely bound to every person who shall take the same for value—"a party who lends his note without limitation as to the time of its use," observes Robertson, C. J., "cannot, therefore, be presumed in law to have limited such time to that before its maturity."²⁹⁵ The authorities are decisive on this question." And in another case in that state²⁹⁶ the rule is asserted that: "One who takes an accommodation note after its dishonor may recover from the maker or indorser if it be used for the purpose for which it was given."²⁹⁷ The party giving the accommodation must show he was injured by the misappropriation. 'If the indorsee knew of the fact of the paper being made for accommodation at the time he received it there could be no difference whether he received it before or after due; * * * the proper question seems to be whether the paper was misapplied by the party accommodated,' * * * unless there is an agreement restraining the transfer of an accommodation note after due, and it is used for the purpose for which it is given, it is immaterial whether the holder advances money upon it before or after its maturity," provided also that such note is delivered without any restriction or limitation upon the payee's authority to use it. And a subsequent holder from the payee, who becomes the owner of an accommodation note after its maturity, may recover, in the absence of proof of payment of the note, from the maker of such note, where it has been discounted by the payee, who received the money on it.²⁹⁸ So the rule making an accommodation note negotiable after its maturity, and obligatory upon the parties thereto when taken for value, has been applied in a New Jersey case,²⁹⁹ where there was no pretense of any misapplication of the note

²⁹³ *Renwick v. Williams*, 2 Md. 356, 274, 36 Am. Rep. 310, per Appleton, 363, per Mason, J. C. J.

²⁹⁴ *First National Bank of Salem v. Grant*, 71 Me. 374, 376, 36 Am. Rep. 334, per Appleton, C. J. ²⁹⁷ *Citing 2 Parsons on Bills & Notes*, 28 *et seq.*

²⁹⁵ *Harrington v. Dorr*, 3 Rob. (N. Y.) 283. ²⁹⁸ *Warder, Bushnell & Glessner Co. v. Gibbs*, 92 Mich. 29, 52 N. W. 73.

²⁹⁶ *Dunn v. Weston*, 71 Me. 270, ²⁹⁹ *Seyfert v. Edison*, 45 N. J. L. 393.

and nothing in the terms of the agreement prohibiting its use after the pay-day of the instrument. In a New York case³⁰⁰ it is held that accommodation notes, or bills without limitation as to time or purpose, may be negotiated when past due, so as to bind accommodation makers or acceptors, and this rule applies even though the holder had knowledge of its origin.³⁰¹ In an English case³⁰² it is held that it is not of itself a defense to an action by the indorser to a bill of exchange to plead that it was accepted for the accommodation of the drawer without consideration, and was indorsed after it became due, there being no allegation of fraud and no averment that plaintiff did not give a valuable and full consideration for the bill; that it was not necessarily to be inferred, because it was an accommodation bill, that there was an agreement not to negotiate it after it became due, and if there was such an agreement, it was the defendant's own fault that the bill was outstanding.³⁰³ So in another English case it is decided that a plea by the acceptor of a bill to an action by the indorsee that the bill was accepted before it became due and for accommodation and without any value or consideration for the acceptance or for the payment, and that the bill was indorsed to the plaintiff after it became due, is bad.³⁰⁴ Again, the indorsee of a note, who receives it for value from the second indorser, after it has been dishonored by the maker, can recover thereon against the maker, although he knew when he received it, that as between the maker and the first indorser, it was an accommodation note.³⁰⁵ So in a Pennsylvania case it is held that it is no defense to an accommodation note that it came into the plaintiff's hands after maturity, if he acquired it from one who acquired it for value before maturity.³⁰⁶ Notwithstanding the preceding authorities, there are many decisions both in this country and in England which have been relied on as sustaining the contrary rule, to the effect that if the accommodated party transfers accommodation paper after its maturity it is subject, in the hands

³⁰⁰ *Harrington v. Dorr*, 26 N. Y. Super. Ct. (3 Rob.) 275.

³⁰¹ *East River Bank v. Butterworth*, 30 How. Pr. (N. Y.) 444, 45 Barb. (N. Y.) 476, *affd.* 51 N. Y. 637.

³⁰² *Charles v. Marsden*, 1 Taunt. 224, *per* Mansfield, Ch. J.

³⁰³ *Examine Watkins v. Maule*, 2 Jac. & W. 237, 244.

³⁰⁴ *Sturtevant v. Ford*, 4 Man. & G. 101, 43 Eng. Com. L. 61. See *Stein v. Yglesias*, 1 Crompt. M. & R. 565; *Carruthers v. West*, 112 B. 143.

³⁰⁵ *Thompson v. Shepherd*, 12 Metc. (Mass.) 311, 46 Am. Dec. 676.

³⁰⁶ *Riegely v. Cunningham*, 9 Phila. (Pa.) 177. See *Tinson v. Francis*, 1 Camp. 19.

of the transference, to the same defenses as would be available against the accommodated party; many of these cases, however, rested also upon other factors.³⁰⁷ So in a New York case, the rule is dissented

³⁰⁷ *Alabama*.—*Battle v. Weems*, 44 Ala. 105 (bill drawn and indorsed by defendant for accommodation of acceptors); *Glasscock v. Smith*, 25 Ala. 474 (delivered after indorser's death and legal title did not pass).

California.—*Coghlin v. May*, 17 Cal. 515 (note reissued and diverted after it had answered its purpose; there was also the factor of collateral security).

Georgia.—*Strauss v. Friend*, 73 Ga. 782 (under Code, § 1783—defendant also frequently demanded return of note—action was by indorsee against maker).

Kentucky.—*Gazzam v. Armstrong*, 3 Dana (Ky.) 554 (action by holder against acceptor; plaintiff paid the bill for drawer's honor at maturity).

Louisiana.—*Whitwell v. Crehore*, 8 La. (O. S.) 540, 28 Am. Dec. 141 (action by holder against indorser; note was received as collateral for debt; it was agreed that indorser was never to be liable).

Maine.—*Cumming v. Little*, 45 Me. 183 (action by indorsee against several persons as defendants; notice held implied by indorsement after maturity and purchaser and indorsee held subject to defenses. Holder had collateral securities of the principal and surrendered them to the latter with the securities' assent).

Massachusetts.—*Kellogg v. Barton*, 94 Mass. (12 Allen) 527 (contract against indorser; written agreement as to payment in consideration of indorsement).

Michigan.—*Simons v. Morris*, 53 Mich. 155, 18 N. W. 625 (suit against indorser; note was payable to order of indorser and indorsed in

blank and was transferred about five years after maturity).

Pennsylvania.—*Peale v. Addicks*, 174 Pa. St. 549, 34 Atl. 203 (no recovery can be had from indorser for accommodation of payee by indorsee after maturity); *Long v. Rhawn*, 75 Pa. St. 128 (suit by indorsee against maker held a good defense that note was taken up and reissued, and so diverted). *Hoffman v. Foster*, 45 Pa. St. 137 (fraudulently obtained and fraudulently circulated by payee; action by indorsee against maker and note indorsed in blank); *Bower v. Hastings*, 36 Pa. St. 285 (action by indorsee against maker).

Rhode Island.—*Bacon v. Harris*, 15 R. I. 599, 10 Atl. 647 (suit against makers by indorsee; a demand note and question of reasonable time arose, note being negotiated nearly two years after date. The rule as to defenses was, however, affirmed).

Virginia.—*Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328, 37 Am. St. Rep. 897, 19 L. R. A. 754 (paid by real debtor and reissued).

English.—*Parr v. Jewell*, 16 C. B. 684, 13 C. B. 909 (a case of accommodation acceptance for drawer; the drawee paid note at maturity and, in violation of his express agreement with acceptor, reissued the note); *Overend, Gurney & Co.*, In re, L. R. 6 Eq. 344 (bill was taken up *supra* protest for honor of drawer); *Lazarus v. Cowie*, 3 Q. B. 459, 2 G. & D. 487, 11 L. J. Q. B. 310 (reissued in violation of 55 Geo. III, C. 184, § 19); *Wrixon v. Macoboy*, 6 Vict. Law R. 350.

from which places an accommodation note, indorsed after due, upon a different basis from other notes, indorsed after maturity, and it is held that the fact even that a transferee paid full value for such note does not render the accommodation indorser, without consideration, liable where the note is taken after maturity from the person for whose accommodation it was indorsed, and that to a note so taken the defense of want of consideration is available against any person into whose hands it may come, and if the indorsement of the payee is given after the note is overdue to enable the person for whose accommodation the note is indorsed to get such accommodation indorsement from the defendant, a subsequent holder cannot recover.³⁰⁸

§ 283. **Accommodation of other parties in general.**—It constitutes no defense to a suit brought against the maker and indorser of a note, on paper given for accommodation of the maker's husband that plaintiff had knowledge of such fact, it not appearing that there were any restrictions as to the use which might be made of the indorsement; nor can the defense of coverture, it is decided, be availed of to prevent a recovery, the note being in the usual form.³⁰⁹ And a payee may recover from his immediate indorsee the amount which an innocent holder has compelled him to pay by reason of his indorsement, where such immediate indorsee has received the benefit of the note, the nominal ownership having passed to the latter and being merely by said indorsement without consideration between the parties.³¹⁰ It has also been decided that a guarantor is liable to a *bona fide* holder under a guaranty of payment expressly indorsed on a note for accommodation of the payee, and the contention that it was intended by the parties to give the benefit of the guaranty to a mere surety for the maker cannot be maintained.³¹¹

§ 284. **Payment of pre-existing debt—Bona fide holder against accommodation maker.**—If a note is without restriction as to its use the fact that an accommodation note was taken in payment of a pre-existing debt constitutes no defense in favor of the maker against a *bona fide* indorsee or holder without notice.³¹² And if an accommoda-

³⁰⁸ *Chester v. Dorr*, 41 N. Y. 279, 284. Two judges dissented.

³⁰⁹ *Archer v. Shea*, 14 Hun (N. Y.) 493.

³¹⁰ *Abraham v. Mitchell*, 112 Pa. St. 320, 3 Atl. 830.

³¹¹ *Baldwin v. Dow*, 130 Mass. 416.

³¹² *Grocers Bank v. Penfield*, 69 N. Y. 502, 25 Am. Rep. 231, aff'g 7 Hun N. Y. 279; *Schepp v. Carpenter*, 51 N. Y. 602, aff'g 49 Barb. (N. Y.) 542; *Purchase v. Mattison*, 6

tion indorser of a note, transferred in part payment, has received the proceeds thereof, part payment of such note by the maker constitutes no defense, the holder of said note being a *bona fide* holder.³¹³ Again unless the note was originally made for the payee's accommodation, or he had fraudulently put it in circulation after it was satisfied in his hands, a demand which the maker had against the payee at the time of transfer cannot be set off against a note taken as collateral.³¹⁴ But, although the fact that accommodation paper has been diverted to a different purpose than that agreed upon between the maker and the payee, may be set up as a defense,³¹⁵ still the fact that the use of the note is not in exact conformity with the purpose for which the accommodation was intended, does not make an indorsement and transfer of paper, without restriction, in payment of an antecedent debt a fraudulent diversion.³¹⁶ The general rule first stated also applies, even though the plaintiff had knowledge of the accommodation character of the paper.³¹⁷

§ 285. **Same subject—Particular rulings and opinions.**—In Alabama it is held that a creditor taking a note with an accommodation indorsement in payment of an antecedent debt is a purchaser for value.³¹⁸ In Illinois it is declared that it is a principle of general application that the beneficiary of an accommodation note, without restriction as to the mode of its use, may transfer it either in payment of his indebtedness or as collateral security for a concurrent or even an antecedent debt, and the maker will have no defense.³¹⁹ In a Maine decision it is said that a holder of an accommodation note, which is without any restriction or limitation as to the payee's authority to use it, may recover thereon, even though he received the note in payment of a precedent debt, or received it as collateral security for such indebtedness.³²⁰ So, under a Maryland ruling, a person

Duer (N. Y.) 587; Montross v. Clark, 2 Sandf. (N. Y.) 115; Pitts v. Foglesong, 37 Ohio St. 676; Snyder v. Elliot, 2 Penny. (Pa.) 474; Crosby v. Lane, Fed. Cas. No. 3425.

³¹² Ward v. Howard, 88 N. Y. 74. But see Lintz v. Howard, 18 Hun (N. Y.) 424.

³¹⁴ Smith v. Van Loan, 16 Wend. (N. Y.) 659.

³¹⁵ Schepp v. Carpenter, 51 N. Y. 602, 604, aff'g 49 Barb. (N. Y.) 542;

Pitts v. Foglesong, 37 Ohio St. 676; Coon v. Moore, 2 Pa. Co. Ct. R. 246.

³¹⁶ Graf v. Smith, 62 Hun, 621, 16 N. Y. Supp. 892.

³¹⁷ Montross v. Clark, 2 Sandf. (N. Y.) 115.

³¹⁸ Marks v. First Nat. Bank, 79 Ala. 550, 58 Am. Rep. 620.

³¹⁹ Miller v. Larned, 103 Ill. 562, 570, per Scott, J.

³²⁰ Dunn v. Weston, 71 Me. 270, 274, 36 Am. Rep. 310, per Appleton,

is entitled to protection as a *bona fide* holder for value, even though he takes an accommodation note in payment of a precedent debt or has taken it as collateral security for a precedent debt, or for future as well as past advances.³²¹ In a New York case the court says: "It is universally conceded that the holder of an accommodation note, without restriction as to the mode of paying it, may transfer it either in payment, or as collateral security for an antecedent debt, and the maker will have no defense. It is only where the note has been diverted from the purpose for which it was entrusted to the payee, or some other equity exists in favor of the maker, that it is necessary that the holder should have parted with value on the faith of the note in order to cut off such equities of the maker."³²² Again, under a federal decision, the transferee, before maturity and without knowledge of its character, of an accommodation note taken in settlement of a pending suit, is a *bona fide* holder, and the defense that said note was an accommodation note is not available.³²³

§ 286. Payment of pre-existing debt—Bona fide indorsee against indorser.—An indorsee who purchases before maturity and without notice a bill drawn and indorsed for the accommodation of the acceptors may recover thereon in an action against the drawers, although such indorsee may have taken the bill in payment of a pre-existing debt.³²⁴ So a *bona fide* indorsee, without notice, may recover against an accommodation indorser in case the payee could recover, notwithstanding the transfer was made for a precedent debt;³²⁵

C. J., quoting from *Robbins v. Richardson*, 2 Bosw. (N. Y.) 253, per Woodruff, J.

³²¹ *Maitland v. Citizens' National Bank of Baltimore*, 40 Md. 540, 562, 17 Am. Rep. 620, citing Story on Bills, § 192, Story on Promissory Notes, § 195.

³²² *Leslie v. Bassett*, 59 N. Y. Super. Ct. (27 J. & S.) 403, 14 N. Y. Supp. 380, quoting from *Grocers' Bank v. Penfield*, 69 N. Y. 504. See *Schepp v. Carpenter*, 49 Barb. (N. Y.) 542, aff'd in 51 N. Y. 602. Where the rule is asserted that if an accommodation note, not restricted as to the mode of its use, has been transferred to pay or secure a prece-

dent debt the holder may recover. The rule is otherwise where the note has been obtained by fraud, or was given for a specific purpose or is void in the hands of the payee on grounds of public policy. In such cases the precedent debt is not a consideration and the holder cannot recover.

³²³ *Tollman v. Quincy*, 129 Fed. 974.

³²⁴ *Frank v. Quast*, 86 Ky. 644, 6 S. W. 909.

³²⁵ *Marks v. First Nat. Bank*, 79 Ala. 550, 58 Am. Rep. 620 (action by payee against indorser); *Uchtmann v. Tonyes*, 64 Hun 634, 18 N. Y. Supp. 889; *Varnum v. Ballamy*, 4

especially so, where the paper was indorsed without restriction,³²⁶ and even though the indorsement was procured by fraud, such fact is held to be no defense;³²⁷ nor, it is determined, are proceedings in bankruptcy a defense.³²⁸ But where the debt, which the indorsement was given to secure, was from the maker to the plaintiff, and was based upon an agreement that a suit brought by the latter to recover the debt should be discontinued, it constitutes a good defense that the plaintiff had violated such agreement and had obtained judgment and levied execution on the property of the maker whereby he was prevented from eventually paying the note.³²⁹ If an overdue check, which represents part of the indebtedness, is surrendered and the balance thereof is canceled, the creditor becomes a *bona fide* holder for value, as against an accommodation indorser of a note made for the entire debt.³³⁰

§ 287. Payment of pre-existing debt—Drafts and bills—Payee—Accommodation acceptor.—If a draft is taken by the payee in payment and satisfaction of the drawer's indebtedness to him, and without notice on his part of any fraudulent circumstances inducing the acceptance, and it is accepted for the accommodation of the drawer, the payee is a *bona fide* holder and entitled upon established principles to recover upon the draft, especially where it is accepted without restriction. And although such draft is in form in favor of the payee, yet the case stands on the same footing in contemplation of law as if the draft had been drawn in favor of the debtor and indorsed by him to the payee.³³¹ And *bona fide* holders without notice of a bill of exchange transferred before maturity can recover against accommodation acceptors, although the bill was given to the plaintiffs in liquidation of a pre-existing debt from the drawers to them, even though they knew that defendant was an accommodation acceptor, especially so as the paper was transferred to accomplish the very purpose had in view in making the acceptance, and, therefore, a recovery against such acceptor would only compel him to do what he

McLean (U. S.) 87, Fed. Cas. No. 16886. See *Rowe v. Gohlman* (Tex. Civ. App. 1907), 98 S. W. 1077.

³²⁶ *Molson v. Hawley*, 1 Blatchf. (U. S.) 409, Fed. Cas. No. 9702.

³²⁷ *Uchtmann v. Tonyes*, 64 Hun (N. Y.) 634, 18 N. Y. Supp. 889. But see *Farrington v. Frankfort Bank*, 31 Barb. (N. Y.) 183.

³²⁸ *Kenworthy v. Hopkins*, 1 John Cas. (N. Y.) 107.

³²⁹ *Bookstaver v. Jayne*, 60 N. Y. 146, revg. 3 Thomp. & Co. 397.

³³⁰ *Burkhalter v. Pratt*, 1 City Ct. R. (N. Y.) 22.

³³¹ *Pugh v. Durfee*, 1 Blatchf. (C. C.) 412, Fed. Cas. No. 11460.

agreed to do when he put his name to the bill.³³² And secret agreements, of which a purchaser has no notice, will not preclude his recovery, against an accommodation drawer, upon a bill drawn and indorsed for the accommodation of acceptors, even though he may have taken the bill in payment of a pre-existing debt.³³³ But the rule is also asserted that one who indorses a bill, without consideration and for accommodation of the maker, has the right to annex such terms and conditions as he pleases, and if the maker does not comply with the full terms of an agreed upon condition with the indorser, but uses the bill in payment of an execution, the indorsee, who has notice and knowledge of such condition, cannot recover, even though the indorsement was also made to enable the maker to obtain the money to pay off such execution. The bill was also received in payment of a pre-existing debt, and it was therefore held upon this point that it was taken subject to all equities and defenses which the indorser could lawfully set up against the liability in the hands of the maker.³³⁴ In a Connecticut case a drawer of a bill was largely indebted to a corporation at the time of the acceptance by its treasurer, and said acceptance was solely a loan of its credit to the drawer for accommodation and was an abuse of the power conferred upon the treasurer, and the corporation had no power to give such acceptance. Thereafter a creditor of the drawer, having indorsed the drafts, sold them for the drawer and gave him credit therefor on account, and such creditor, one of the drafts having been duly protested, took up said draft as payee and indorser, the debt was not discharged or released, nor was anything of value relinquished by the plaintiffs, but the fact that the paper was solely for accommodation was not known to them. Upon these facts it was held that plaintiffs were not *bona fide* holders, and were subject to any defense which could have been availed of had the drawer been the plaintiff, even though they

³³² *Jewett v. Hone*, 1 Woods (C. C.) 530, 536, Fed. Cas. No. 7311. Woods, C. J., said in this case: "To hold that because Hone was an accommodation acceptor, and the plaintiffs knew it, therefore the bill is not good, would be to strike a fatal blow at all discounts of negotiable securities for pre-existing debts. Upon such a doctrine what would become of that large class of cases

where new notes are given by the same or other parties by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity?"

³³³ *Frank v. Quast*, 86 Ky. 649, 6 S. W. 909.

³³⁴ *Hickerson v. Raiguel & Co.*, 49 Tenn. (2 Heisk.) 329. Compare, however, chapter herein on Diversion and Fraudulent Transfer.

had taken up and paid said draft; but it was also asserted that if a person holds an acceptance without notice that it is for the accommodation of the drawer, and it is by an officer authorized to accept if the drawer has funds, he is not to be affected by the intrinsic want of funds, and can enforce it if he holds *bona fide*; for as between such holders of negotiable paper without notice, and stockholders of a corporation, the law gives preference to the former.³³⁵

³³⁵ Webster & Co. v. Howe Machine Co., 54 Conn. 357, 8 Atl. 472, 1 Am. Co., 54 Conn. 394, 8 Atl. 482. See St. Rep. 123.
Credit Co., Ltd. v. Howe Machine

CHAPTER XII.

ILLEGAL OR IMMORAL CONSIDERATION.

Sec.	Sec.
288. Illegal consideration—Original parties— <i>Bona fide</i> holders.	295. Compounding criminal acts.
289. Same subject—Exceptions and qualifications — Notice — Knowledge—Fraud, etc.	296. Where consideration is money or property won at gambling device.
290. Illegal considerations — Effect on surety.	297. Same subject—Statutory prohibitions.
291. Paper given for consideration in violation of statute.	298. Same subject—Qualifications of rule—Other instances.
292. Same subject.	299. Illegal and immoral considerations.
293. Where constitution and laws violated—Enemy aided.	300. Same subject—Decisions.
294. Illegal sales.	301. Same subject—Decisions continued.

§ 288. Illegal consideration—Original parties—*Bona fide* holders.

—A note is unenforceable as between the immediate parties where it is based upon a consideration which is illegal in the law or by reason of a statute, or because it is against public policy, religion or morals.¹

¹ Ball v. Putnam, 123 Cal. 134, 55 Pac. 773, holding that where the consideration is against public policy or good morals or the express mandate of the law the note is void.

Bill or note is illegal and void when given in consideration of abduction of person (Barker v. Parker, 23 Ark. 390); when given to an affianced husband because of seduction or alienation of affections of his betrothed (Case v. Smith, 107 Mich. 416, 65 N. W. 279); when for surrender of other void notes (Kuhl v. Galley Universal Press Co., 123 Ala. 452, 26 So. 535). So a note is held void when made on Sunday (Reeves v. Butcher, 31 N. J. L. [2

Vr.] 224); or when in settlement of account for goods sold and delivered, some of the items being for goods sold on Sunday and some for the price of liquors (Wadsworth v. Dunnam, 117 Ala. 661, 23 So. 699); when for the price of goods sold of which the sale is prohibited by law (Carlton v. Bailey, 27 N. H. 230); where part of consideration is for liquors sold contrary to statute (Widoe v. Webb, 20 Ohio St. 431); when for intoxicating liquors sold without a license or in violation of a statute (Snyder v. Koehler, 17 Kan. 432; Bick v. Seal, 45 Mo. App. 475; Gammon v. Plaisted, 51 N. H. 444; Kidder v. Blake, 45 N. H. 530;

But the fact that a negotiable instrument was, as between the immediate parties thereto, based upon an illegal consideration, will not

Coburn v. Odell, 30 N. H. 540; Fuller v. Bean, 30 N. H. 181; see Garland v. Lane, 46 N. H. 245; Doolittle v. Lyman, 44 N. H. 608; Oswald v. Moran, 8 N. D. 111, 77 N. W. 281; Craig & Co. v. Proctor, 6 R. I. 547; Gorsuth v. Butterfield, 2 Wis. 237. Compare Doe v. Burnham, 31 N. H. 226; Carleton v. Woods, 28 N. H. 290, as to beer sold in violation of law, see Sheary v. O'Brien, 77 N. Y. Supp. 378, 75 N. Y. App. Div. 121, aff'd, 76 N. E. 1108). So a note given to a municipality to enable the maker to carry on the liquor business, the license therefor being postponed contrary to the provisions of the city charter under the statute, is illegal and void (Meyers-Marx Co. v. City of Ennessley, 141 Ala. 602, 37 So. 639); and rule applies to paper given for rebating insurance premiums (Tillinghast v. Craig, 9 Ohio Cir. Dec. 459; see Heffron v. Daly, 133 Mich. 613, 95 N. W. 714, 10 Det. L. N. 344); or for insurance premium where insurance company had not complied with state requirements (Swing v. Cider & Vinegar Co., 77 Mo. App. 391); or a note given to an unlicensed physician (Coyle v. Campbell, 10 Ga. 570); when given for import duties in violation of the act admitting a state into the Union (City of Natchez v. Trimble, Walker [Miss.] 376); in case of a bond in consideration of certain tickets, notes, or checks, with intent to circulate the same as currency in lieu of money (Yeates v. Williams, 5 Ark. 684); a note given in furtherance of a contract, void as against public policy and good morals (Parsons v. Randolph, 21 Mo. App. 353); a note given bank in consideration of transaction violating statute as to withdrawal or payments of capital stock by directors (City Bank v. Barnard, 1 Hall [1 N. Y. Super. Ct.] 70); or where note discounted in unauthorized banking business (Huber v. German Congregation, 16 Ohio St. 371); a note based upon contract violating the national bankrupt law (Clafflin v. Torlina, 56 Mo. 369); illegal banking notes in the similitude of bank post-notes (Attorney Gen'l v. Life & Fire Ins. Co., 9 Paige [N. Y.] 470); and where the consideration is fictitious stock of a corporation (Alabama Nat. Bk. v. Halsey, 109 Ala. 196, 19 So. 522. See Haas v. Hall & Farley, 111 Ala. 442, 20 So. 78). So a note given in compromise of a suit by *scire facias* to condemn land under a lottery law, violates the statute, and is contrary to public policy and void as between maker and payee; but otherwise as to an indorsee before due and without notice, and as to the maker such fact is no defense (Poe v. Justices of the Peace, Dudley [Ga.] 249). The rule also applies to a note given in pursuance of an agreement between husband and wife in respect to alimony, to facilitate procuring a divorce by making no defense to an action pending or about to be commenced (Viser v. Bertrand, 14 Ark. 267, 283, 284; Everhart v. Puckett, 73 Ind. 409; Adams v. Adams, 25 Minn. 72, 79; Sayles v. Sayles, 21 N. H. 312; Stoutenberg v. Lybrand, 13 Ohio St. 228, 232. See Stokes v. Anderson, 118 Ind. 533); to an assigning debtor's note given to one

creditor to induce acceptance of assignment (*Brown v. Everett Ridley Ragan Co.*, 111 Ga. 404, 36 S. E. 813); to a note received to induce one creditor to sign composition deed without knowledge of other creditors, parties to deed (*Winn v. Thomas*, 55 N. H. 294; to paper given by insolvent to creditor to sign his petition, the note being in blank to be filled up after the debtor's exoneration (*Payne v. Eden*, 3 Caines [N. Y.] 213. See also *Yeamans v. Chatterton*, 9 Johns. [N. Y.] 295); to a note made for property transferred to drawer to defraud payee's creditors (*Church v. Muir*, 33 N. J. L. [4 Vr.] 318). A note is also void as in restraint of trade, as creating monopoly and contrary to public policy where based upon a consideration not to engage in a competitive business (*Tuscaloosa Co. v. Williams* [Ala.] 28 So. 669. But see *Moore v. Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 207, 6 So. 41). So drafts based upon an assignment to equalize prices, or a combination in restraint of trade are illegal and unenforceable (*Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173). The rule also applies to paper based upon a threat of the payee to oppose the allowance by the city council of the maker's claim for street paving, as such transaction is contrary to public policy (*French v. Talbot Paving Co.*, 100 Mich. 443, 59 N. W. 166); to a note given, by applicants for a public road, to a caveator to withdraw his opposition (*Smith v. Aplegate*, 23 N. J. L. [3 Zab.] 352. Examine *Burkhart v. Hart*, 36 Ore. 586, 60 Pac. 205); to paper received for any sum, the payment of which by the petitioners therefor is made a condition of laying out a high-

way (*Dudley v. Cilley*, 5 N. H. 558); when note given upon condition that payee would not bid at judicial sale (*Jones v. Caswell*, 3 Johns. Cas. [N. Y.] 29); when paper is for lease of lands within Indian reservation and lessor makes title under an Indian (*Chaffee v. Garrett*, 6 Ohio 421. That it is no defense that maker was an Indian, see *Warnock v. Itawis*, 38 Wash. 144, 80 Pac. 297); or in consideration of the sale of a claim to public lands while title still in United States (*Jarvis v. Campbell*, 23 Kan. 370); or a note based upon a consideration of a sale of an interest, where the vendor can sell none, in an Indian trader's license, in violation of the public policy of the government and of the statute (*Hobbie v. Zaepffell*, 17 Neb. 537); or paper made to procure or corruptly influence officer to violate his official duty (*Devlin v. Brady*, 36 N. Y. 531); or to bribe a public officer (*Collier v. Waugh*, 64 Ind. 456); or to secure the consideration agreed to be paid for a sale of a public office (*Meredith v. Ladd*, 2 N. H. 517); or for sale of office of deputy sheriff (*Carleton v. Whitcher*, 5 Vt. 196); when based upon consideration to give to candidate for election the payee's interest (*Swanze v. Hull*, 8 N. J. L. [3 Halst.] 54; when based upon consideration to resign public office in favor of another and to use influence in appointment of successor (*Meachem v. Dow*, 32 Vt. 721); when in consideration that candidate for election withdrawn from ticket in favor of another candidate (*Ham v. Smith*, 87 Pa. St. 63); or for appointment to office of deputy sheriff (*Ferris v. Adams*, 23 Vt. 136); when based upon an agreement to procure and have a

person appointed administrator (Porter v. Jones, 52 Mo. 399). Nor can a surety upon a promissory note be legally defrauded by a promise made to another to have the principal appointed to a public office; as such a promise is contrary to the policy of the law and unenforceable (Graham v. Marks & Co., 98 Ga. 67, 25 S. E. 931). So a note given by a trustee of a savings association, for a consideration moving to himself, to secure the election of another to the office of trustee is void as against public policy and is based upon an illegal consideration (Dickson v. Kittson, 75 Minn. 168, 74 Am. St. Rep. 447, 77 N. W. 820); likewise so when given to secure payment of money won on election (Russell v. Pyland, 2 Humph. [21 Tenn.] 131). So a bet on a foot race constitutes gaming (Jones v. Cavanaugh, 149 Mass. 124, 21 N. E. 306); and note is illegal when for the sales of products understood to be solely a speculation on chances (Pearce v. Dill, 149 Ind. 136, 48 N. E. 788; Plank v. Jackson, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117. See Farmers' & Drovers' Bk. of La. v. Unser, 13 Ky. L. Rep. 965); or when given on grain options (Wade v. Wickersham, 27 Neb. 457, 43 N. W. 259); or when for services in aiding sale of personal property to be delivered in future (Kahn, Jr., v. Walton, 46 Ohio St. 195, 20 N. E. 203). See Rogers v. Corre, 6 Ohio Cir. Dec. 602); or in consideration of "Bohemian Oats" contract (Schmueckle v. Waters, 125 Ind. 265, 25 N. E. 281; Payne v. Raubinek, 82 Iowa 587, 48 N. W. 995). And a note given for sale of "prolific oats * * as a speculation," though not a gambling contract is against public policy (Merrill v. Packer, 80 Iowa 542, 45 N. W. 1076). So a wager as to the collection of an execution, while not gaming within a statute, is void as against public policy between the original parties, but valid as to a *bona fide* holder or transferee of a check given therefor (Boughner v. Meyer, 5 Colo. 71, 40 Am. Rep. 139). And a note for price of slot machine is illegal (Kuhl v. M. Galley Universal Press Co., 123 Ala. 452, 26 So. 535). The rule also applies to paper received in satisfaction of a personal injury if compromise of public offense included (Bailey v. Stiles, 3 N. J. Eq. [2 Green.] 249); to a note intended to defeat execution of the criminal law (Baker v. Faris, 61 Mo. 389, 390); or to favor, protect, or not to prosecute a criminal (Brittin v. Chegary, 20 N. J. L. [Spenc.] 625); when given for money lent knowingly to suppress the prosecution or the evidence (Plummer v. Smith, 5 N. H. 553); or in consideration that payee use his influence to secure acquittal in prosecution for felony (Ricketts v. Harvey, 106 Ind. 564, 6 N. E. 325; when intended to influence one not to appear as a witness in a fraud investigation (Hoyt v. Macon, 2 Colo. 502); or when only to aid in suppression of criminal prosecution, even though note under seal (Morrill v. Goode-now, 65 Me. 178); when based upon an agreement to indemnify the maker against a voluntary escape (Ayer v. Hutchins, 4 Mass. 370); or where consideration is not to search plaintiff's house for stolen property, and to secure its restoration (Merrill v. Carr, 60 N. H. 114); when based upon agreement not to prosecute maker for adultery (Clark v. Ricker, 14 N. H. 44); or when received in consideration of bond to indemnify against any pub-

lic prosecution (*Hinds v. Chamberlin*, 6 N. H. 225).

When bill or note is not illegal and void. Knowledge that notes to be used for unlawful purpose does not invalidate (*Henderson v. Waggoner*, 2 Lea [70 Tenn.] 133). And paper is held valid when executed on Sunday (*Wilkie v. Chandon*, 1 Wash. 355, 25 Pac. 464). So a note is held not illegal which is given for paper in the similitude of bank notes circulated as money (*Wright v. Hughes*, 13 Ind. 109). A note given to legislature in divorce legislation may also be valid (*Day v. Cutler*, 22 Conn. 632, 633); nor is paper given for one of the parties' benefit during pendency of divorce suit, after adultery testified to, against public policy (*Adams v. Adams*, 91 N. Y. 381); nor is note illegal when given to discontinue proceedings in bankruptcy (*Repplier v. Bloodgood*, 1 Sweeny [31 N. Y. Super. Ct.] 34); and when given instead of cash for a liquor license note is collectible (*Appling County v. McWilliams*, 69 Ga. 840); nor is paper void when based on consideration of loan to maker of state notes used by borrower (*Gowen v. Shute*, 4 Baxt. [63 Tenn.] 57); nor when for the sale of diseased sheep (*Vining v. Bricker*, 14 Ohio St. 331); and a liquor dealer's note given county treasurer for loan made by latter out of his private funds for the amount of a liquor tax, is not void as being based upon a transaction against public policy (*Hatch v. Reid*, 112 Mich. 430, 70 N. W. 418, dist'g *Doran v. Phillips*, 47 Mich. 228); nor is paper invalid when based upon a condition that payment be made when horse purchased had won a race, part of the purchase money having been paid

(*Treacy & Wilson v. Chinn*, 79 Mo. App. 648); nor a note given for use of billiard table, unless payee kept a tavern (*Northrup v. Minturn*, 13 Johns. [N. Y.] 85). So a note is valid when taken as security for appearance in court in one state of person arrested in another state (*Harp v. Osgood*, 2 Hill [N. Y.] 216; and it is not void when for payment of money resulting in release of accused (*Armstrong v. Southern Express Co.*, 4 Baxt. [63 Tenn.] 376); nor when given for oats sold at fictitious price with bond to buy more at same price (*Kurz v. Fish*, 58 Hun [N. Y.] 602, 11 N. Y. Supp. 209, 33 N. Y. St. R. 674).

"The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute, on the ground of public policy," and includes a note given for part of the purchase money for timber growing on public lands, to which the payee claimed a possessory right. *Swanger v. Mayberry*, 59 Cal. 91.

Although mere knowledge of lender of use for illegal or immoral purpose will not prevent recovery, yet aiding or participating in unlawful scheme or design precludes recovery. *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947.

Where part of consideration of entire contract illegal, contract is void and unenforceable as to immediate parties having knowledge otherwise as to negotiable note in hands of *bona fide* holder without

prevent a *bona fide* holder or purchaser, for value before maturity without notice or knowledge of the illegality from recovering thereon.^{1*} And it is held that the taint of illegality in the old note

knowledge. *Bozeman v. Allen*, 48 Ala. 512. See also *Frick v. Moore*, 82 Ga. 163, 8 S. E. 80.

Payee's unsigned memorandum on back of note is invalid as a testamentary disposition and constitutes no defense to a note payable on demand, where such memorandum directs the amount of the note unpaid at the testator's death to be expended by the maker for a monument and funeral expenses, even though so expended. *Moore v. Weston* (N. D.), 102 N. W. 163.

Note originally invalid may subsequently become valid by the conduct of the maker so as to render him liable thereon. *Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co.*, 141 Cal. 308, 74 Pac. 851. *Examine Central Nat. Bank v. Copp*, 184 Mass. 328, 68 N. E. 334.

^{1*} *Alabama*: *Bozeman v. Allen*, 48 Ala. 512; *Saltmarsh v. Tuthill*, 13 Ala. 390.

Georgia: *Rhodes v. Beall*, 73 Ga. 641; *Meadow v. Bird*, 22 Ga. 246.

Illinois: *Eagle v. Kohn*, 84 Ill. 292; *Hemenway v. Cropsey*, 37 Ill. 357.

Indiana: *Johnston v. Dickson*, 1 Blackf. (Ind.) 256.

Iowa: *Payne v. Raubinek*, 82 Iowa 587, 591, 48 N. W. 995 (but void in other hands. "Bohemian Oats Contract"); *Merrill v. Pack-er*, 80 Iowa 543, 45 N. W. 1076; *Hanks v. Brown*, 79 Iowa 560, 44 N. W. 811; *Lake v. Streeter*, 34 Iowa 601; *Anderson v. Stark-weather*, 28 Iowa 409.

Kansas: *Draper v. Cowles*, 27 Kan. 484.

Kentucky: *Maddox v. Graham*, 2 Metc. (Ky.) 56 (negotiable bonds).

Louisiana: *Succession of Weil*, 24 La. Ann. 139; *Knox v. White*, 20 La. Ann. 326.

Maine: *Hapgood v. Needham*, 59 Me. 442; *Nutter v. Stover*, 48 Me. 163.

Maryland: *Gwyn v. Lee*, 1 Md. Ch. 445.

Massachusetts: *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471; *Williams v. Cheney*, 3 Gray (Mass.) 215.

Michigan: *Macomb v. Wilkinson*, 82 Mich. 486, 47 N. W. 336.

Missouri: *Third National Bank v. Tinsley*, 11 Mo. App. 498.

New York: *Rockwell v. Charles*, 2 Hill (N. Y.) 499; *Gould v. Arm-strong*, 2 Hall (N. Y.) 266.

North Carolina: *Glenn v. Farm-ers' Bk. of North Carolina*, 70 N. C. 191 (negotiable security).

Tennessee: *Ferris v. Tavel*, 87 Tenn. 386, 11 S. W. 93, 3 L. R. A. 414.

Vermont: *Converse v. Foster*, 32 Vt. 828.

United States: *Goodman v. Si-monds*, 20 How. (U. S.) 343, 15 L. Ed. 934; *Atlas Bank v. Holm*, 34 U. S. App. 472, 19 C. C. A. 94, 71 Fed. 489.

See *Iowa*: *First Nat. Bk. v. Getz*, 96 Iowa 139, 64 N. W. 799.

Michigan: *Hunt v. Rumsey*, 83 Mich. 136, 47 N. W. 105, 9 L. R. A. 674 ("Red Cyon Wheat Note").

Mississippi: *Hart v. Machine Co.*, 72 Miss. 809, 834, 17 So. 769.

New York: *Devlin v. Brady*, 36 N. Y. 531, 2 Transc. App. 271, aff'g 32 Barb. 518 (note to procure official to violate his duty).

Pennsylvania: *Albertson v. Laugh-lin*, 173 Pa. St. 525, 34 Atl. 216.

does not affect a renewal note.² Again, if notes based upon an illegal consideration pass into a *bona fide* assignee's hands, and he, on repeated promises of payment, repeatedly indulges the obligor, and ultimately surrenders such notes to the latter and takes a new note payable to his own creditor, the obligor waives the original consideration and is liable.³ So a new note from the obligor is valid in the hands of a *bona fide* assignee without notice of the illegal consideration of the original.⁴ And a *bona fide* indorsee of notes of a municipal corporation sold below par may be valid in the hands of such holder for value where the circumstances of the sale justify it.⁵ If the consideration of a note was the loan of state notes valuable as money at the date of the loan such note cannot be avoided on the ground of unlawful issuance where the maker used them as money at the time and was benefited thereby.⁶

§ 289. Same subject—Exceptions and qualifications—Notice or knowledge—Fraud, etc.—The above general rule is, however, subject to certain exceptions and qualifications, and may be thus stated: Illegality between original parties will not affect an innocent indorsee except under the statutes of gaming and usury, unless he had notice or took the bill after it became due, and in order to render negotiable security void for illegality in the hands of an innocent holder for value without notice, and before due, the statute which makes the

South Carolina: Carroll County Sav. Bank v. Atrother, 28 S. C. 504, 6 S. E. 313; Bell v. Weed, 1 Bay (S. C.) 249.

Tennessee: First Nat. Bk. of Massillon v. Coughron (Tenn. 1899), 52 S. W. 1112 (note held void; foreign corporation had not complied with state laws as to terms of doing business).

Federal: Hamilton v. Fowler, 99 Fed. 18.

Note founded on illegal or immoral consideration is valid in hands of bona fide holder unless statute makes note invalid. Henry v. State Bank of Laurend (Fidelity Savings Bank of Iowa, 1906), 107 N. W. 1034.

Bona fide payee of drafts fraudu-

lently issued by employe of a bank may hold the proceeds, where the bank has been negligent in leaving blank drafts signed by the cashier in such employe's hands. Clifford Banking Co. v. Donovan Commission Co. (Mo., 1906), 94 S. W. 527.

²Buchanan v. Drovers' Nat. Bk., 6 U. S. App. 506, 5 C. C. A. 83, 55 Fed. 223; Seventh Ward Nat. Bk. v. Newbold, 2 City Ct. Rep. (N. Y.) 125.

³Shreve v. Olds, 2 A. K. Marsh. (Ky.) 141.

⁴Woolridge v. Gates, 2 J. J. Marsh. (Ky.) 222.

⁵Rockwell v. Charles, 2 Hill (N. Y.) 499.

⁶Goweb v. Shute, 4 Baxt. (Tenn.) 57.

contract illegal and void must make the same a crime, or the act itself must be immoral and *contra bonos mores*.^{6*} Such paper has also been held not collectible when the statute declares negotiable securities void under certain circumstances.^{6**} So knowledge of the illegality will defeat a recovery.⁷ And a note, the consideration of which was valid and legal as between the original parties, may become void for illegality as to subsequent parties who are also parties to the illegality, and even as to a *bona fide* holder, if he be compellable to trace his title through the parties to the illegal consideration, and such passage of title is void by law.^{7*} So where two parties enter into a contract for a fraudulent purpose, they being in *pari delicto*, the law will leave them where it finds them and will not enforce the collection of a note given for such a consideration.⁸ Other exceptions and qualifications exist and are noted herein under subsequent sections.⁹

§ 290. **Illegal consideration—Effect on surety.**—Sureties may set up the illegality of a transaction as a defense in an action by a payee where the note is made to a public officer in contravention of public policy and against the statute for the private and illegal use or loan of public funds.¹⁰ Nor is a surety bound by an illegal contract not obligatory upon the principal.¹¹

§ 291. **Paper given for consideration in violation of statute.**—The consideration of a note may be so far illegal as to invalidate it, even in a *bona fide* holder's hands, where such note is given in violation of the express terms of a statute.¹² So the general rule as to illegality

^{6*} Rhodes v. Beall, 73 Ga. 641.

^{6**} Eagle v. Kohn 84 Ill. 292.

⁷ Norton & Macauley v. Pickens, 21 La. Ann. 575; Gould v. Leavitt, 92 Me. 416, 43 Atl. 17; Macomb v. Wilkinson, 83 Mich. 486, 47 N. W. 336; Brisbane v. Lesterjette, 1 Bay (S. C.) 113.

^{7*} Adams v. Rowan, 8 Smedes & M. (Miss.) 624.

⁸ Cowell v. Harris, 2 Ohio Cir. Ct. R. 404.

⁹ See §§ 291, 292, 298, 300, 301 herein.

¹⁰ Board of Education v. Thompson, 33 Ohio St. 321. See § 288, note 1, herein.

¹¹ Gill v. Morris, 11 Heisk. (Tenn.) 614, 27 Am. Rep. 744. But see Davis v. Board, 74 N. C. 374, 72 N. C. 441.

¹² Irwin v. Marquet, 26 Ind. App. 383, 59 N. E. 38. See also the following cases:

Alabama.—Kuhl v. Press Co., 123 Ala. 452, 26 So. 535; Hanover Bank v. Johnson, 90 Ala. 549, 8 So. 42.

Arkansas.—Wyatt v. Wallace, 67 Ark. 575, 55 S. W. 1105.

Georgia.—Cunningham v. Bank, 71 Ga. 400, 51 Am. Rep. 266; Weed v. Bond, 21 Ga. 195.

Connecticut.—Conklin v. Roberts, 36 Conn. 461.

of consideration and *bona fide* holders^{12*} does not apply where the note is positively made wholly and utterly void by statute.^{12**} But where

Illinois.—Town of Eagle v. Kohn, 84 Ill. 292; Chapin v. Dake, 57 Ill. 295; Bank v. Vankirk, 39 Ill. App. 23.

Iowa.—Bank v. Alsop, 64 Iowa 97, 19 N. W. 863.

Kentucky.—Morton v. Fletcher, 2 A. K. Marsh. (Ky.) 137, 12 Am. Dec. 366.

Louisiana.—Groves v. Clark, 21 La. Ann. 567 (Const. 1868, Art. 128).

Maine.—Sproule v. Merrill, 16 Shep. (Me.) 260.

Maryland.—Emerson v. Townsend, 73 Md. 224, 20 Atl. 984.

Massachusetts.—Bayley v. Taber, 5 Mass. 286.

Nevada.—Evans v. Cook, 11 Nev. 69.

New York.—Vallett v. Parker, 6 Wend. (N. Y.) 615.

North Carolina.—Glenn v. Bank, 70 N. C. 191.

Ohio.—Bank v. Portner, 46 Ohio St. 381, 21 N. E. 634.

South Carolina.—Mordecai v. Dawkins, 9 Rich. L. (S. C.) 262.

Tennessee.—Snoddy v. Bank, 88 Tenn. 573, 13 S. W. 127, 7 L. R. A. 705.

Virginia.—Woodson v. Barrett, 2 Hen. & M. 80, 3 Am. Dec. 612.

United States.—Root v. Merriam, 27 Fed. 909.

England.—Hitchcock v. Way, 6 Adol. & E. 943, 33 E. C. L. 249; Shillito v. Theed, 7 Bing. 405, 20 E. C. L. 181; Henderson v. Benson, 8 Price 281.

Canada.—Summerfeldt v. Worts, 12 Ont. 48. Examine Durkee v. Conklin, 13 Colo. App. 313, 57 Pac. 486; Noble v. Cornell, 1 Hilt. (N. Y.) 98.

Where notes were given for commercial fertilizer, which fertilizer was not tagged as required by law, such notes rest upon a void contract and are not valid in the hands of a *bona fide* purchaser for value. *Alabama Nat. B'k. v. C. C. Parker & Co.* (Ala., 1906), 40 So. 987. That invalidity of notes for fertilizers may be set up as a defense, see *Boyett v. Standard Chemical and Oil Co.* (Ala., 1906), 41 So. 756.

Void notes—Illegality as to branded or marked fertilizers. See *Kirby v. Huntsville Fertilizer & Milling Co.*, 105 Ala. 529, 17 So. 38; *Merri-man & Co. v. Knox*, 99 Ala. 93, 9 So. 427; *Steiner v. Ray*, 84 Ala. 93, 4 So. 172, note here valid; *Holt v. Nevassa Guano Co.*, 114 Ga. 666, 40 S. E. 735; *Allen v. Pearce*, 84 Ga. 606, 10 S. E. 1015; *Conley v. Sims*, 71 Ga. 161; *Reeves v. Grafting*, 67 Ga. 512.

^{12*} § 288 and note 1 herein.

^{12**} *Alabama*.—*Bozeman v. Allen*, 48 Ala. 512.

New York.—Vallett v. Parker, 6 Wend. (N. Y.) 615; *Grimes v. Hil-lenbrand*, 6 Thomp. & C. (N. Y.) 620, 4 Hun 354.

North Carolina.—Glenn v. Farmers' Bank of North Carolina, 70 N. C. 101.

South Carolina.—Brisbane v. Lesterjette, 1 Bay (S. C.) 113 (indorsee cannot recover if he appears to have had knowledge or if he did not give valuable consideration).

United States.—Hatch v. Burroughs, 1 Woods (U. S.) 439, Fed. Cas. No. 6203. See *Shank v. Bank*, 124 Ga. 508.

See as to *Massachusetts statute*: *Kendall v. Robertson*, 12 Cush.

paper is given for a loan of money it is enforceable even though a license is a prerequisite to engaging in the loaning business, the loan of money being neither an act *malum in se* nor *malum prohibitum*,¹³ and if a bank violates a federal statute in certifying paper it cannot avail itself of such violation to avoid its liability.¹⁴ And where the law has been violated by the issuance of state notes, which are received as a loan by the maker of a note and used by him as money, he is liable, notwithstanding the illegal issue;¹⁵ and where *bona fide* holders have not been parties to the illegal transaction on which the note was based an exception has qualifiedly been made.¹⁶ So where a statute merely declares a note illegal it has been decided that the note is good in the hands of an innocent holder, the distinction being made between such a provision and one declaring the note void.¹⁷ Again a subsequent illegal contract does not prevent recovery upon a note otherwise enforceable and valid at its inception.¹⁸

§ 292. **Same subject.**—Although a statute provides that notes given for a patent right shall express upon its face its consideration, such note is not void because of non-compliance with such requirement, and a *bona fide* holder thereof is protected. It is only where the considera-

(Mass.) 156; Rev. Stat. Mass. 35, § 2.

But see as to English statute: *Fitch v. Jones*, 5 El. & Bl. 238; *Henderson v. Benson*, 8 Price 281 (5 & 6 Wm. IV, c. 41, 8 & 9 Vict., c. 109); *Hay v. Ayling*, 16 Q. B. 423; *Parsons v. Alexander*, 5 El. & Bl. 263.

Where there is plea of illegal consideration and some evidence to sustain it onus of proof is on plaintiff to show that he is indorsee and holder for valuable consideration. *Bozeman v. Allen*, 48 Ala. 512, 516.

¹³ *Vermont Loan Co. v. Hoffman*, 5 Idaho 376, 49 Pac. 314. See *Meyer-Marx Co. v. Ensley City*, 141 Ala. 602, 37 So. 639; *American Ins. Co. v. Wellman*, 69 Ind. 413. See § 288, note 1 herein.

¹⁴ *Thompson v. Bank*, 146 U. S. 240, 13 Sup. Ct. 66 (violating Rev.

St. U. S., § 5208. Statutory penalty is the only remedy. *Thompson v. Bank*, 113 N. Y. 325, 21 N. E. 57).

¹⁵ *Gowen v. Shute*, 4 Baxt. (Tenn.) 57. See § 288, note 1, herein.

¹⁶ *Sproule v. Merrill*, 16 Shep. (Me.) 260, Stat., c. 158, § 16.

See also *Maine*.—*Cattle v. Cleaves*, 70 Me. 256.

Massachusetts.—*Cazet v. Field*, 9 Gray (Mass.) 329.

New Hampshire.—*Norris v. Langley*, 19 N. H. 423; *Doe v. Burnham*, 11 Fost. (N. H.) 426.

New York.—*Cowing v. Altman*, 71 N. Y. 435, 27 Am. Rep. 70 [reversing 1 *Thomps. & Co.* (N. Y.) 494].

Texas.—*Campbell v. Jones*, 2 Tex. Civ. App. 263, 21 S. W. 723.

¹⁷ *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717, 24 L. R. A. 280.

¹⁸ *Wilcoxon v. Logan*, 91 N. C.

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tion is expressed in the note that the indorsee before maturity and for value takes it subject to all defenses.¹⁹ It is also decided, however, that where a statute provides that a negotiable instrument given in payment for an interest in a patent right shall be absolutely void when it does not show upon its face that it was executed for such consideration, it is void in the hands of a *bona fide* holder for a valuable consideration.²⁰ But a "peddler's note" is not necessarily void for non-compliance with a statutory requirement, but the principle of estoppel

¹⁹ *Georgia*.—Parr v. Erickson, 115 Ga. 873, 42 S. E. 240, under act of 1897, Van Epps' Code Supp., § 6650, *et seq.*; Smith v. Wood, 111 Ga. 221, 36 S. E. 649.

Indiana.—Teschler v. Merea, 118 Ind. 586, 21 N. E. 316. Mitchell, J., said in this case that a promissory note fair upon its face containing the requisite words of negotiability, although taken by a payee in violation of such a statute, is nevertheless a valid obligation in the hands of an innocent holder for value. New v. Walker, 108 Ind. 365, 9 N. E. 386.

Nebraska.—Moses v. Comstock, 4 Neb. 516.

New York.—Canajoharie Nat. Bank v. Diefendorf, 4 N. Y. Supp. 262 (compare this case in 123 N. Y. 191 as to good faith and burden of proof). Vosburgh v. Diefendorf, 48 Hun (N. Y.) 619, 1 N. Y. Supp. 58 (compare this case in 119 N. Y. 357).

Pennsylvania.—Hunter v. Henninger, 93 Pa. St. 373; Haskell v. Jones, 86 Pa. St. 173; Metropolitan Bank v. Sieber, 33 Leg. Int. 193, 11 Phila. 558.

Tennessee.—Harmon v. Haggerty, 88 Tenn. 705, 13 S. W. 690.

Vermont.—Pendar v. Kelley, 48 Vt. 27.

²⁰ *Arkansas*.—Wyatt v. Wallace, 67 Ark. 575, 55 S. W. 1105, decided under Sand. & H. Dig. Ark., §§ 493-496. See the following cases:

Georgia.—Rhodes v. Beall, 73 Ga. 641; Weed v. Bond, 21 Ga. 195.

Indiana.—Aurora v. West, 22 Ind. 88, 85 Am. Dec. 413.

Louisiana.—Baldwin v. Sewell, 23 La. Ann. 444; Levy v. Germillion, 21 La. Ann. 635; Coco v. Callihan, 21 La. Ann. 624; Groves v. Clark, 21 La. Ann. 567.

Massachusetts.—Bayley v. Taber, 5 Mass. 286, 4 Am. Dec. 57.

Nebraska.—Kittle v. DeLamater, 3 Neb. 325.

New York.—Claffin v. Boorum, 122 N. Y. 385, 25 N. E. 360.

North Carolina.—Ward v. Sugg, 113 N. C. 489, 18 S. E. 717, 24 L. R. A. 280.

Texas.—Andrews v. Hoxie, 5 Tex. 171.

Note given for patent rights; validity of, see United States.—Pe-grau v. American Alkali Co., 122 Fed. 1000.

Indiana.—Jones v. Peoples' State Bank, 32 Ind. App. 119, 69 N. E. 466.

Kansas.—Pinney v. First National Bank, 68 Kan. 223, 75 Pac. 119.

Kentucky.—Hays v. Walker, 25 Ky. L. Rep. 1045, 76 S. W. 1099.

Maine.—Hathorn v. Wheelwright, 99 Me. 951, 59 Atl. 517.

Pennsylvania.—Troxell v. Malin, 9 Pa. Super. Ct. 483, 43 W. N. C. 547.

Wisconsin.—J. H. Clark Co. v. Rice (Wis. 1906), 106 N. W. 231.

arising from acts of the maker may preclude him from claiming a defense on the grounds that the statute has been violated, the purchaser having no notice that the payee was a peddler.²¹ In a Georgia case it is held that though it may be declared by statute that all contracts, covenants or security based on the consideration of permitting a bankrupt to be discharged are void, yet where a negotiable note was given by a bankrupt debtor to his creditor for the amount of his debt in consideration that the creditor would withdraw his objections to the discharge of the debtor, such note was not void in the hands of a *bona fide* purchaser before due and without notice.²² So under a New York decision it is decided that a check given to carry out an agreement made in contravention of the bankrupt act as to fees of officers of courts is not absolutely void, even though founded on an illegal consideration, but is valid in the hands of a *bona fide* holder for value taking it before it was dishonored and without notice of its illegality.²³ But a note given for a balance due on a transaction itself void by statute or for money lent to pay bills which the person taking the note had illegally assisted to circulate cannot be enforced.²⁴ Nor is a note enforceable when issued by a bank in violation of the general law.²⁵ If the defense of illegal consideration is set up the whole statute must be examined to see whether the legislature intended to prevent enforcing a contract relating to the thing prohibited.²⁶ Again, it is held that the repeal of the statute before action brought precludes the defense of the original prohibition.²⁷ But a subsequently enacted statute prohibiting an act will not preclude recovery where the consideration of the note was lawful.²⁸

²¹ Billington v. McColpin, 22 Ky. L. Rep. 1281, 60 S. W. 923.

²² Rhodes v. Beall, 73 Ga. 641. See § 125, herein.

²³ Cowing v. Altman, 71 N. Y. 435, 27 Am. Rep. 70, rev'g 1 Thomp. & C. 494. See § 125 herein.

²⁴ Brown v. Tarkington, 3 Wall. (U. S.) 377. See § 288, note 1, herein.

²⁵ Root v. Wallace, 4 McLean (U. S.) 8, Fed. Cas. No. 12039. Examine Oneida Bank v. Ontario Bank, 21 N. Y. 490.

²⁶ Harris v. Runnels, 12 How. (U. S.) 79. See Darby v. Institution, 1 Dill. (U. S.) 141, Fed. Cas. No. 3571.

Examine Bacon v. Lee, 4 Iowa 490.

²⁷ Nichols v. Gee, 30 Ark. 135; Holmes v. French, 68 Me. 525; Smith v. Glanton, 39 Tex. 365. But see Pond v. Horne, 65 N. C. 84; Ayres v. Probasco, 14 Kan. 175.

²⁸ Arkansas.—Newton v. Wilson, 31 Ark. 484.

Connecticut.—Hubbard v. Callahan, 42 Conn. 524.

Massachusetts.—North Bridge-water Bank v. Copeland, 7 Allen (Mass.) 139.

Virginia.—Cecil v. Hicks, 29 Grat. (Va.) 1.

United States.—Boyce v. Tabb, 18 Wall. (U. S.) 546. But see Weed v.

§ 293. Where constitution and laws violated—Enemy aided.

Where a note is given for a debt created by a municipality in violation of the constitution it cannot be enforced and is invalid even in the hands of a *bona fide* indorsee for value before it became due.²⁹ The constitution and laws of the United States made in pursuance thereof are the supreme law of the land, and any contract or undertaking of any kind which destroys or impairs its supremacy or operates to aid or encourage any attempt to that end, is unlawful and violates the supreme paramount law of the land, and no court sitting under the constitution and exercising authority by virtue of its provisions will treat such acts as a meritorious consideration for the promise of any one. Such a transaction is palpably illegal and contrary to public policy. This principle applies to notes given in aid of the enemy or in aid of a rebellion or treasonable combination against the United States, in which case all the illegal facts and the entire transaction may be shown in defense to an action on such instrument even by a transferee for value.³⁰ Recovery has been allowed in some cases on the ground

Snow, 3 McLean (U. S.) 265, Fed. Cas. No. 17347.

²⁹ *Town of Wadley v. Lancaster*, 124 Ga. 354.

³⁰ *Alabama*.—*Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Oxford Iron Co. v. Quinchett*, 44 Ala. 487.

Arkansas.—*Booker v. Robbins*, 26 Ark. 660 (horse bought by the maker for the confederate service with payee's knowledge held a good defense in suit by payee); *Portis v. Green*, 25 Ark. 376; *McMurtry v. Ramsey*, 25 Ark. 350; *Ruddell v. Landers*, 25 Ark. 238 ("there can be no question but the whole transaction was not only contrary to public policy, but was palpably illegal and treasonable from its inception, and all attempted obligations made or passed between the parties were absolutely void"); *Tatum v. Kelley*, 25 Ark. 209.

Georgia.—*Murphy v. Weems*, 69 Ga. 687; *O'Byrne v. City of Savannah*, 41 Ga. 331 (a note given for a tax assessed during the existence of the confederate government but not

collected is void, but there may be two considerations which are severable and the note be good as to part); *Chancely v. Bailey*, 37 Ga. 532.

North Carolina.—*Lewis v. Latham*, 74 N. C. 283 (illegal consideration exists and vitiates a note given for a horse with knowledge of its treasonable use); *Logan v. Plummer*, 70 N. C. 388; *Cronly v. Hall*, 67 N. C. 9 (illegality appeared upon face of instrument and so bound subsequent holders); *Kingsbury v. Fleming*, 66 N. C. 524 (if money be lent to aid in the accomplishment of an illegal purpose such illegality is not purged by the borrower failing so to apply the money); *Kingsbury v. Gooch*, 64 N. C. 528.

Tennessee.—*Gill v. Creed*, 3 Coldw. (43 Tenn.) 295; *Thornburg v. Harris*, 3 Coldw. (43 Tenn.) 157.

Texas.—*Roquemore v. Alloway*, 33 Tex. 461 (such illegal contract can acquire no validity by transfer before or after maturity).

West Virginia.—*Slifer v. Howell's*

that the mere knowledge by the vendor that the purchaser intends to make an illegal or immoral use of the article purchased does not invalidate the note given in payment for such article, that there must be something to show participation in the illegal transaction or an intent to aid and promote the illegal purpose;³¹ and that mere knowledge that the funds might possibly or probably be used in advancing such illegal purpose is insufficient, the borrower being engaged in business which was also not illegal;³² and where a note in the usual form was given for a loan of money which the lender knew was intended to be used for the equipment of cavalry to serve the confederate states, but that by the contract the borrower was not restricted in any way as to the use of the money, but might use it as he saw fit, it was held that the loan could be recovered.³³ So, if the contract be unconnected with the illegal act, but is founded on a new consideration, the courts will enforce it, especially if the party is in possession of all the gains and profits.³⁴ So, where a note was given after the war for money borrowed to pay a debt incurred during the war for such illegal purpose, the illegality was held to be too remote.³⁵ So, where a note was given for the lease of a tract of land and the purpose of the lease was to raise food for laborers in manufacturing iron for the confederate government, it was held that such indirect and remote consequences would not be considered.³⁶ So, where a note was given in connection with partnership interests by some of the firm members to others the fact that it had, with other business, a contract for the enemy's government, does not render the note illegal, though based upon the proceeds of the general

Admr., 9 W. Va. 391 (where a contract is connected by its consideration with an illegal transaction of such a character it cannot be enforced).

United States.—Taylor v. Thomas, 22 Wall. (89 U. S.) 479; Hanauer v. Woodruff, 15 Wall. (82 U. S.) 439, 442, per Field, J.; Hanauer v. Doane, 12 Wall. (79 U. S.) 342. But see Murphy v. Weems, 69 Ga. 687; Glenn v. Bank, 70 N. C. 191; Kingsbury v. Suit, 66 N. C. 601 (a case of a single bill given for money borrowed to pay a debt theretofore contracted); Bank of Tennessee v. Cummings, 9 Heisk. (Tenn.) 465; Hatch v. Burroughs, 1 Woods 439, Fed. Cas. No. 6203.

³¹ Wallace v. Lark, 12 S. C. 576.

³² Oxford Iron Co. v. Spradley, 51 Ala. 171; Jones v. Bank, 9 Heisk. (56 Tenn.) 455. See Cooper v. Thompson, 20 La. Ann. (La.) 182; Walker v. Jeffries, 45 Miss. 160.

³³ Walker v. Jeffries, 45 Miss. 160. Examine Bank of Tennessee v. Cummings, 9 Heisk. (56 Tenn.) 465.

³⁴ Gilliam v. Brown, 43 Miss. 641. See Williams v. Alexander, 79 N. C. 411; Powell v. Smith, 66 N. C. 401; Thornburg v. Harris, 3 Coldw. (43 Tenn.) 157; Puryear v. McGavock, 9 Heisk. (56 Tenn.) 461.

³⁵ Poindexter v. Davis, 67 N. C. 112.

³⁶ McKesson v. Jones, 66 N. C. 258.

business.³⁷ And notes given in consideration of bonds issued by the enemy during the civil war in aid of the rebellion, commonly known as war bonds, are not based upon a valid consideration, the issuing of the bonds being an open act of hostility to the United States, especially where every holder of the paper knew the object for which it was issued.³⁸

§ 294. **Illegal sales.**—The fact that goods sold in violation of the law constitutes the consideration of a note is not a defense available against one who holds the paper for a valuable consideration before maturity and without notice of the illegality.³⁹ Such a defense, however, may be available against the payee or his transferee after maturity.⁴⁰ But the rule does not apply to illegal sales made by an agent who receives a note in payment, but gives the payee his own note, the last note not being open to the defense that the law was violated by such sales.⁴¹ If a sale of certain property is void under a statute, because of non-compliance with the laws of the state, it has been decided that such non-compliance constitutes a good defense to an action on a note given for the purchase price of property of the particular class specified.⁴²

§ 295. **Compounding criminal acts.**—Notes given for the purpose of compounding or procuring the dismissal of a criminal prosecution are not enforceable, as they are contrary to public policy and void, and therefore such a settlement is a good defense to an action thereon by the payee.⁴³ But, as will appear hereafter, a distinction exists between

³⁷ Gullatt v. Thrasher, 42 Ga. 429.

³⁸ Tucker v. Horner, 28 Ark. 335; Thornburg v. Harris, 3 Coldw. (43 Tenn.) 157; Gill v. Creed, 3 Coldw. (43 Tenn.) 295 (note given for confederate treasury notes); Grant v. Ryan, 37 Tex. 37; Hanauer v. Woodruff, 15 Wall. (82 U. S.) 439.

³⁹ *Maine.*—Cottle v. Cleaves, 70 Me. 256; Hapgood v. Needham, 59 Me. 442; Field v. Tibbetts, 57 Me. 358, 99 Am. Dec. 779; Baxter v. Ellis, 57 Me. 178.

Massachusetts.—Cazet v. Field, 9 Gray (Mass.) 329.

New Hampshire.—Great Falls Bank v. Farmington, 41 N. H. 32; Doe v. Burnham, 11 Fost. (N. H.) 426; Norris v. Langley, 19 N. H. 423.

New York.—Allen v. McFadden, 20 N. Y. Supp. 360.

Texas.—Campbell v. Jones, 2 Tex. Civ. App. 263, 21 S. W. 723.

Vermont.—Converse v. Foster, 32 Vt. 828; Pindar v. Barlow, 31 Vt. 529. See § 288, note 1, herein.

⁴⁰ Glass v. Alt, 17 Kan. 444; Merri-
rick v. Butler, 2 Lans. (N. Y.) 103.

⁴¹ Domestic Sewing Mach. Co. v. Hatfield, 58 Ind. 187.

⁴² Hanover Nat. Bank v. Johnson, 90 Ala. 549, 8 South. 42; Streit v. Sanborn, 47 Vt. 702.

⁴³ Kirkland v. Benjamin, 67 Ark. 480, 55 S. W. 840; Rogers v. Blythe, 51 Ark. 519, 11 S. W. 822; Woodham v. Allen, 130 Cal. 194, 62 Pac. 398; Bell v. Wood, 1 Bay (S. C.) 249.

a private and a public suit, as in case of seduction or bastardy.^{43*} And it has been decided that an indorser of a note signed by the maker to avoid a criminal prosecution is not within the rule as to such a defense.⁴⁴ It is also held that the rule permitting such a defense does not apply as against an innocent indorsee for value, there being no statute to that effect.⁴⁵ And as against such an indorsee without notice before maturity of a note based upon a consideration which was a forbearance to sue the maker for slander in stating that a written order of the maker held by the payee was forged, there can be a recovery, even if said order was forged.⁴⁶

§ 296. Where consideration is money or property won at gambling device.—In the absence of a statutory provision that a bill or note given for a wagering contract shall be void, the defense that it was for such a consideration cannot be sustained against a *bona fide* holder thereof for value before maturity and without notice;⁴⁷ and where

See also *Turley v. Bartlett*, 10 Heisk. (Tenn.) 221. See § 288, note 1, herein.

^{43*} See §§ 299–301 herein.

⁴⁴ *Bowman v. Hiller*, 130 Mass. 153, 39 Am. Rep. 442.

⁴⁵ *Wentworth v. Blaisdell*, 17 N. H. 275; *Clark v. Ricker*, 14 N. H. 44; *Hill v. Northrup*, 1 Hun (N. Y.) 612, 4 Thomp. & C. 120. But see *Bell v. Wood*, 1 Bay (S. C.) 249.

⁴⁶ *Herrick v. Swomley*, 56 Md. 439.

⁴⁷ *California*.—*Haight v. Joyce*, 2 Cal. 64, 56 Am. Dec. 311.

Colorado.—*Boughner v. Meyer*, 5 Colo. 71, 40 Am. Rep. 139.

Illinois.—*Shirley v. Howard*, 53 Ill. 455; *Adams v. Wooldridge*, 3 Scam. (Ill.) 255; *Biegler v. Merchants Loan & Trust Co.*, 62 Ill. App. 560.

Indiana.—*Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. 281.

Rhode Island.—*Atwood v. Weeden*, 12 R. I. 293.

Texas.—*Thompson v. Samuels* (Tex.), 14 S. W. 143. See § 288, note 1, herein.

A defense that notes had been given on Sunday and on account of a stock-gambling transaction is not available, where the notes are regular upon their face, as against a purchaser in good faith for value, before maturity and without notice. *Myers v. Kessler* (C. C. A.), 142 Fed. 730.

Bet at billiards for game and liquors. If plaintiff kept a billiard saloon and played with the defendant upon the terms that the defendant should pay for the use of the table by both parties in case he lost, but otherwise he should pay nothing, it is gaming. It is also gaming if the parties played together upon the terms that the defendant, in case he lost, should pay the plaintiff for liquors and cigars to be used by the plaintiff but otherwise not, and the same would apply to the price of the use of table or to the price of the liquors, so that a note given for the amount therefor would be void both as to the original note and the renewal thereof where such acts are

paper is signed at the maker's request by accommodation indorsers to be discounted at a certain bank, which has no knowledge that the proceeds are to be used for gambling purposes, such use will constitute no defense to an action on the paper.⁴⁸ As a general rule, however, paper based upon such a consideration is open to a defense showing that the actual consideration was a wager or gambling where the action is brought by an original party or by subsequent holders taking it after maturity or with notice.⁴⁹ It is also held that the general rule also governs what are known as "Bohemian Oats" notes;⁵⁰ and the same rule governs as to the assignee of a note given for wagers intentionally lost at cards to enable the obligee to sell it for the joint benefit of the obligor and himself.⁵¹

§ 297. **Same subject—Statutory prohibitions.**—Where a statute provides that all judgments by confession, conveyances, bonds, bills, notes and securities, when the consideration is money or property won at any game or gambling device, shall be void and may be set aside and vacated by any court of competent jurisdiction upon suit brought for that purpose by the person so confessing, giving, entering into or executing the same, or by his executors, etc., purchaser or other person interested therein, the main purpose of such an act is to discourage

contrary to the statute against gaming, and so even though the plaintiff was licensed to sell such goods. *Murphy v. Rogers*, 151 Mass. 118, 120, 24 N. E. 335; *Holden v. Cosgrove*, 12 Gray (78 Mass.) 216.

Gambling—That statute constitutional as to assignment of bill or note based on gambling consideration see *Higgenbotham v. McGready*, 183 Mo. 96, 81 S. W. 883.

⁴⁸ *Birdsall v. Wheeler*, 62 App. Div. (N. Y.) 625, 71 N. Y. Supp. 67.

⁴⁹ *Indiana*.—*Spray v. Burk*, 123 Ind. 565, 24 N. E. 588.

Iowa.—*Peoples Sav. Bank v. Gifford*, 108 Iowa 277, 79 N. W. 63.

Massachusetts.—*Scollans v. Flynn*, 120 Mass. 271.

Rhode Island.—*Atwood v. Weeden*, 12 R. I. 293.

England.—*Brown v. Turner*, 7

Term R. 630, 2 *Esp.* 631; *Aubert v. Maze*, 2 *Bos. & P.* 374; *Steers v. Lashley*, 6 *T. R.* 61, 533; *Amory v. Merryweather*, 2 *Barn. & C.* 573; *Amory v. Merryweather*, 4 *Dowl. & R.* 86.

⁵⁰ *Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. 281; *Payne v. Raubinek*, 82 Iowa 587, 48 N. W. 995; *Merrill v. Packer*, 80 Iowa 542, 45 N. W. 1076; *Ward v. Doane*, 77 Mich. 328, 43 N. W. 980; *Davis v. Seeley*, 71 Mich. 209, 38 N. W. 901; *McNamara v. Gargett*, 68 Mich. 454, 36 N. W. 218; *Jacobs v. Mitchell*, 46 Ohio St. 601, 22 N. E. 768. Compare *Stewart v. Simpson*, 2 Ohio Cir. Ct. R. 415. See § 288, note 1, herein.

⁵¹ *Thompson v. Moore*, 4 *T. B. Mon. (Ky.)* 79.

and suppress gaming by preventing retention of the spoils by the gambler, or the successful transfer of them to his colleagues. And where a transfer or indorsement is made of drafts given as security for money loaned and to be loaned for the purpose of gambling with the lender, such indorsement is within the inhibitions of the statute, as it is to be regarded either as a security or as a new bill, nor in such case does the rule as to parties in *pari delicto* apply;⁵² and generally such express statutory prohibitions as to notes or paper given for such wagering or gambling considerations, or based upon such gaming transactions, precludes a recovery, it being a good defense that it was so given, even against a *bona fide* holder.⁵³

§ 298. Same subject—Qualifications of rule—Other instances.—In determining whether a note given in an option or “future” deal shall be subject in the hands of a *bona fide* holder to the defense of an illegal consideration, it seems that the inhibition in the statute must be suffi-

⁵² *Morton v. Provident Nat. Bank of Waco, Tex. Civ. App. 1906, 93 S. W. 189* (under Rev. Stat. Mo. 1899, § 3426), considering *Williams v. Wall, 60 Mo. 318* (which cites 2 Bouv. L. Dict. 493; *Slacum v. Pomeroy, 6 Cranch (U. S.) 221, 3 L. Ed. 204; Coffee v. Planters' Bank of Tenn., 13 How. (U. S.) 183, 14 L. Ed. 105; Van Stophorst v. Pearce, 4 Mass. 258; Chapin v. Duke, 57 Ill. 295, 11 Am. Rep. 15; Savings Bank of Kansas v. National Bank of Commerce, 38 Fed. 800, and distinguishing Higginbotham v. McCready (Mo.), S. W. 883.*

⁵³ *Alabama*.—*Ivey v. Nicks, 14 Ala. 564.*

Colorado.—*Ayer et al. v. Younker, 10 Colo. App. 27, 50 Pac. Rep. 218.*

Connecticut.—*Conklin v. Roberts, 36 Conn. 461.*

Illinois.—*Williams v. Judy, 8 Ill. 282, 44 Am. Dec. 699; Pope v. Hanke, 52 Ill. App. 453; International Bank v. Vankirk, 39 Ill. App. 23; Tenney v. Foote, 4 Ill. App. 594.*

Indiana.—*Irwin v. Marquett, 26 Ind. App. 383, 59 N. E. 38.*

Iowa.—*Koster v. Seney, 99 Iowa 584, 68 N. W. 824; Traders' Bank v. Alsop, 64 Iowa 98, 19 N. W. 863.*

Kentucky.—*Pace v. Martin, 2 Duv. (Ky.) 522; Early v. McCart, 2 Dana (Ky.) 414.*

Mississippi.—*Lucas v. Waul, 12 Smedes & M. (Miss.) 157.*

Ohio.—*Lagonda Nat. Bank v. Portner, 46 Ohio St. 381, 21 N. E. 634.*

Pennsylvania.—*Harper v. Young, 112 Pa. St. 419, 3 Atl. 670; Unger v. Ross, 13 Pa. St. 601.*

South Carolina.—*Mordecai v. Dawkins, 9 Rich. Law. (S. C.) 262.*

Tennessee.—*Snoddy v. American Nat. Bank, 88 Tenn. 573, 13 S. W. 127, 17 Am. St. Rep. 918, 7 L. R. A. 705.*

Texas.—*Stewart v. Miller, 3 Willson (Tex. Civ. App.), § 292.*

Wyoming.—*Swinney v. Edwards, 8 Wyo. 54, 55 Pac. 306.*

United States.—*Pearce v. Rice, 142 U. S. 28, 12 Sup. Ct. 130. But see Crawford v. Spencer, 92 Mo. 498, 4 S. W. 713. See § 288, note 1, herein.*

ciently specific to cover cases of this character to warrant such a defense being sustained; so that the general rule governing in cases of statutes as to gambling must be qualified to the above extent;⁵⁴ although where the statute expressly and in sufficiently specific terms makes such notes void it constitutes an available and good defense even against a *bona fide* holder;⁵⁵ but the note may not be subject to such a defense as that of a gambling consideration where the transaction is valid, in that the intent of one of the parties was an actual purchase and sale of stocks, the gambling purpose being only that of the other party.⁵⁶ Again, a certificate of deposit may be based upon a gambling transaction and be indorsed and assigned in a foreign state, and still the indorser or assignor be liable at the suit of a *bona fide* holder for value, although such negotiable paper be void in such *bona fide* holder's hands under express declaration of the statute of the state where suit is brought.⁵⁷

§ 299. **Illegal and immoral considerations.**—It is a well settled rule that contracts based upon a consideration in furtherance of immorality are illegal, against public policy, vicious and void, and this applies to bills and notes, but a distinction has been made between a note given as a compensation for an injury committed, although an immoral act, and a note given to encourage future immorality, it being held that the paper is valid in the former case, although it is void in the latter. another distinction is also made in this connection between bonds and deeds and instruments under seal, and those not under seal, it being held that the rule governing in the former case has no application in the latter. These distinctions will fully appear in the next following sections.

⁵⁴ *Indiana*.—Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687, 10 Am. St. Rep. 23, 5 L. R. A. 432.

Michigan.—Shaw v. Clark, 49 Mich. 384.

Missouri.—Crawford v. Spencer, 92 Mo. 498, 4 S. W. 713; Third Nat. Bank v. Tinsley, 11 Mo. App. 498.

New York.—Provost v. McEnroe, 102 N. Y. 650, 5 N. E. 795.

Pennsylvania.—Northern Nat. Bk. of Lancaster v. Arnold (Pa. Sup.), 40 Atl. 794.

United States.—Hentz v. Jewell, 20

Fed. 592; Jackson v. Foote, 12 Fed. 37; Third Nat. Bank v. Harrison, 3 McCrary (U. S.) 316, 10 Fed. 243. But see Hawley v. Bibb, 69 Ala. 52; Cunningham v. Bank, 71 Ga. 400. See § 288, note 1, herein.

⁵⁵ Pope v. Hanke, 155 Ill. 617, 40 N. E. 839; Snoddy v. Bank, 88 Tenn. 573, 13 S. W. 127; Root v. Merriam, 27 Fed. 909.

⁵⁶ Bangs v. Hornick, 30 Fed. 97.

⁵⁷ Sullivan v. German Nat. Bank, 18 Colo. App. 99, 70 Pac. 162.

§ 300. **Same subject—Decisions.**—Future cohabitation is a vicious consideration, and contracts upon it may be rescinded by the party or those claiming in priority under him, but a meretricious connection between a man and a woman does not disable her from receiving of him by gift or contract.^{57*} A distinction is made, however, between contracts under seal and not under seal as to past cohabitation as a consideration, although future cohabitation as a consideration makes the contract utterly void.⁵⁸ So, a bond or note under seal is not invalid because based upon past cohabitation as a consideration, it not appearing that there was any stipulation for future cohabitation, even though cohabitation continues after the execution of the bond, the onus being upon defendant to prove the immoral consideration in such case.⁵⁹ So, a bond for cohabitation with a woman seduced by the obligor and for maintenance after his death is illegal and void in law, where it is the price of prostitution, *premium prostitutionis*, especially where by the condition in the bond if she became virtuous she was to lose the annuity.⁶⁰ Again, where a statute forbids a person having a wife or lawful children from giving a woman with whom he lives in adultery, or to his bastard children, more than one-fourth the clear value of his estate, either by deed or will, "or by any other ways or means whatsoever," a promissory note is within such proviso, and when given to such paramour can only be recovered to that amount in case the statute is applicable. And where the jury were instructed that if the consid-

^{57*} *Winebrinner v. Weisiger*, 3 T. B. Mon. (19 Ky.) 33.

"Contracts made in furtherance of immorality, or designed to facilitate and continue an immoral course of life, are illegal and void at common law; as where rooms are let for the purpose of prostitution, or notes or bonds are given to secure the continuance of an illicit intercourse. But where there is an existing obligation, either legal or moral, arising out of past illicit intercourse, to recompense the injured party, it is held that a bond or other specialty executed for that purpose alone is a valid instrument." *Edwards on Bills & Prom. Notes* (2d ed.) 321.

"A bond given in consideration of future illicit cohabitation is void,

but not so if given for past cohabitation, nor is it void if given to support a putative child; but a bill or note as between immediate parties would not be enforced if given for past cohabitation because not founded upon a consideration." *Daniel on Neg. Inst.* (5th ed.), § 195.

⁵⁸ *Potter & Son v. Gracie*, 58 Ala. 303, 29 Am. Rep. 748.

Future illicit intercourse as consideration makes contract void. *Walker v. Gregory*, 36 Ala. 180.

A promissory note based on past cohabitation is not supported by a sufficient consideration. *Singleton v. Bremar*, 1 Harp. (S. C.) 201, distinguishing between notes and bonds or deeds.

⁵⁹ *Brown v. Kinsey*, 81 N. C. 245.

⁶⁰ *Walker v. Perkins*, 3 Burr. 1568.

eration thereof was solely for past cohabitation they should find for the plaintiff to the full amount thereof, and if for future cohabitation then they should find for the defendant, and they found for the latter, the judgment was affirmed.⁶¹ And where a married man living with his wife cohabited for several years with another woman who knew he was married, and upon ceasing to cohabit with her he gave her a bond to secure an annuity to her for life and the payment of a sum of money to provide for her children borne to him by her during cohabitation, an action at law was sustained. Upon such bond Bayley, J., said: "It is clearly established that a bond given to a single woman by a single man, as a *præmium pudicitiae*, at the time he determines the illicit connection is valid between the parties * * * It having been once established that a bond given to secure a provision to a woman who has lived with a man in a state of fornication is valid, my present impression is that we ought not to hold that a bond given to a woman who has lived with a man in a state of adultery is void, because in one case the woman has been guilty of a greater degree of immorality than in the other."⁶² So, in an action on an annuity bond, given by a man to a woman with whom he cohabits, it is for the jury to determine whether at the time it was given there was or was not an intention and agreement to continue the connection in future, for if such intention existed the bond was given in furtherance thereof, and no recovery can be had thereon.⁶³

§ 301. **Same subject—Decisions continued.**—Where a note is given after seduction and as a compensation for the injury caused thereby, and not in settlement of a criminal prosecution, the consideration is valid independently of the compromise of the suit.⁶⁴ Again, a promissory note given in compromise of bastardy proceedings is valid and of sufficient consideration for a recovery at law, even though the offspring comes into the world stillborn after a compromise has been effected;⁶⁵ and so even though the child lived but a few days after birth.⁶⁶ And in another similar case it is held that where the law au-

⁶¹ *Massey v. Wallace*, 32 S. C. 149, 10 S. E. 937.

⁶³ *Friend v. Harrison*, 2 Carr. & P. 584, 12 Eng. C. Law 276.

⁶² *Nye v. Moseley*, 6 Barn. & Cr. 133. See *People v. Hayes*, 70 Hun (N. Y.) 111, 54 N. Y. St. R. 184; *aff'd*, 140 N. Y. 484, 35 N. E. 95, 37 Am. St. Rep. 573, 23 L. R. A. 83. *Examine Gray v. Mathias*, 5 Ves. Jr. 286, 294.

⁶⁴ *Smith v. Richards*, 29 Conn. 232. See *Shenk v. Mingle*, 13 Serg. & R. (Pa.) 29.

⁶⁵ *Merritt v. Flemming*, 42 Ala. 234 (action by payee against maker).

⁶⁶ *Maxwell v. Campbell*, 8 Ohio St. 265.

thorizes no one but the mother of a bastard to institute a prosecution against the putative father, she may or may not, at her option, commence such prosecution. So that a note given by the father of the bastard in consideration of her promise not to commence such a suit is valid and collectible, and the death of the child in such a case cannot in any degree affect the consideration of the note, as such a note is given not to secure a maintenance of the child, but to avoid a prosecution for bastardy.⁶⁷ If a promissory note recites two considerations for promise therein contained, and either of them is inconsistent with law, morality or public policy, it is held that the whole contract is vicious and void; yet a promissory note for past cohabitation, or based upon the obligation to support defendant's bastard child, is legal and valid even though the mother agrees not to prosecute the defendant under the statute.⁶⁸ In an English case it is held that where the statute only authorizes the parish officers to take security from the putative father of a bastard to indemnify the parish, and they take a promissory note absolute for a sum certain, and there is a tender of a lesser sum as the amount of the charge actually sustained by the parish, no further recovery can be had. The security being given for indemnity excludes every other consideration. The parish officers are not to speculate, but to take the security as a matter of public duty in the form prescribed in the statute. Lord Ellenborough said: "I am of opinion that the plaintiffs are not entitled to recover beyond the sum paid into court, whether considering the contract as void upon principles of public policy, or considering it with relation to the individuals with whom it was made, as a contract for gain or loss by persons clothed with a public trust upon the subject-matter of their trust, and giving them an interest in the mal-execution of it."⁶⁹ Again, where a lodging under a weekly tenancy was not originally let for the purposes of prostitution, but it was subsequently so used with the plaintiff's knowledge recovery was denied for such subsequent rental.⁷⁰ But where plaintiff was employed to wash clothes for defendant, who was a prostitute, knowing her to be such, it was decided that the use to which the clothes might be applied could not bar a recovery in an action for work and labor.⁷¹

⁶⁷ *Harter v. Johnson*, 16 Ind. 271. *Examine Hoit v. Cooper*, 41 N. H.

⁶⁸ *Burgen v. Straughan*, 7 J. J. 111.

Marsh. (30 Ky.) 584. See also

Hays v. McFarlan, 32 Ga. 699, 79

Am. Dec. 317; *Jackson v. Finney*

and *Riley*, 33 Ga. 512.

⁷⁰ *Jennings v. Throgmorton*, 21 *Eng. C. Law* 744.

⁷¹ *Lloyd v. Johnson*, 1 Bos. & P. 340.

⁶⁹ *Cole v. Garver*, 6 East. 109, 110.

CHAPTER XIII.

USURY.

Sec.

302. Usury—Generally.

303. *Bona fide* holders—Paper based on usurious contract between original parties.

Sec.

304. Maker and transferee — Discount and transfer.

305. Renewal bill or note—Extensions.

306. Corporations.

§ 302. **Usury—Generally.**—The general rule that contracts to pay usurious interest are void and unenforceable, or at least voidable at the option of the borrower or those in privity with him, since that which the statute declares unlawful and void can have no validity to the extent specified,¹ applies to an action by a payee on a note tainted

¹ *Arkansas*.—Sapp v. Cobb, 60 Ark. 367, 30 S. W. 349.

Florida.—Maxwell v. Jacksonville Loan & Imp. Co., 45 Fla. 425, 468, 34 So. 255; Lyle v. Winn, 45 Fla. 419, 34 So. 158.

Georgia.—Howell v. Pennington, 118 Ga. 494, 45 S. E. 272.

Kentucky.—Guenther v. Wisdom, 27 Ky. L. Rep. 230, 84 S. W. 771.

Michigan.—George N. Fletcher & Sons v. Alpena Cir. Judge, 136 Mich. 511, 99 N. W. 748, 11 Det. Leg. N. 105.

Missouri.—Missouri Real Estate Syndicate v. Sims, 179 Mo. 679, 78 S. W. 1006; Vette v. Geist, 155 Mo. 27, 55 S. W. 871; Osborn v. Payne, 111 Mo. App. 29, 85 S. W. 667; Cowgill v. Jones, 99 Mo. App. 390, 73 S. W. 995.

Nebraska.—Hare v. Hooper, 56 Neb. 480, 76 N. W. 1055.

New Jersey.—Clarke v. Day (N. J.), 60 Atl. 39.

New York.—Union Credit & Investment Co. v. Union Stockyard & Market Co., 92 N. Y. Supp. 269; Reich v. Cochran, 85 N. Y. Supp. 247, 41 Misc. 621.

North Carolina.—Erwin v. Morris (N. C.), 40 S. E. 53; Churchill v. Turnage, 122 N. C. 426, 30 S. E. 122.

Oklahoma.—Metz v. Winne (Okla.), 79 Pac. 223.

West Virginia.—Lorentz v. Pinell, 55 W. Va. 114, 46 S. E. 796. Examine Matz v. Avick, 76 Conn. 388, 56 Atl. 630.

If one is financially embarrassed and he employs another to assist him, and the value of his services is afterward agreed upon and paid by a promissory note it is not usury. Noyes v. Landon, 59 Vt. 569, 10 Atl. 342.

with usury and such a defense is good as to him;² and a scheme or device to evade the usury laws brings the note within the rule.³ Such a defense extends not only to parties but to privies;⁴ and where one seeking relief was neither a party nor privy it was refused.⁵ But such defense, it is declared, is available against personal representatives.⁶ It is, however, so it is determined, a personal defense limited to immediate parties or the debtor,⁷ and a purchaser of mortgaged property can-

² *Georgia*.—Howell v. Pennington, 118 Ga. 494, 45 S. E. 272; Angier v. Smith, 101 Ga. 844, 28 S. E. 167. *Illinois*.—Armour v. Moore, 5 Ill. App. 433.

Iowa.—Pardoe v. State Nat. Bk., 106 Iowa 345, 76 N. W. 800.

Minnesota.—Johnson v. Joyce, 90 Minn. 377, 97 N. W. 113.

Missouri.—Citizens' Nat. Bk. v. Donnell, 172 Mo. 384, 72 S. W. 925, aff'd 195 U. S. 369, 49 L. Ed. 238, 25 Sup. Ct. 49.

Nebraska.—Allen v. Dunn (Neb.), 99 N. W. 680.

New York.—Strickland v. Henry, 66 N. Y. App. Div. 23, 73 N. Y. Supp. 12; Dunham v. Dey, 13 Johns. (N. Y.) 40; Ketchum v. Barber, 4 Hill (N. Y.) 224, 234.

Texas.—Webb v. Galveston & H. Inv. Co. (Tex. Civ. App.), 75 S. W. 355.

United States.—McLean v. Lafayette Bank, 2 McLean (U. S.) 587. Examine Scott v. Kennedy, 201 Pa. 462, 51 Atl. 384; Peterson v. Berry, 125 Fed. 902, 60 C. C. A. 610.

³ *Missouri K. & T. Trust Co. v. Krumseig*, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474, aff'g 23 U. S. C. C. A. 1, 40 U. S. App. 620, 77 Fed. 32, which affirmed 71 Fed. 350.

⁴ *Laux v. Gildersleeve*, 23 N. Y. App. Div. 352, 48 N. Y. Supp. 301. See Crawford v. Nimmons, 180 Ill. 143, 54 N. E. 209, rev'g 80 Ill. App. 543. Examine generally Ford v. Washington Building & Co. Asso., 10 Idaho 30, 76 Pac. 1010.

⁵ *Vette v. Geist*, 155 Mo. 27, 55 S. W. 871. See generally *Missouri Real Estate Syndicate v. Sims*, 179 Mo. 679, 78 S. W. 1006.

⁶ *Fox v. Whitney*, 16 Mass. 118.

⁷ *Alabama*.—Stickney v. Moore, 108 Ala. 590, 19 So. 76; Cain v. Gimon, 36 Ala. 168.

Connecticut.—Loomis v. Eaton, 32 Conn. 550.

Idaho.—Anderson v. Oregon Mortg. Co., 8 Idaho 418, 69 Pac. 130.

Illinois.—Crawford v. Nimmons, 180 Ill. 143, 54 N. E. 209, rev'g 80 Ill. App. 543.

Iowa.—Conger v. Babbet, 67 Iowa 13, 24 N. W. 569.

New Hampshire.—Savage v. Fox, 60 N. H. 17.

New York.—Bullard v. Raynor, 30 N. Y. 197.

North Carolina.—Faison v. Grandy (N. C. 1901), 38 S. E. 897.

South Carolina.—Zeigler v. Maner, 53 S. C. 115, 30 S. E. 129.

West Virginia.—Smith v. McMillan, 46 W. Va. 577, 33 S. E. 283. But see Prather v. Smith, 101 Ga. 283, 28 S. E. 85; Akers v. Demond, 103 Mass. 318.

Examine generally *Bacon v. Iowa Savings & Loan Ass'n*, 121 Iowa 449, 96 N. W. 977; *People's Building & Loan Ass'n v. Pickard* (Neb.), 96 N. W. 337; *People's Building & Loan Ass'n v. Palmer* (Neb.), 89 N. W. 316; *Bird v. Kendall*, 62 S. C. 178, 40 S. E. 142; *Harper v. Middle States Loan, Building & Construction Co.*, 55 W. Va. 149, 46 S. E. 817.

not avail himself of the defense;⁸ nor as against an indorser can usury between maker and payee be set up;⁹ nor, as against the payee, is usury between the payee and acceptor of a bill a defense;¹⁰ although it is held that usury on the part of the maker is available in behalf of an accommodation indorser,¹¹ or of an acceptor of a bill in an action by the holder.¹² But as against a surety an usurious contract between the principal and holder of a note constitutes no defense,¹³ although if collateral has been pledged by a surety for payment he may set up this defense;¹⁴ although where the principal has obtained an extension by an usurious contract the surety is entitled to the benefit of the payments made,¹⁵ but an indorser has been denied such a defense,¹⁶ though it has been held available to a surety against one who purchases the paper after maturity.¹⁷ But in construing the language used the words will not be strained to sustain such a defense.¹⁸ Again, where a usurious loan has been obtained by a pledge of notes fraudulently obtained the owner may set up the defense of usury under a statute making a pledge based on usury illegal and void.¹⁹ So, a mortgage given to secure a usurious note will, so it is decided, be likewise

Receivers may set up defense.
Short v. Post, 58 N. J. Eq. 130, 42 Atl. 569.

⁸ *Town of Reading v. Town of Weston*, 7 Conn. 409; *Read v. Eastman*, 50 Vt. 67.

⁹ *Challis v. McCrum*, 22 Kan. 157; *McKnight v. Wheeler*, 6 Hill (N. Y.) 492; *Bly v. Bank*, 79 Pa. St. 453.

¹⁰ *Woolfolk v. Plant*, 46 Ga. 422.

¹¹ *Newport Nat. Bank v. Tweed*, 4 Houst. (Del.) 225; *Nat. Bank of Auburn v. Lewis*, 75 N. Y. 516 [reversing 10 Hun (N. Y.) 468].

¹² *Jackson v. Fassit*, 33 Barb. (N. Y.) 645, 21 How. Prac. (N. Y.) 279, 12 Abb. Prac. (N. Y.) 281. Ill. 123.

¹³ *Illinois*.—*Sanner v. Smith*, 89 Ill. 123.

Kansas.—*Jenness v. Cutler*, 12 Kan. 500.

Kentucky.—*Burks v. Wonerline*, 6 Bush (Ky.) 20.

Mississippi.—*Brown v. Proffit*, 53 Miss. 649.

New Hampshire.—*Cole v. Hills*, 44 N. H. 227.

Ohio.—*First Nat. Bank of Columbus v. Garlinghouse*, 22 Ohio St. 492; *Selser v. Brock*, 3 Ohio St. 302.

Vermont.—*Lamoille County Nat. Bank v. Bingham*, 50 Vt. 105; *Davis v. Converse*, 35 Vt. 503; *Ward v. Whitney*, 32 Vt. 89.

¹⁴ *Buquo v. Bank of Erin (Tenn.)*, 52 S. W. 775.

¹⁵ *Lemmon v. Whitman*, 75 Ind. 318.

¹⁶ *Stewart v. Bramhall*, 74 N. Y. 85 [affirming 11 Hun (N. Y.) 139]; *Union Nat. Bank v. Wheeler*, 60 N. Y. 612.

¹⁷ *Maher v. Lanfrom*, 86 Ill. 513.

¹⁸ *Hamilton v. Le Grange*, 2 H. Bl. 144.

¹⁹ *Keim v. Vette*, 167 Mo. 389, 67 S. W. 223. *Examine Chambers v. Gilbert*, 68 Minn. 183, 70 N. W. 1077. See generally *Osborn v. Payne*, 111 Mo. App. 29, 85 S. W. 667.

affected,²⁰ and so discharge the mortgagor from paying interest in certain cases.²¹ So, the defense of usury is open to a trustee who has mortgaged the trust estate.²² But the fact that a larger per cent has been charged than the usual time prices does not make usurious a bond and mortgage given for personalty purchased;²³ and in case of a junior mortgagee, the debtor being insolvent, it is held that the former cannot avail himself of the defense of usury against a prior incumbrancer.²⁴ So an agreement, based upon usurious interest, to extend the time for payment does not taint with usury the original note and mortgage which were not so tainted;²⁵ nor does the receiving, after maturity, usurious interest invalidate a note and mortgage not otherwise tainted with usury;²⁶ for receiving such usurious interest on a note after it becomes due does not constitute usury, such note not being originally tainted with usury.²⁷ So, a note for prior advances and a mortgage for future advances will be valid as to such of the secured debts as are not usurious.²⁸ Again, the validity of a note is not destroyed by the taking of a separate note under a usurious contract.²⁹ If an agent is authorized to make a loan to a person and is entrusted with a certain sum of money for that purpose, and he violates the usury laws, the principal is responsible for such unlawful exactions by his agent, and cannot maintain that the contract was not usurious.³⁰

²⁰ *Illinois*.—*Kleeman v. Frisbie*, 63 Ill. 482.

Nebraska.—*Farm Land Security Co. v. Nelson*, 52 Neb. 624, 72 N. W. 1048.

North Carolina.—*Beard v. Bingham*, 76 N. C. 285.

South Carolina.—*Erhardt v. Varn*, 51 S. C. 550, 29 S. E. 225.

Federal.—*Krumbieg v. Missouri, K. & T. Trust Co.*, 71 Fed. 350. See *Bouker v. Galligan* (N. J. Eq.), 57 Atl. 1010. *Examine Kellogg*, In re, 113 Fed. 120; *Sherwood v. Haney*, 63 Ark. 249, 38 S. W. 15; *Elder v. Elder*, 119 Ga. 174, 45 S. E. 990; *Burdette v. Robinson*, 97 Ga. 612, 25 S. E. 349.

²¹ *May v. Folsom*, 113 Ala. 198, 20 So. 984. *Examine Wallace v. Goodlett*, 104 Tenn. 670, 58 S. W. 343.

²² *Wagner v. Pease*, 104 Ga. 417, 30 S. E. 895.

²³ *Churchill v. Turnage*, 122 N. C. 426, 30 S. E. 122.

²⁴ *Stickney v. Moore*, 108 Ala. 590, 19 So. 76.

²⁵ *Morse v. Welcome*, 68 Minn. 210, 70 N. W. 978.

²⁶ *McEwin v. Humphrey* (Ind. Ty.), 45 S. W. 114.

²⁷ *Dell v. Oppenheimer*, 9 Neb. 454, 4 N. W. 51; *Mahler v. Merchants' Nat. Bk.*, 65 Minn. 37, 67 N. W. 655.

²⁸ *Atkinson v. Burt*, 65 Ark. 316, 45 S. W. 987.

²⁹ *Cooper v. Tappan*, 4 Wis. 362.

³⁰ *Robinson v. Sims*, 85 Minn. 242, 88 N. W. 845. See *Short v. Pullen*, 63 Ark. 385, 38 S. W. 1113; *Beach v. Lattner*, 101 Ga. 357, 28 S. E. 110; *Ridgway v. Davenport*, 37 Wash. 134, 79 Pac. 606. Compare *Whaley v. American Freehold Land Mortgage Co.*, 74 Fed. 73, 20 C. C. A. 306, 42 U. S. App. 90.

So a principal may be bound by notice to his agent that a note purchased by the latter is tainted with usury.³¹ But a mortgage note may provide for a greater than a legal rate of interest after its maturity.³² The question of the availability of the defense of usury in actions on bills, notes, etc., is so largely a matter of statutory regulation in different jurisdictions, and is so largely dependent thereupon that recourse must be had to those statutes to determine who is entitled and who not to make such a defense, and the relative and respective rights of the parties.³³ It may be stated, however, that the repeal

³¹ *Haynes v. Gay*, 37 Wash. 230, 79 Pac. 794.

³² *Sloane v. Lucas* (Wash.), 79 Pac. 949.

³³ *Georgia*.—*Lanier v. Cox*, 65 Ga. 265 (Ga. Acts 1875, p. 105).

Idaho.—*Anderson v. Oregon*, 8 Idaho 418, 69 Pac. 130 (Idaho Rev. St. 1887, Sec. 1266).

Illinois.—*Carter v. Moses*, 39 Ill. 539 (Ill. Acts 1845 & 1857); *Hemenway v. Cropsey*, 37 Ill. 357 (Ill. Acts 1849).

Maine.—*Tuxbury v. Abbott*, 59 Me. 466 (Me. Rev. St. 1857, c. 45); *Wing v. Dunn*, 24 Me. 128 (Me. Rev. St., c. 69, Sec. 6).

Massachusetts.—*North Bridge-water Bank v. Copeland*, 7 Allen (Mass.) 139 (Mass. St. 1863, c. 242); *Kendall v. Robertson*, 12 Cush. (Mass.) 156 (Mass. Rev. St., c. 35, Sec. 2; Mass. Rev. St. 1846, c. 199).

Michigan.—*Coatsworth v. Barr*, 11 Mich. 199 (Mich. Comp. Laws, Sec. 1316).

Mississippi.—*Rozelle v. Dickerson*, 63 Miss. 538 (Miss. Code 1880, § 1141).

New York.—*Clafin v. Boorum*, 122 N. Y. 385, 25 N. E. 360 (4 N. Y. Rev. St., p. 2513, § 5); *Aeby v. Rapelye*, 1 Hill (N. Y.) 9 (1 N. Y. Rev. St., p. 772, § 5).

North Carolina.—*Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717, 24 L. R. A. 280 (N. C. Code, § 3836).

South Carolina.—*Gaillard v. Le Seigneur*, 1 McMullan (S. C.) 225 (S. C. Acts 1777 & 1831).

Virginia.—*Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 22 S. E. 487, 29 L. R. A. 827 (Va. Code 1887, § 2818); *Moffet v. Bickle*, 21 Gratt. (Va.) 280 (Va. Code, ch. 177, § 19, p. 733).

Upon this subject of the effect of statutory provisions and the rights of parties with relation to defenses under usurious contracts see generally the following cases:

Alabama.—*Turner v. Merchants' Bank*, 126 Ala. 397, 28 So. 469 (Code 1886, § 4140, Discount by banks).

Connecticut.—*Matz v. Arick*, 76 Conn. 388, 56 Atl. 630 (Gen. Stat. 1902, § 4599).

Idaho.—*First Nat. Bank v. Glenn*, 10 Idaho 224, 77 Pac. 623 (Rev. St. 1887, § 425); *Finney v. Moore*, 9 Idaho 284, 74 Pac. 806 (Rev. Stat. 1887, § 1266).

Kentucky.—*Tomlin v. Morris*, 26 Ky. L. Rep. 681 (Ky. Stat. 1903, § 2219).

Michigan.—*Becker v. Headstein* (Mich.), 100 N. W. 752 (Comp. Laws, § 4857); *Green v. Grant*, 134 Mich. 462, 96 N. W. 583, 10 Det. Leg. N. 546 (Comp. Laws 1897, § 4857).

Minnesota.—*Lee v. Melby*, 93 Minn. 4, 100 N. W. 379 (Laws 1877, p. 52, c. 15).

Missouri.—*Vette v. Geist*, 155 Mo. 27, 55 S. W. 871 (Laws 1891, p. 170);

of a statute which validates an usurious note does not make the note invalid and subject to the defense of usury;³⁴ and where a subsequent statute reduces the rate of interest, continuing to pay the former legal rate does not constitute usury;³⁵ nor does the enactment of a statute with reference to usury make it retroactive as to contracts existing at the time it became a law.³⁶ Under the New York statute, which makes it lawful to receive, or to contract to receive and collect, any sum agreed upon in writing by the parties, for making advances of money repayable on demand to an amount not less than five thousand dollars, upon bills of exchange or other negotiable instruments as collateral security for such repayment, it is held that such excess of the legal rate of interest upon loans so made are not usurious even though orally agreed upon.³⁷ Again, actions at law and in equity are within the meaning of the term "action" in a usury statute.³⁸

§ 303. Bona fide holders—Paper based on usurious contract between original parties.—Whether paper based on a usurious contract between the original parties is or is not subject to the defense of usury as against a *bona fide* holder before maturity, without notice, and for value, is a question upon which the decisions are far from being in harmony. The general rule, however, seems to be that such a defense

Davis, McDonald & Davis v. Tandy, 107 Mo. App. 437, 81 S. W. 457 (Rev. Stat. 1899, § 3710).
ley, 55 S. C. 132, 32 S. E. 531, 33 S. E. 1 (Rev. Stat., § 1390).

Nebraska.—Allen v. Dunn (Neb.), 99 N. W. 680 (Cobbeys Ann. St. 1903, § 6725).

New York.—Samuel Wilde's Sons, In re, 133 Fed. 562 (Laws N. Y. 1882, p. 290, c. 237, warehouse receipts clause).

North Carolina.—Faison v. Grandy, 186 N. C. 827, 36 S. E. 276 (Code, § 3635; Acts 1895, c. 69).

North Dakota.—Waldner v. Bowden State Bank (N. D.), 102 N. W. 169 (Rev. Codes 1899, § 4066).

Oklahoma.—Metz v. Winne (Okla.), 79 Pac. 223 (Wilson's Rev. & Ann. Stat. 1903, § 848).

South Carolina.—Newton v. Wood-

Washington.—Ridgway v. Davenport, 37 Wash. 134, 79 Pac. 606 (1 Ballinger's Ann. Codes & St., § 3669).

³⁴ First Ecclesiastical Soc. v. Loomis, 42 Conn. 570.

³⁵ Mastin v. Cochran, 25 Ky. L. Rep. 712, 76 S. W. 343.

³⁶ North Bridgewater Bank v. Copeland, 7 Allen (89 Mass.) 139. See Hackley v. Sprague, 10 Wend. (N. Y.) 113.

³⁷ Samuel Wilde's Sons, In re, 133 Fed. 562; Laws N. Y. 1882, c. 237; 2 Cumming & Gilbert's Gen'l Laws N. Y., p. 1994.

³⁸ Coatsworth v. Barr, 11 Mich. 199, construing Mich. Comp. Laws, § 1316.

is not available against such holder in the absence of a statutory provision making such paper absolutely void.³⁹ In several jurisdictions,

³⁹ *Alabama*.—Orr v. Sparkman, 120 Ala. 9, 23 So. 829.

Arkansas.—Tucker v. Wilamouicz, 8 Ark. (3 Eng.) 157.

Illinois.—Hemenway v. Cropsey, 37 Ill. 358; Sherman v. Blackman, 24 Ill. 347; Conkling v. Underhill, 3 Scam. (Ill.) 388.

Indiana.—See Harbaugh v. Tanner, 163 Ind. 574, 71 N. E. 145.

Iowa.—Dickerman v. Day, 31 Iowa 444; Brown v. Wilcox, 15 Iowa 414.

Kansas.—Gross v. Funk, 20 Kan. 655.

Kentucky.—Roby v. Sharp, 6 T. B. Mon. (Ky.) 375; Owings v. Grimes, 5 Litt. (Ky.) 331.

Maryland.—Gwynn v. Lee, 9 Gill (Md.) 137; Burt v. Gwinn, 4 Har. & J. (Md.) 507.

Massachusetts.—Towne v. Rice, 122 Mass. 67; Ayer v. Tilden, 15 Gray (Mass.) 178.

Minnesota.—Robinson v. Smith, 62 Minn. 62, 64 N. W. 90; First Nat. Bank v. Bentley, 27 Minn. 87, 6 N. W. 422.

Nebraska.—Cheney v. Janssen, 20 Neb. 128, 29 N. W. 289; Sedgwick v. Dixon, 18 Neb. 545, 26 N. W. 247; Darst v. Backus, 18 Neb. 231, 24 N. W. 681; Evans v. De Roe, 15 Neb. 630, 20 N. W. 99; Cheney v. Cooper, 14 Neb. 415, 16 N. W. 471; State Sav. Bank v. Scott, 10 Neb. 83, 4 N. W. 314; Wortendyke v. Meehan, 9 Neb. 221, 2 N. W. 339. See Bovier v. McCarthy, 4 Neb. (unofficial) 490, 94 N. W. 965.

New Hampshire.—Young v. Berkeley, 2 N. H. 410.

New York.—Long Island Bank v. Boynton, 105 N. Y. 656, 11 N. E. 837; Chatham Bank v. Betts, 37 N.

Y. 356, affirming 9 Bosw. (N. Y.) 552, 23 How. Prac. (N. Y.) 476; Farmers' & Merchants' Bank of Genesee v. Parker, 37 N. Y. 148; Kitchel v. Schenk, 29 N. Y. 515; Bank v. Flanigan, 39 Leg. Int. (N. Y.) 264; Hackley v. Sprague, 10 Wend. (N. Y.) 113; Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Odell v. Greenly, 4 Duer (N. Y.) 358. See McWhirter v. Longstreet, 81 N. Y. Supp. 334, 39 Misc. 331.

North Carolina.—Coor v. Spicer, 65 N. C. 401.

Pennsylvania.—Bly v. Second Nat. Bank, 79 Pa. St. (29 P. F. Smith) 453; Creed v. Stevens, 4 Whart. (Pa.) 223.

South Carolina.—Foltz v. Mey, 1 Bay (S. C.) 486.

Tennessee.—Bradshaw v. Van Valkenburg, 97 Tenn. 316, 37 S. W. 88.

Virginia.—Lynchburg Nat. Bank v. Scott, 91 Va. 652, 22 S. E. 487.

United States.—Tilden v. Blair, 21 Wall. (U. S.) 241, 22 C. Ed. 632; Palmer v. Call, 2 McCrary (U. S. C. C.) 522. See Fleckner v. United States Bank, 8 Wheat. (U. S.) 339.

Examine Wilson v. Knight, 59 Ala. 172; Saylor v. Daniels, 37 Ill. 339; Robinson v. Smith, 62 Minn. 62, 64 N. W. 90; Holmes v. Bank, 53 Minn. 350, 55 N. W. 555; Mason v. Anthony, 42 N. Y. (3 Keyes) 609, 35 How. Pr. 477, 3 Abb. Dec. 207; Holmes v. Williams, 10 Paige (N. Y.) 326; Ramsey v. Clark, 4 Humph. (Tenn.) 244; Fant v. Miller, 17 Gratt. (Va.) 77; Otto v. Surgee, 14 Wis. 571.

Action against payee as indorser by bona fide holder, the originally usurious contract is not available

however, such a defense is good against a *bona fide* holder⁴⁰ where such an instrument is expressly declared void by statute,⁴¹ although the term "unlawful" in a statute is held not to have such an effect.⁴² Again, although there has been a waiver of all defenses as against a *bona fide* holder, the statutory defense of usurious contract may be sustained,⁴³ and knowledge or notice of this statutory infirmity in the paper precludes recovery.⁴⁴

as a defense. *McKnight v. Wheeler*, 6 Hill (N. Y.) 492.

Usurious contract between intermediate holders of paper transferred before maturity can not be set up against indorsee without notice. *King v. Johnson*, 3 McCord (S. C.) 365.

⁴⁰ *Alabama*.—*Orr v. Sparkman*, 120 Ala. 9, 23 So. 829; *Pearson v. Bailey*, 23 Ala. 537.

Connecticut.—*Townsend v. Bush*, 1 Conn. 260.

Georgia.—*Walton Guano Co. v. Copeland*, 112 Ga. 319, 37 S. E. 411; *Clarke v. Havard*, 111 Ga. 242, 36 S. E. 837; *Angier v. Smith*, 101 Ga. 844, 28 S. E. 167; *Laramore v. Bank*, 69 Ga. 722.

Iowa.—*Bacon v. Lee*, 4 Iowa (Clarke Rept.) 490.

Kentucky.—*True v. Triplett*, 4 Metc. (Ky.) 57; *Early v. McCart*, 2 Dana (Ky.) 414.

Maryland.—*Cockey v. Forrest*, 3 Gill & J. (Md.) 482; *Burt v. Gwinn*, 4 Har. & J. (Md.) 507.

Massachusetts.—*Whitten v. Hayden*, 7 Allen (Mass.) 407; *North Bridgewater Bank v. Copeland*, 7 Allen (Mass.) 139; *Sylvester v. Swan*, 5 Allen (Mass.) 134; *Knapp v. Briggs*, 2 Allen (Mass.) 551.

New York.—*Union Bank of Rochester v. Gilbert*, 83 Hun (N. Y.) 417, 31 N. Y. Supp. 945; *Clark v. Loomis*, 5 Duer (N. Y.) 468; *Clark v. Sisson*, 4 Duer (N. Y.) 408; *Powell v. Waters*, 8 Cow. (N. Y.) 669.

North Carolina.—*Faison v. Grandy*, 128 N. C. 438, 38 S. E. 897.

United States.—*Hamilton v. Fowler*, 99 Fed. 18.

England.—*Young v. Wright*, 1 Camp. 139. Examine further, *Rodecker v. Littauer*, 8 C. C. A. 320, 59 Fed. 857; *Aeby v. Rapelye*, 1 Hill (N. Y.) 9; *Lynchburg v. Norvell*, 20 Gratt. (Va.) 601; *Ackland v. Pearce*, 2 Camp. 599; *Lowe v. Waller*, 2 Doug. 736; *Lowes v. Mazzaredo*, 1 Starkie 385; *Chapman v. Black*, 2 Barn. & Ald. 590; *Henderson v. Benson*, 8 Price 288.

⁴¹ *Alabama*.—*Pearson v. Bailey*, 23 Ala. 537; *Faris v. King*, 1 Stew. (Ala.) 255.

Kentucky.—*True v. Triplett*, 4 Metc. (Ky.) 57.

Massachusetts.—*Bridge v. Hubbard*, 15 Mass. 96, 8 Am. Dec. 86.

New York.—*Claffin v. Boorum*, 122 N. Y. 385, 25 N. E. 360.

South Carolina.—*Solomons v. Jones*, 3 Brev. (S. C.) 54, 5 Am. Dec. 538; *Payne v. Trezevant*, 2 Bay (S. C.) 23.

United States.—*Kellogg*, In re, 113 Fed. 120 (under laws of New York); *Rodecker v. Littauer*, 59 Fed. 857, 8 C. C. A. 320.

⁴² *Pickaway Co. Bank v. Prather*, 12 Ohio St. 497. See *Ewell v. Daggs*, 108 U. S. 143.

⁴³ *Union Nat. Bank v. Fraser*, 63 Miss. 231.

⁴⁴ *Torrey v. Grant*, 10 Smedes & M. (Miss.) 89; *Berry v. Thompson*,

§ 304. **Maker and transferee—Discount and transfer.**—In a suit by the transferee against the maker it constitutes no defense that the paper was indorsed and discounted under a usurious contract at an unlawful rate of interest.⁴⁵ But it seems, under a comparatively recent decision, that such a rule would not apply to a bill or note which had its inception only at the time of being discounted under such usurious contract.⁴⁶

§ 305. **Renewal bill or note—Extensions.**—A renewal note is tainted with usury where the original note was so tainted,⁴⁷ for a note is not purged of the taint of usury by a mere renewal of the note without changing the contract or restoring the overcharge of interest;⁴⁸ so

3 Johns. Ch. (N. Y.) 395, *aff'd* 17 Johns. 436.

⁴⁵ *Alabama*.—Capital City Ins. Co. v. Quinn, 73 Ala. 558.

Georgia.—See Campbell v. Morgan, 111 Ga. 200, 36 S. E. 621.

Iowa.—Dickerman v. Day, 31 Iowa 444, 7 Am. Rep. 156.

Maine.—Clapp v. Hanson, 15 Me. (3 Shep.) 345.

Massachusetts.—Knights v. Putnam, 3 Pick. (Mass.) 184.

Mississippi.—Newman v. Williams, 29 Miss. 212.

New Jersey.—Importers & Traders' Nat. Bank v. Littell, 47 N. J. L. 233; Durant v. Banta, 27 N. J. L. 624.

New York.—Archer v. Shea, 14 Hun (N. Y.) 493; Stewart v. Bramhall, 11 Hun (N. Y.) 139; Cameron v. Chappell, 24 Wend. (N. Y.) 94; Dowe v. Schutt, 2 Denio (N. Y.) 621.

Pennsylvania.—Gaul v. Willis, 26 Pa. St. (2 Casey) 259.

Vermont.—Cady v. Goodnow, 49 Vt. 400.

United States.—Nichols v. Fearson, 7 Pet. (U. S.) 103.

England.—Parr v. Eliason, 1 East 92; Daniel v. Cartony, 1 Esp. 274. Compare Clark v. Sisson, 4 Duer (N. Y.) 408; Fish v. De Wolf, 17 N. Y. Super. Ct. (4 Bosw.) 573.

⁴⁶ Simpson v. Hefter, 87 N. Y.

Supp. 243, 42 Misc. 482. See also the following cases:

Arkansas.—German Bank v. De Shon, 41 Ark. 331.

Delaware.—Nailor v. Daniel, 5 Houst. (Del.) 455.

Maine.—Tufts v. Shepherd, 49 Me. 312.

Massachusetts.—Whitten v. Hayden, 7 Allen (Mass.) 407.

New York.—Eastman v. Shaw, 65 N. Y. 522; Clark v. Sisson, 22 N. Y. 312; French v. Hoffmire, 43 N. Y. Supp. 496, 19 Misc. Rep. 714; Pratt v. Adams, 7 Paige (N. Y.) 615; Clark v. Sissons, 5 Duer (N. Y.) 468; Bennett v. Smith, 15 Johns. (N. Y.) 355.

United States.—Rodecker v. Litauger, 8 C. C. A. 320, 59 Fed. 857.

⁴⁷ Pardoe v. Iowa State Nat. Bank, 106 Iowa 345, 76 N. W. 800; Clark v. Sisson, 4 Duer (N. Y.) 408; Macungie Sav. Bank v. Hottenstein, 89 Pa. St. 328. See Ives v. Bosley, 35 Md. 262; Union Nat. Bank v. Fraser, 63 Miss. 231; Wild v. Howe, 74 Mo. 551; Derrick v. Hubbard, 27 Hun (N. Y.) 347; Niblack v. Champeny, 10 S. D. 165, 72 N. W. 402; Fay v. Tower, 58 Wis. 286, 16 N. W. 558.

⁴⁸ Nicrosi v. Walker, 139 Ala. 369, 37 So. 97.

the original transaction is not purged by taking a renewal note, no rights of *bona fide* holders being involved;⁴⁹ and a transaction may be usurious as to a renewal note although it bears the legal rate of interest where the note is but an agreement to pay an old debt with usurious interest.⁵⁰ But an accommodation note delivered in payment of another and usurious note is not a renewal of the latter so as to permit of the defense of usury;⁵¹ and if a new note, not tainted with usury, is substituted for another but usurious note, the new security is held to be valid in a *bona fide* holder's hands.⁵² And a note may be purged of usury by the repeal of a statute so that a renewal note given thereafter, will not be affected by the taint;⁵³ nor will the usurious contract as to the original note be a defense to a renewal note while in the hands of a *bona fide* holder, where such holder could otherwise be free from such defense of usury.⁵⁴ A bonus for extending the time of payment of a note then bearing the full legal rate of interest precludes recovery of the bonus;⁵⁵ and if the time of payment is extended the test of whether the contract is usurious or not is the rate of interest borne by the debts for which there is a forbearance.⁵⁶ But the taking of usury for forbearance in extending the time is held not to make usurious a note and mortgage originally valid.⁵⁷

⁴⁹ *Nicrosi v. Walker*, 139 Ala. 369.

⁵⁰ *Citizens' Nat. Bank v. Donnell*, 172 Mo. 384, 72 S. W. 925.

⁵¹ *Palmer v. Carpenter*, 53 Neb. 394, 73 N. W. 690.

⁵² *Powell v. Waters*, 8 Cow. (N. Y.) 669. See *Masterson v. Grubbs*, 70 Ala. 406; *Faison v. Grandy*, 128 N. C. 438, 38 S. E. 897.

⁵³ *Houser v. Bank*, 57 Ga. 95; *Flight v. Reed*, 1 Hurl. & C. 703.

⁵⁴ *Alabama*.—*Masterson v. Grubbs*, 70 Ala. 406; *Mitchell v. McCullough*, 59 Ala. 179.

Nebraska.—*Palmer v. Carpenter*, 53 Neb. 394, 73 N. W. 690.

New York.—*Kent v. Walton*, 7 Wend. (N. Y.) 256; *Smalley v. Doughty*, 6 Bosw. (N. Y.) 66; *Odell v. Greenly*, 4 Duer (N. Y.) 358; *Brinckerhoff v. Foote*, 1 Hoff. Ch.

(N. Y.) 291; *Powell v. Waters*, 8 Cow. (N. Y.) 669.

Texas.—*Smith v. White* (Tex. Civ. App.), 25 S. W. 809; *Keys v. Cleburne B. & L. Assn.* (Tex. Civ. App.), 25 S. W. 809.

United States.—*Palmer v. Call*, 7 Fed. 737, 2 McCrary (U. S.) 522.

England.—*Cuthbert v. Haley*, 8 Term R. 390.

⁵⁵ *Missouri Real Estate Syndicate v. Sims*, 179 Mo. 679, 78 S. W. 1006. See *Green v. Lake*, 2 Mackey (D. C.) 162. *Examine Ganz v. Lancaster*, 169 N. Y. 357, 62 N. E. 413, rev'g 63 N. Y. Supp. 800; *Fay v. Tower*, 58 Wis. 286; *Vary v. Norton*, 6 Fed. 808.

⁵⁶ *Kassing v. Ordway*, 100 Iowa 611, 69 N. W. 1013.

⁵⁷ *Morse v. Welcome*, 68 Minn. 210, 70 N. W. 978.

§ 306. **Corporations.**—Corporations are generally subject to the usury laws to the same extent as in the case of individuals,⁵⁸ although there are exceptions;⁵⁹ and where this defense is not available to a corporation it will not be sustained when urged by indorsers in actions against them.⁶⁰ Again, by the national bank act the local law as to the rates of discount controls banking associations, unless a special rate is allowed to banks of issue organized under the state laws, or unless no rate is specified, in which case the rate is fixed by the revised statutes, and if a rate is charged in violation of these provisions it will be a good defense to the recovery of interest;⁶¹ but the note cannot be

⁵⁸ *Iowa*.—National Bank of Winterset v. Eyre, 52 Iowa 114, 2 N. W. 995.

Massachusetts.—Maine Bank v. Butts, 9 Mass. 49.

Missouri.—Farmers' & Traders' Bank v. Harrison, 57 Mo. 503.

New York.—Bank of Utica v. Hildard, 5 Cow. (N. Y.) 153.

Ohio.—Niagara Co. Bank v. Baker, 15 Ohio St. 68.

Tennessee.—Chafin v. Bank, 7 Heisk. (Tenn.) 499.

⁵⁹ *Freese v. Brownell*, 35 N. J. L. 285; *Ex parte Aynsworth*, 4 Ves. 678. See 2 Cummings & Gilberts Genl. Laws N. Y., p. 1994, Laws N. Y. 1850, ch. 172; *Freese v. Brownell*, 35 N. J. L. 285.

⁶⁰ *Massachusetts*.—Maine Bank v. Butts, 9 Mass. 49.

New York.—Union Nat. Bank v. Wheeler, 60 N. Y. 612; *Rosa v. Butterfield*, 33 N. Y. 665; *Stewart v. Bramhall*, 11 Hun (N. Y.) 139; *Luddington v. Kirk*, 16 Misc. Rep. 301, 37 N. Y. Supp. 1141.

Tennessee.—Chafin v. Bank, 7 Heisk. (Tenn.) 499. But see *Bock v. Lauman*, 24 Pa. St. 435; *Hungerford's Bank v. Potsdam & W. R. Co.*, 10 Abb. Prac. (N. Y.) 24, rev'g 9 Abb. Prac. (N. Y.) 124; *Hungerford's Bank v. Dodge*, 30 Barb. (N. Y.) 626.

As to sureties, see *Freese v. Brownell*, 35 N. J. L. 285.

As to accommodation acceptor who is liable as a surety, see *First Nat. Bank of New York v. Morris*, 1 Hun (N. Y.) 680.

⁶¹ *Nebraska*.—*Tomblin v. Higgins*, 53 Neb. 92, 73 N. W. 461; *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381, 64 N. W. 1073.

North Carolina.—*Wachovia Nat. Bank v. Ireland*, 122 N. C. 571, 29 S. E. 835.

Pennsylvania.—*Guthrie v. Reid*, 107 Pa. St. 251.

South Dakota.—See *First Nat. Bank v. McCarthy* (S. D.), 100 N. W. 14.

Texas.—*First Nat. Bank v. Ledbetter* (Tex. Civ. App.), 34 S. W. 1042.

United States.—U. S. Rev. St., §§ 5197, 5198. See *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369, 49 L. Ed. 238, 25 Sup. Ct. 49, aff'g 172 Mo. 384, 72 S. W. 925; *First Nat. Bank v. Lasater*, 196 U. S. 115, 49 L. Ed. 408, 25 Sup. Ct. 206, rev'g (Tex. Civ. App.) 72 S. W. 1054.

This act supersedes state usury laws as to national banks. *Nat. Bank of Winterset v. Etre*, 52 Iowa 114, 2 N. W. 995; *Davis v. Randall*, 115 Mass. 547; *Central Nat. Bank v. Pratt*, 115 Mass. 539; *Bramhall v. Bank*, 36 N. J. L. 243; *First Nat.*

Bank of Columbus v. Garlinghouse, 22 Ohio St. 492. Compare Hintermister v. Bank, 3 Hun (N. Y.) 345, or an act declaring the contract void for usury, Importers & Traders Nat. Bank v. Littell, 46 N. J. L. 506. Compare First Nat. Bank of Whitehall v. Lamb, 50 N. Y. 95, rev'g 57, Barb. (N. Y.) 429, or prohibiting it as a misdemeanor. Slaughter v. Bank, 109 Ala. 157, 19 South. 430.

Accommodation and business paper are within the intent of the U. S. statutes.

New York.—Johnson v. Bank, 74 N. Y. 329.

Ohio.—Barbour v. Bank, 45 Ohio St. 133, 12 N. E. 5.

Tennessee.—Barrett v. Bank, 85 Tenn. 426, 3 S. W. 117.

Vermont.—Hill v. Bank, 56 Vt. 582.

United States.—Rev. St. U. S., §§ 5197, 5198.

Defense of usury is not available against a state or national bank. Schlesinger v. Lehmeier (City Ct. N. Y.), 99 N. Y. Supp. 819.

Federal and state usury laws—National state banks and private bankers. In the late case of Schlesinger v. Kelly (N. Y. App. Div. 1906), 99 N. Y. Supp. 1083, it is decided that the federal statutes cover the whole question of usury as to banks and are exclusive of the operations of the state usury law, so far as national banks are concerned, and repeal the usury law by implication so far as state banks are concerned, not only where the bank has directly participated in the usurious transaction, but also where it is the innocent holder of paper void in the hands of private parties for usury in its inception. The decision is of importance and we give the opinions of the court in full, as follows: "Clarke, J. This action was brought

by the plaintiff, as receiver of the Federal Bank of New York, to recover upon two promissory notes, amounting, in the aggregate, to the sum of \$2,798, made by the defendant. The Federal Bank was a state bank. The notes in suit were acquired by the receiver as part of the assets of said bank when he took possession thereof under his appointment by the court. The plaintiff concedes that the notes were usurious notes at their inception, and that the defendant's dealings which resulted in the giving of the notes were had with one David Rothschild or Louis Rothschild, doing business as J. Gould & Co., or the Globe Security Company, or one Muirhead, and not directly with the Federal Bank, and the notes so given were given to one of the aforesaid persons, and at no time did the defendant have dealings with or borrow directly from the Federal Bank. The defendant concedes that the bank was a *bona fide* holder of the notes in due course; that the notes were complete and regular upon their face; that the bank became such holder before maturity, and without notice of any infirmity in the instruments, or defect in the title of the person negotiating them. The defendant claims that the notes in suit, not having been given directly to the plaintiff's assignor, and being admittedly usurious in their inception, were absolutely void, no matter into whose hands they came. The plaintiff claims that the Federal Bank, having been a state bank, was on a parity by express statute with national banks, and was not subject to the provisions of the usury law declaring usurious notes void, and that, being the holder in due course for value without notice, it held the instruments free from

any defect of title of prior parties, and free from defenses available to prior parties among themselves, and is entitled to enforce payment for the full amount thereof against all parties liable thereon. It is now settled beyond controversy, as the result of a series of cases in the court of appeals and in the Supreme Court of the United States, that because of the federal legislation now embraced in §§ 5197 and 5198 of the revised statutes of the United States (U. S. Comp. St. 1901, p. 3493), and of the statutory law of this state, first embodied in chapter 163, p. 437, of the laws of 1870, and now appearing substantially without change in § 55 of the banking law (chapter 689, p. 1869, of the laws of 1892), that the provisions of the usury law (1 Rev. St. [1st Ed.], pp. 771, 772, pt. 2, c. 4, tit. 3, § 5) declaring usurious notes void have been repealed by implication when said notes had been given to, and said usurious interest received by, a national bank or state bank or private banker. Section 5197, Rev. St. U. S., provides that any banking association may take and charge upon any note interest at the rate allowed by the laws of the state, territory or district where the bank was located, and no more, and § 5198, Rev. St. U. S., provides that the taking or charging a rate of interest greater than that allowed by the preceding section, when knowingly done, should be deemed a forfeiture of the entire interest which the note carried with it, or which had been agreed to be paid thereon, and that, in case a greater rate of interest had been paid, there could be recovered back twice the amount of the interest thus paid, provided such action was commenced within two years from the time the usuri-

ous transaction occurred. Section 55 of the banking law of this state makes substantially the same provisions, and concludes as follows: 'The true intent and meaning of this section is to place and continue banks and private and individual bankers on an equality in the particulars herein referred to with the national banks authorized under the act of congress entitled "An act to provide a national currency, secured by pledges of United States bonds, and to provide for the circulation and redemption thereof," approved June 30, 1864.'

"In *Whitehall v. Lamb*, 50 N. Y. 95, 10 Am. Rep. 438, the court of appeals held that national banks in this state were subject to the usury laws of the state, and that the provisions of the national bank act limiting forfeitures for taking usury applied only to banks located in states and territories where no usury law existed.

"In *Farmers' Bank v. Hale*, 59 N. Y. 53, following the decision in the former case, and applying the provisions as to parity, the court held that, it having been decided that national banks located in this state are subject to the usury laws thereof, those laws were not repealed by chapter 163, p. 437, of the laws of 1870, as to state banks, but that they were also subject thereto.

"Thereafter, the Supreme Court of the United States, in *Farmers' & Mechanics' National Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196, in a case originating in this state, overruled the doctrine as laid down by the court of appeals, and held that the only forfeiture was that provided by the act of congress, and that no loss of the entire debt was incurred by a national bank, as a penalty or otherwise, by reason of

the provisions of the usury law of the state. The court said: "These clauses, examined by their own light, seem to us too clear to admit of doubt as to anything to which they relate. They form a system of regulations. All the parts are in harmony with each other, and cover the entire subject. * * * The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in any wise affect their operation, except in so far as congress may see proper to permit."

"Thereafter, the Court of Appeals, in *Hintermister v. First National Bank*, 64 N. Y. 212, held that, since the Supreme Court of the United States had given its interpretation to the act of congress, the cases of the *National Bank of Whitehall v. Lamb*, and *Farmers' Bank of Fayetteville v. Hale*, *supra*, could no longer be considered as furnishing a rule of decision in cases within the principle of adjudication by the federal court, and said: 'It follows that in order to give effect to the evident intention of the legislature of this state, the statute enacted in 1870 to put the state banks upon an equality with the national banks should have the same interpretation and effect as is given to the act of congress. Any other interpretation would do violence to the clearly expressed will of the legislature, do injustice to the state institutions,

and give undue effect to the legislation of congress, so far as it is hostile to the state banks. Both cases may, therefore, be regarded as overruled.'

"Exclusive control over national banks and their freedom from the operation of state laws, as laid down in the *Dearing* case, *supra*, has been reasserted in *Haseltine v. Central National Bank*, 183 U. S. 131, 22 Sup. Ct. 49, 46 L. Ed. 117, and *Easton v. Iowa*, 188 U. S. 220, 23 Sup. Ct. 288, 47 L. Ed. 452. The effect of these decisions and these statutes is that, if an usurious note is directly given to a state bank, and said bank takes, receives, or reserves interest beyond the amount allowed by law, that nevertheless the note is not void, and the sole forfeiture is that provided in regard to the interest, and the right of action to recover double the amount of interest paid within two years. The amount of the note is a valid and enforceable debt.

"The appellant concedes the force and effect of the foregoing cases, but asserts that the principle therein laid down applies only when the usurious transaction is made directly with the bank, and the bank receives, or reserves, charges, or is paid the usurious interest. The argument is that the usury law has not been repealed as between private parties, and that, as a note usurious in its inception between private parties is by the statute void, it never can acquire validity; and cites *Claffin v. Boorum*, 122 N. Y. 385, 25 N. E. 360, where the court said: 'A note void in its inception for usury. continues void forever, whatever its subsequent history may be. It is as void in the hands of an innocent holder for value as it was in the hands of those who made

the usurious contract. No validity can be given to it by sale or exchange, because that which the statute has declared void cannot be made valid by passing through the channels of trade.'

"That case was not a case involving a bank, but was between private individuals, and involved the sale of accommodation paper, which the court held was merely a loan of money, the purchaser being the lender and the seller the borrower. None of the cases or statutes affecting banks hereinbefore alluded to were cited or were involved in that case, and the result of applying the rule there laid down to the case at bar would be this: That whereas, when the bank was the wrong-doer, and took the usurious interest, that although the usury statute declared the note void, the banking statutes made it valid as to its face value, and the wrong-doer escaped all forfeiture except in so far as the interest was concerned; while if the bank were an absolutely innocent party, and had taken the note in good faith for valuable consideration and without notice, receiving therefor only the legal interest, yet nevertheless it would be punished for the illegal act of others by the loss of the full amount advanced by it. Such a result would be so inequitable and illogical as to demonstrate that the reasoning must be fallacious. The answer to it is clearly found in the cases already cited.

"In *Farmers' Bank v. Hale*, 59 N. Y. 53, the court said: 'It may be conceded that the first section of the act, standing alone, would supersede the usury laws, and operate as a repeal by implication, so far as applicable to banking associations.'

"That statement of the effect of

the statute becomes effective by reason of the *Dearing* case, *supra*, and the reiteration of the doctrine by the Supreme Court of the United States that the federal statutes were exclusive in their application to national banks, and absolutely withdrew such banks from the operation of the state laws. That being true, no provision of the state law declaring an usurious law void would affect a national bank, not only if it were guilty of usury, but also if it bought or discounted usurious paper.

"The supreme court, in the *Easton* case, 188 U. S. 220, 23 Sup. Ct. 288, 47 L. Ed. 452, after citing the *Dearing* case, as follows: 'The states can exercise no control over national banks, or in any wise affect their operation, except in so far as congress may deem proper to permit. Anything beyond this is an abuse, because it is the usurpation of power, which a single state cannot give.' And *Davis v. Elmira Savings Bank*, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700: 'National banks are instrumentalities, and, as such, necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of those agencies of the federal government to discharge the duties for the performance of which they were enacted. These principles are axiomatic, and are sustained by the repeated adjudications of this court' —stated: 'Our conclusions, upon principle and authority, are that

congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations.'

"Therefore, applying the parity principle, as the United States statutes cover the whole question of usury as affecting banks, and therefore being exclusive so far as national banks are concerned, and excluding from their operations our state law in that regard, it follows that the usury statute has been repealed by implication so far as state banks are concerned, not only where the bank itself has been a direct participator in the usurious transaction, but where it is the innocent holder in due course of the paper which, in the hands of private parties, would be void for usury in its inception. The argument that a void note could never acquire validity applies with as much force and effect to the usurious note taken by the bank, but, as we have seen, such a note, by the operations of the state and federal statutes, is not void; in other words, the mandate of the state has yielded to the superior command of the nation as to national banks, and by its own statutes the state has assimilated such rule to its own banks.

"It follows that the judgment appealed from should be affirmed, with costs." O'Brien, P. J., and McLaughlin, and Houghton, J. J., concur.

"Laughlin, J. (concurring): I agree with Mr. Justice Clarke that the judgment should be affirmed, but for different reasons than those expressed in his opinion. I doubt whether section 5197 of the Revised Statutes of the United States, regu-

lating the charge of interest by national banks, and section 55 of the banking law of our state (chapter 689, p. 1869, Laws 1892), in effect extending the same rights and privileges to state banks as are conferred upon national banks by the act of congress, are susceptible of the construction that they relate not only to discounts of paper by a bank, but also to discounts by any party prior to the time the bank becomes a holder. I am of opinion, however, that the effect of the enactment of section 96 of the Negotiable Instruments Law (Laws 1897, p. 732, c. 612), which provides that 'A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable therefor,' is to render the defense of usury inapplicable to a *bona fide* holder of negotiable paper acquiring the same in due course.

"Mr. Crawford, in the preface of the first edition of his Annotated Negotiable Instruments Law, states that the first draft of the law was prepared by him for a sub-committee of the committee on commercial law for the commissioners of the different states on uniformity of law; that the draft was submitted to the commissioners on uniformity of laws at the conference in Saratoga, in 1896, at which twenty-seven commissioners, representing fourteen different states, were present; that his draft was revised by the commissioners in a manner to make changes in the existing laws which he had not felt at liberty to incorporate in the original draft, and, as thus amended, adopted. In an explanatory note to the Negotia-

ble Instruments Law, as reported to the legislature in 1897 by the commissioners of statutory revision, it appears that the Negotiable Instruments Law, as prepared by the commission on uniformity of law in the United States, was introduced in the senate of the state of New York by Senator Lexow, and that at the request of the judiciary committee of the senate the commission of statutory revision rearranged the bill, and added several statutes relating to negotiable instruments which were not included in the bill as originally introduced, but which were in the commercial paper law prepared by this commission.' It thus appears that the legislature, in enacting the Negotiable Instruments Law, had in mind that there was a concerted move to have that law adopted in the various states and territories, and it has been enacted in practically the same form in most of the states and some of the territories of the Union. The only case to which our attention has been called in which a court of review has been called upon to decide whether the Negotiable Instruments Law supersedes, as to *bona fide* holders in due course for value, local laws declaring negotiable paper tainted with usury null and void, is *Wirt v. Stubblefield*, 17 App. D. C. 283. In that case, Alvey, C. J., delivering the opinion of the court, construing the same provision of the Negotiable Instruments Law enacted by congress for the District of Columbia, said: 'We know, moreover, that the great and leading object of the act, not only with congress, but with the large number of the principal commercial states of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instru-

ments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions, and the effect of mere local laws and usages that have heretofore prevailed. The great object sought to be accomplished by the enactment of the statutes to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all the parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statutes, as against the original maker or acceptor, as is the case by the operation, indeed, by the express provision, of the statutes of Charles and Anne.'

"I agree with the views expressed in that opinion. It is, I think, evident that the purpose of the commission representing the various states of the Union in preparing the draft of the Negotiable Instruments Law, and of the various legislatures in enacting it, will be thwarted if section 96 is to receive the construction that, even as against *bona fide* holders in due course for value, the maker of the note may successfully defend, upon the ground that in the inception of the note some local law was violated. The force and effect of the statute against usury will not be seriously impaired by the construction which I think should be given the Negotiable Instruments Law. The usury laws remain in full force, but to facilitate the free circulation of negotiable

avoided by reason of usury charged by a national bank;⁶² nor can a bank, by offering to remit the excess, evade the statute as to forfeiture of the entire interest.⁶³ But it is held that an action for the statutory penalty is the only remedy for the recovery of usury.⁶⁴

paper by protecting holders thereof in due course for value in their right to enforce the same, the usury laws are to that extent superseded by the provisions of section 96 of the Negotiable Instruments Law (Laws 1897, p. 732, c. 612). Of course, it was perfectly competent for the legislature to do this. The only question is whether or not it so intended, and I am of opinion that it did.

"The case of *Strickland v. Henry*, 66 App. Div. 23, 73 N. Y. Supp. 12, does not hold that the Negotiable Instruments Law has not to any extent superseded the usury law. It was there merely held that a holder of commercial paper, who received the same at a usurious discount, is not protected under the Negotiable Instruments Law, where it appears that the note never had a legal inception, and that its first transfer was at the usurious discount. The court there say: 'The holder is bound to know the character of the paper he is dealing with, and, if it turns out to be accommodation paper, the transaction is usurious.' Of course, a person taking negotiable paper must determine at his peril whether or not it has had an inception, but, having ascertained that fact, I think that it was the purpose and intent of the legislature to relieve him from any latent infirmity, as by a discount at a usurious rate of interest at its inception, or other analogous latent infirmities.

"I therefore vote to affirm the judgment."

The case of *Farmers' & Mechanics' National Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196 (cited in the above opinion) is also cited in *Christopher v. Norvell*, 201 U. S. 216, 225, to the point that "The bank, although its shares of stock were private property, was an instrumentality of the general government in the conduct of its affairs." The latter case also cites *Davis v. Elmira Savings Bank*, 151 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700 (quoted from in the above opinion), quoting the words: "National banks are instrumentalities of the federal government, created for public purposes, and as such are necessarily subject to the paramount authority of the United States," citing also, *Eastern v. Iowa*, 188 U. S. 220, 237.

⁶² *Chase Nat. Bank v. Faurot*, 149 N. Y. 536, 44 N. E. 164; *Stephens v. Bank*, 111 U. S. 197, 4 Sup. Ct. 337; *Cox v. Beck*, 83 Fed. 269. See *Second Nat. Bk. v. Fitzpatrick*, 27 Ky. L. Rep. 483, 84 S. W. 1150.

⁶³ *Citizens' National Bank v. Donnell*, 195 U. S. 369, 49 L. Ed. 238, 25 Sup. Ct. 49, aff'g 172 Mo. 384, 72 S. W. 925; *Rev. Stat. U. S.*, § 5198, U. S. Comp. Stat. 1901, p. 3493.

⁶⁴ *Kentucky*.—*Marion Nat. Bank v. Thompson*, 101 Ky. 277, 40 S. W. 903.

Nebraska.—*Montgomery v. Bank*, 50 Neb. 652, 70 N. W. 239; *Lanham v. Bank*, 46 Neb. 663, 65 N. W. 786; *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381, 64 N. W. 1073.

Pennsylvania.—*Nat. Bank of Fayette Co. v. Dushane*, 96 Pa. St. 340.
Texas.—*Comanche Nat. Bank v.*

Dabney (Tex. Civ. App.), 44 S. W. 413. nell, 195 U. S. 309, 25 Sup. Ct. 49, 49 L. Ed. 238, aff'g 172 Mo. 384, 72

United States.—Driesbach v. Bank, S. W. 925.

104 U. S. 52; Bamet v. Bank, 98 U. S. 555; Cox v. Beck, 83 Fed. 269. Demand is unnecessary to recover penalty. First Nat. Bank v. Turner (Kan. 1895), 42 Pac. 936.

CHAPTER XIV.

EFFECT OF CONDITIONS OR AGREEMENTS.

- | Sec. | Sec. |
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| 307. Collateral conditions or agreements—General rules. | 325. Same subject—Performance prevented by maker—Non-performance prevented by maker. |
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346. Same subject—Condition that contract be completed to acceptance of agent.

347. Conditional acceptance.

SEC.

348. Conditional or restricted indorsement.

349. Indorsement of condition to enforce which would be illegal.

350. Waiver of conditions.

§ 307. **Collateral conditions or agreements—General rules.**—The right of a *bona fide* holder of commercial paper to recover thereon against a maker, drawer, or indorser cannot be defeated by the fact that a condition or agreement to which the defendant was a party has not been performed or complied with, where it was not contained in the instrument or is not a part thereof and the holder had no notice of the same.¹ As has been said in reference to an acceptance of an instru-

¹ *Alabama*.—Bank of Luverne v. Birmingham Fertilizer Co. (Ala. 1905), 39 So. 126; Garner v. Fite, 93 Ala. 405, 9 So. 367; Hair v. La Brouse, 10 Ala. 548.

Colorado.—McIntosh v. Rice, 13 Colo. App. 393, 58 Pac. 358; Kinkel v. Harper, 7 Colo. App. 45, 42 Pac. 173.

Connecticut.—Goodrich v. Stanley, 23 Conn. 79.

Georgia.—Wooten v. Inman, 33 Ga. 41.

Illinois.—Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360; Hodges v. Nash, 141 Ill. 391, 31 N. E. 151; Foy v. Blackstone, 31 Ill. 538.

Indiana.—Clanin v. Esterly Harvesting Mach. Co., 118 Ind. 372, 21 N. E. 35; Strough v. Gear, 48 Ind. 100.

Iowa.—Graff v. Logue, 61 Iowa 704, 17 N. W. 171; Skinner v. Church, 36 Iowa 91; Gage v. Sharp, 24 Iowa 15.

Kentucky.—Frank v. Quast, 86 Ky. 649, 6 S. W. 909; Gano v. Finnell, 13 B. Mon. (Ky.) 390; Roby v. Sharp, 6 T. B. Mon. (Ky.) 375.

Maine.—Wait v. Chandler, 63 Me. 257; Cushing v. Wyman, 44 Me. 121.

Massachusetts.—Patten v. Glea-

son, 106 Mass. 439; Carrier v. Sears, 4 Allen (Mass.) 336, 81 Am. Dec. 707.

Minnesota.—First National Bank v. Campo. Board Mfg. Co., 61 Minn. 274, 63 N. W. 731.

Mississippi.—Hart v. Taylor, 70 Miss. 655.

Missouri.—Jennings v. Todd, 118 Mo. 296, 24 S. W. 148, 40 Am. St. R. 373; Henshaw v. Dutton, 59 Mo. 139.

New Hampshire.—Matthews v. Crosby, 56 N. H. 21.

New Jersey.—Haines v. Dubois, 30 N. J. L. 259; Gulick v. Gulick, 16 N. J. L. 186.

New York.—Maas v. Chatfield, 90 N. Y. 303; Adams v. Blancan, 6 Rob. (N. Y.) 334; Moore v. Miller, 6 Lans. (N. Y.) 396; Harbeck v. Craft, 4 Duer (N. Y.) 122.

North Carolina.—Potts v. Dublin, 125 N. C. 413, 34 S. E. 514.

Ohio.—First National Bank v. Fowler, 36 Ohio 524.

Pennsylvania.—Mishler v. Reed, 76 Pa. St. 76.

Tennessee.—Merritt v. Duncan, 7 Heisk. (Tenn.) 156; Bowers v. Douglass, 2 Head (Tenn.) 376.

Texas.—Heffron v. Cunningham, 76 Tex. 312, 13 S. W. 259.

Wisconsin.—Gillman v. Henry, 53

ment: "If one purpose making a conditional acceptance only, and commit the acceptance to writing, he should be careful to express the condition thereon. He cannot use general terms, and then exempt himself from liability by relying upon particular facts which have already happened, though they are connected with the condition expressed. Why? Because the particular fact is, of itself, susceptible of being made a distinct condition. It matters not what the acceptor meant by a cautious and precise phraseology, if it be not expressed as a condition."² The rule is equally applicable though the condition or agreement referred to is in writing.³ This is also the general rule even as between the maker and payee or other parties who are not *bona fide* holders, parol evidence not being admissible to contradict or vary the terms of a written contract.⁴ Certain exceptions, however, exist, as in the case of a conditional delivery or a delivery in escrow, in which case such evidence is admissible for the purpose of showing that the instrument never became a binding one, and also where the condition goes to the consideration of the paper.⁵

§ 308. Same subject continued—Illustrations.—Where a person's name appears on an instrument as a joint promisor he cannot show as against a *bona fide* holder that by agreement of the parties he signed the note as surety merely, and this has been held true though the holder was a purchaser after maturity where he purchased without

Wis. 465, 10 N. W. 692; *Murdock v. Arndt*, 1 Pin. (Wis.) 70.

United States.—*McMurray v. Moran*, 134 U. S. 150, 10 Sup. Ct. 427; *Burnes v. Scott*, 117 U. S. 582, 9 Sup. Ct. 865; *Brown v. Spofford*, 95 U. S. 474; *Forsythe v. Kimball*, 91 U. S. 291.

Indian Territory.—Compare *Mehlin v. Mutual Reserve Fund L. A.*, 2 Ind. Terr. R. 396, 51 S. W. 1063.

So it is said by the United States Supreme Court: "The general rule that a written contract cannot be contradicted or waived by evidence of an oral agreement between the parties before or at the time of such contract, has been often recognized and applied by this court, especially in cases in which it was sought to

deprive *bona fide* holders of, or parties to, negotiable securities of the right to which they were entitled according to the legal import of the terms of such contract." Per Mr. Justice Harlan in *Burke v. Dulaney*, 153 U. S. 228, 232, 14 Sup. Ct. 816.

² *La Wayne, J.*, in *United States Bank v. Bank of the Metropolis*, 15 Pet. (U. S.) 377.

³ *Hoare v. Graham*, 3 Camp. 57; *Montague v. Perkins*, 22 Eng. L. & Eq. 516. See *Kervan v. Townsend*, 25 App. Div. 256, 49 N. Y. Supp. 137; *Bowerbank v. Monteiro*, 4 Taunt. 844.

⁴ See sections following in this chapter.

⁵ See §§ 312-319 herein.

notice;⁶ and where a note, the property of a married woman, is indorsed by her in blank, without restriction, and delivered to a creditor of her husband as security for the latter's debt, she cannot show, in an action by a *bona fide* purchaser, without notice, from such creditor, that her assignment was other than what it purports to be from the instrument itself;⁷ and an acceptance in the following terms: "accepted on condition that his contracts be complied with," will not retroact to embrace forfeiture which had been incurred at the time, so as to relieve the acceptor from liability on the paper;⁸ and where drafts are indorsed in blank by the owner to a person for collection who transfers to another purchasing without notice of the want of ownership, the latter becomes a *bona fide* holder and may retain the proceeds as against the true owner.⁹

§ 309. **Evidence explanatory of contract.**—Where it is apparent that a bill or note is incomplete or contains but part of the agreement of the parties, evidence is admissible for the purpose of proving the entire contract.¹⁰ So, in a suit on an instrument, in form a conditional note, evidence is admissible that the note was signed by the maker on distinct admission by payee that it did not contain the terms of their contract, and that it was agreed that they should subsequently meet and draw another instrument which would truly express their contract.¹¹ Such evidence must not, however, be repugnant to or inconsistent with the intention of the parties, as is already shown by the instrument itself.¹²

⁶ Lewis v. Long, 102 N. C. 206, 9 S. E. 637, 11 Am. St. R. 725.

⁷ Shirk v. North, 138 Ind. 210, 37 N. E. 590.

⁸ United States v. Bank of the Metropolis, 15 Pet. (U. S.) 377.

⁹ Coors v. German National Bank, 14 Colo. 202, 23 Pac. 328, 7 L. R. A. 845. See Rainsbotham v. Cator, 1 Starkie 228; Gorgier v. Mievville, 3 Barn. & C. 45, holding that where a foreign prince gave bonds, whereby he declared himself and his successors bound to every person who should for the time being be the holders of the bonds for the payment of the principal and interest in a certain manner, the property

in these instruments passed by delivery as the property in bank notes, exchequer bills, or bills of exchange payable to bearer, and that a pledgee, taking such paper from an agent of the owner without knowledge of the ownership or agency, obtained a good title thereto.

¹⁰ West v. Kelly's Exrs., 19 Ala. 353, 54 Am. Dec. 192; Ruggles v. Swanwick, 6 Minn. 526; Hill v. Huntress, 43 N. H. 480; Juilliard v. Chaffee, 92 N. Y. 529. See Gorrell v. Home Life Ins. Co., 63 Fed. 371, 24 U. S. App. 188, 11 C. C. A. 240.

¹¹ Hopper v. Eiland, 21 Ala. 714.

¹² West v. Kelly's Exrs., 19 Ala. 353, 54 Am. Dec. 192.

§ 310. **Where note and contemporaneous agreement are mutual and dependent.**—The rule that parol evidence of a contemporaneous agreement is not admissible to contradict the terms of a bill or note does not operate to exclude evidence of such an agreement in all cases. It is a general rule in the construction of contracts that two contemporaneous writings, where they are between the same parties and relate to the same subject matter and are mutually dependent, constituting, in fact, but one contract, of which each is evidence of a part only thereof, may be read and construed as one contract in actions between the parties or their representatives. And this rule has been frequently applied in the case of a bill or note and a contemporaneous agreement in writing, such agreement being construed as a part of the same contract for the purpose of explaining or controlling the terms of the former or as a condition precedent.¹³ The cases in which evidence of such an agreement has been admitted have generally been those where the agreement constituted the consideration for which the note was given.¹⁴ So, a contract of sale and a note may be construed together where executed under such circumstances;¹⁵ and where a note and a lease were each the consideration for the other, both are to be construed as one contract, and if upon breach of the lessor's agreement to make certain improvements or repairs upon the premises the lessee refuses to accept possession, in an action against the latter on the note

¹³ *Arkansas*.—Richardson v. Thomas, 28 Ark. 387, 391.

California.—Prouty v. Adams, 141 Cal. 304, 74 Pac. 545; Goodwin v. Nickerson, 51 Cal. 166.

Georgia.—Montgomery v. Hunt, 93 Ga. 439.

Illinois.—Bailey v. Cromwell, 4 Ill. 71, 21 N. E. 59.

Indiana.—Hickman v. Rayl, 55 Ind. 551.

Maryland.—Duvall v. Farmers' Bank of Maryland, 9 Gill & J. (Md.) 31.

Michigan.—Fink v. Chambers, 95 Mich. 508, 55 N. W. 375; Sutton v. Beckwith, 68 Mich. 303, 36 N. W. 79, 13 Am. St. R. 344.

New Hampshire.—Hill v. Huntress, 43 N. H. 480.

New York.—Rogers v. Smith, 47

N. Y. 324; Hoag v. Parr, 13 Hun (N. Y.) 95.

North Carolina.—Sydnor v. Boyd, 119 N. C. 481, 26 S. E. 92, 37 L. R. A. 734; Carrington v. Waff, 112 N. C. 115, 16 S. E. 1008.

Ohio.—Jacobs v. Mitchell, 46 Ohio St. 601, 22 N. E. 768.

Oregon.—Sayre v. Mohney, 30 Ore. 238, 47 Pac. 197.

Texas.—Kelly v. Webb, 27 Tex. 368; Glass v. Adone (Tex. Civ. App. 1905), 86 S. W. 798.

English.—Webb v. Salmon, 19 L. J. Q. B. N. S. 34; Savage v. Aldren, 2 Starkie 232.

¹⁴ See cases in preceding note and §§ 322-329 herein.

¹⁵ May v. Cole, 8 Blackf. (Ind.) 479; Hoag v. Parr, 13 Hun (N. Y.) 95.

given for the rent he may avail himself of such failure by the lessor as a defense.¹⁶ So evidence has been held admissible, in an action on a note to the creditor of the maker, of a contemporaneous written agreement which is a part of the same contract by which the payee agreed to give work to the maker at a certain price per day until such note was paid and that there has been a breach of such agreement.¹⁷ And in an action on purchase-money notes it was decided that a deed, containing covenants to the effect that plaintiff would look to no other property for the satisfaction of his debt than that mentioned therein, was to be construed with the note as parts of one contract and that the vendor should be confined in his recovery to the property named in the deed.¹⁸ And where a note and the contract, in pursuance of which it was executed, are a part of the same transaction and may be taken together in determining the intent of the parties it may be shown that by the terms of the contract the obligation of the signers of the note, though in form joint and several, was not in fact to be such but each was to be liable for his proper share.¹⁹ But in the case of mortgage notes it has been decided that the indebtedness is represented by the notes to which the mortgage is collateral and that it refers to them for the purpose of identification of the contract and that therefore, in the case of an irreconcilable contradiction between the mortgage and the note as to the time of payment, the terms of the latter instrument must control.²⁰ The breach of such an agreement may be shown in defense to an action by an indorsee after maturity,²¹ or by an assignee with notice or knowledge thereof.²² Where, however, a defendant relies upon an agreement of this kind as a bar to an action against him and pleads it as such, it is decided that it must be alleged to be in writing.²³

§ 311. Conditions precedent—Generally.—In many cases an instrument for the payment of money is dependent either as to the time

¹⁶ *Hickman v. Rayl*, 55 Ind. 551.

¹⁷ *Minzey v. Marcy Mfg. Co.*, 25 Ohio Cir. Ct. R. 593.

¹⁸ *Richardson v. Thomas*, 28 Ark. 387.

¹⁹ *City Deposit Bank Co. v. Green* (Iowa 1905), 103 N. W. 96.

²⁰ *Ferris v. Johnson* (Mich. 1904), 98 N. W. 1014.

²¹ *Munro v. King*, 3 Colo. 238.

²² *Thomas v. Page*, 3 McLean (U. S.) 167.

²³ *Osborne v. Taylor*, 58 Conn. 439, 20 Atl. 605.

If plaintiff counts upon a writing and the plea shows an agreement contemporaneous and modifying its terms, it must show that this agreement was also in writing. *Peddie v. Donnelly*, 1 Colo. 421, 423, per Wells, J.

of payment or as to the rights and liabilities of the parties upon the performance of some condition or the happening of some contingency which is in the nature of a condition precedent.²⁴ In order, however, that a condition or contingency should so control the operation of such an instrument it is essential that it should either be expressed therein or contained in a contemporaneous agreement which is to be construed with the instrument as one contract.²⁵ And if the performance of such a condition by the party obligated to perform is prevented by the other party, the latter cannot avail himself of such non-performance as a defense.²⁶ In some cases a request or demand of the thing claimed may constitute a condition precedent to the obligation of the defendant. When this is the case, such demand, before suit brought, should be averred and proved to enable the plaintiff to maintain the action and to preclude the defense of want or failure of consideration.²⁷ Non-performance of a condition precedent may be a good defense to an action against the maker by an assignee²⁸ or indorsee, where it is provided by statute that any defense which a maker has against a payee before notice of the transfer is available against an indorsee.²⁹

§ 312. Conditional delivery—Maker to payee—Effect of.—Although it is held in many cases that a delivery of a note to the payee by the maker will operate as an absolute delivery, though it is agreed that its taking effect is dependent upon a condition or contingency, on the ground that such an instrument cannot be delivered as an escrow to the payee,³⁰ yet the weight of authority supports the rule that in an

²⁴ *California*.—McLaughlin v. Clausen, 85 Cal. 322, 24 Pac. 636.

Georgia.—Keaton v. Read, 32 Ga. 493.

Massachusetts.—Tufts v. Kidder, 8 Pick. (Mass.) 537.

Michigan.—Sutton v. Beckwith, 68 Mich. 303, 36 N. W. 79, 13 Am. St. R. 344.

New York.—Coffin v. Grand Rapids Co., 61 N. Y. Super. Ct. 51, 18 N. Y. Supp. 782.

Pennsylvania.—Massey v. Blair, 176 Pa. St. 34, 34 Atl. 925.

SEE cases cited in § 322 herein as to "conditions affecting considerations."

²⁵ See §§ 307, 308 herein.

²⁶ *Massey v. Blair*, 176 Pa. St. 34, 34 Atl. 925.

²⁷ *Howland v. Edmonds*, 24 N. Y. 307. See *Edgerton v. Aspinwall*, 3 Conn. 445.

²⁸ *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638; *Johnson v. First National Bank*, 24 Ill. App. 352. See *Billings v. Everett*, 52 Cal. 661.

²⁹ *Shoe & Leath. Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753.

³⁰ *Converse v. Moulton*, 2 Root (Conn.) 195; *Neely v. Lewis*, 10 Ill. 31; *Stewart v. Anderson*, 59 Ind. 375; *Roche v. Roanoke Seminary*, 56 Ind. 198; *Robb v. Victory*, 6

action by the payee of a note against the maker, the latter may show that he delivered the instrument to the payee, it being agreed that it should not take effect until the happening of a certain contingency or the performance of a certain condition and that neither the contingency has occurred nor the condition been performed.³¹ "Such parol evidence does not contradict the note or seek to vary its terms. It merely goes to the point of its non-delivery. The note in its terms is precisely what both the maker and the payee intended it to be. No

Blackf. (Ind.) 47; *Jones v. Shaw*, 67 Mo. 667; *Henshaw v. Dutton*, 59 Mo. 139; *Massman v. Holscher*, 49 Mo. 87. See *Underwood v. Simonds*, 12 Metc. (Mass.) 275; *Porter v. Pierce*, 22 N. H. 275, 55 Am. Dec. 151.

³¹ *Connecticut*.—*McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 408, 1 Am. St. R. 111.

Illinois.—*Belleville Savings Bank v. Bornman*, 124 Ill. 200, 16 N. E. 210; *Harding v. Commercial Loan Co.*, 84 Ill. 251.

Indiana.—*Carlisle v. Terre Haute &c. R. R. Co.*, 6 Ind. 316.

Indian Territory.—*Mehlin v. Mutual Reserve Fund L. A.*, 2 Ind. Terr. 396, 51 S. W. 1063.

Iowa.—*Oakland Cemetery Assn. v. Lakins* (Iowa 1904), 101 N. W. 778; *Ware v. Smith*, 62 Iowa 159, 17 N. W. 479; *Williams v. Donaldson*, 8 Clarke (Iowa) 109.

Maine.—*Goddard v. Cutts*, 11 Me. 440.

Maryland.—*Devries v. Shumate*, 53 Md. 211.

Massachusetts.—*Wilson v. Powers*, 131 Mass. 539; *Watkins v. Bowers*, 119 Mass. 383.

Minnesota.—*Mendenhall v. Ulrich* (Minn. 1905), 101 N. W. 1057; *Smith v. Mussetter*, 58 Minn. 159, 59 N. W. 995; *Holt v. McIntire*, 50 Minn. 466, 52 N. W. 918.

Missouri.—*Hert v. Ford* (Mo. 1896), 36 S. W. 671.

New Hampshire.—*Porter v. Pierce*, 22 N. H. 275, 55 Am. Dec. 151; *Congregational Society v. Goddard*, 7 N. H. 430.

New York.—*Seymour v. Cowing*, 4 Abb. Dec. (N. Y.) 200; *Claffin v. Tushler*, 66 Barb. (N. Y.) 649.

North Carolina.—*Carrington v. Waff*, 112 N. C. 115, 16 S. E. 1008.

Rhode Island.—*Sweet v. Stevens*, 7 R. I. 375.

South Carolina.—*Barton v. Anderson*, 4 Rich. (S. C.) 507.

South Dakota.—*McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 363, 64 N. W. 163, 58 Am. St. R. 839.

Tennessee.—*Alexander v. Wilkes*, 11 Lea (Tenn.) 221; *Breedon v. Grigg*, 8 Baxt. (Tenn.) 163.

Utah.—*State Bank v. Burton*, 14 Utah 420, 48 Pac. 402.

Vermont.—*Jarvis v. Rogers*, 3 Vt. 336.

Wisconsin.—*Hillsdale College v. Thomas*, 40 Wis. 661.

United States.—*Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816; *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 565; *Burnes v. Scott*, 117 U. S. 582; *Quebec Bank v. Hellman*, 110 U. S. 178, 4 Sup. Ct. 76, 28 L. Ed. 111.

See *Jennings v. Moore* (Mass. 1905), 75 N. E. 214.

one desires to vary its terms or to contradict them.”³² So it is said in another case: “Of course, no rule is more elementary than that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. But the rule is almost equally well settled that parol evidence may be given to prove the existence of any separate parol agreement constituting a condition precedent to the attaching of any obligation under the written instrument. This is not to vary a written instrument, but to prove that no contract was ever made,—that its obligation never commenced.”³³ That a delivery should be conditional, it is not necessary that express words to that effect should be used at the time. That conclusion may be drawn from all the circumstances which properly form a part of the entire transaction, whether in point of time they precede or accompany the delivery.³⁴ But while it is competent for a maker to show by parol that the note was to become a binding agreement only on the happening of a certain contingency and that the contingency has not happened, yet his proof must be reasonably certain to that end.³⁵

§ 313. Same subject continued—Application of rule.—In the application of the general rule it has been decided that a maker may show in defense to an action by the payee of a note that such note was to become a valid contract only upon the performance of a condition that a certain building should be leased to the defendant by a third person and that such lease was never made,³⁶ or that it was to be valid only on the condition that the transaction in which it was given was approved by a certain attorney and that such attorney has refused to approve thereof.³⁷ And in an action on a note given to an agent of an insurance company by the maker at the time of his making an application for insurance evidence is admissible to show that the delivery was not absolute but that the note was to take effect only upon the arrival of the policy and its being satisfactory and accepted by the defendant.³⁸ And it may be shown that the note was given to become an absolute obligation of the maker in the event of his electing, upon ex-

³² *McFarland v. Sikes*, 54 Conn. 250, 252, 7 Atl. 708, 1 Am. St. R. 111, per Park, C. J.

³³ *Smith v. Mussetter*, 58 Minn. 159, 161, 59 N. W. 995, per Mitchell, J.

³⁴ *Wilson v. Powers*, 131 Mass. 539, 541, per Devens, J.

³⁵ *Elwell v. Turney* (Wash. 1905), 81 Pac. 1047.

³⁶ *Smith v. Mussetter*, 58 Minn. 159, 59 N. W. 995.

³⁷ *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563.

³⁸ *Graham v. Rammel* (Ark. 1905), 88 S. W. 899.

amination or investigation, to take a certain interest in property, and was delivered and accepted only as a memorandum of what the maker was to pay in case he decided to take such interest and that he never decided to accept the interest referred to.³⁹ So where subscription notes were executed to an institution on conditions which were not expressed therein, it was decided that, in an action against the receiver to determine the liability of the makers to creditors, it might be shown by the subscribers what the conditions were on which such notes were given, and that they were not performed, such evidence not being contradictory or avoiding their effect, but going to show that the notes never went into effect.⁴⁰ Where, however, a bill or note is not to become a binding obligation upon the maker until the performance of a certain condition, and by the connivance or consent of the maker it is not performed, he cannot avail himself of non-performance as a defense to an action on the instrument.⁴¹ One who relies on such a defense has the burden of establishing it.⁴²

§ 314. Same subject—Effect upon third parties—Bona fide holders.—It is no defense to an action by a *bona fide* holder of a note against the maker that the latter delivered the instrument to the payee under an agreement that it was to take effect only upon the happening of a certain event or the performance of some condition and that it was transferred to the holder prior to the occurrence of the event or the performance of the condition upon which its taking effect depended.⁴³

³⁹ *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698.

⁴⁰ *Catt v. Oliver*, 98 Va. 580, 36 S. E. 980.

⁴¹ *Batavian Bank v. North*, 114 Wis. 637, 90 N. W. 1016.

⁴² *Perley v. Perley*, 144 Mass. 104, 10 N. E. 726.

⁴³ *Georgia*.—*Goodman v. Fleming*, 57 Ga. 350.

Illinois.—*Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246.

Indiana.—*Clanin v. Esterly Harvesting Mach. Co.*, 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863.

Iowa.—*Graff v. Logue*, 61 Iowa 704, 17 N. W. 171; *Gage v. Sharp*, 24 Iowa 15.

Maine.—*Wait v. Chandler*, 63 Me. 257; *Adams v. Smith*, 35 Me. 324.

Minnesota.—*Mendenhall v. Ulrich* (Minn. 1905), 101 N. W. 1057.

Missouri.—*Donovan v. Fox*, 121 Mo. 236, 25 S. W. 915; *Jennings v. Todd*, 118 Mo. 296, 24 S. W. 148, 40 Am. St. R. 373; *Henshaw v. Dutton*, 59 Mo. 139.

New York.—*Chase National Bank v. Faurot*, 149 N. Y. 532, 44 N. E. 164; *Cowles v. Gridley*, 24 Barb. (N. Y.) 301.

Compare *Dodd v. Dunne*, 71 Wis. 578, 37 N. W. 430, holding where one executed a note for a purchase of land, it being agreed that the note should take effect when the contract for the sale of the land was consummated, and the payee took the note from the maker's desk, though without objection

This rule is based upon the familiar principle that where one of two parties must suffer by reason of the fraud or misconduct of another the loss must be borne by the one who has put it in the power of such third person to so act.⁴⁴ Upon proof, however, of the fact that a note was delivered to the payee to take effect upon the performance of some condition or the happening of some contingency the burden then rests on a plaintiff to show that he is a *bona fide* holder without notice.⁴⁵ And as against an assignee, with notice of the condition attending the delivery of a bill or note, the defense of non-performance is available.⁴⁶ And an assignee who takes a note for indemnity is held to take it subject to equities existing between the original parties, and therefore to the defense of a failure of the contingency or conditions upon which the note was to take effect.⁴⁷

§ 315. Condition that other signatures be procured.—Where a note is signed by a person upon the condition that it is not to take effect until the signature of another has been procured it may be shown in defense to an action on the paper by a payee or holder with notice of such fact that there has been a breach of the condition upon which defendant affixed his signature to the paper.⁴⁸ So where a person signs

by the latter, that a *bona fide* purchaser could not recover thereon, as there was no delivery of the note. See § 13 herein as to "Execution or Delivery Procured by Force or Fraud." See § 20 herein as to "Want of Delivery."

⁴⁴Galvin v. Syfers, 22 Ind. App. 43, 52 N. E. 96, per Wiley, J.

⁴⁵Mendenhall v. Ulrich (Minn. 1905), 101 N. W. 1057.

⁴⁶Shufeldt v. Gillilan, 124 Ill. 460, 16 N. E. 879; French v. Wallack, 12 N. Y. St. R. 159. See Stricklin v. Cunningham, 58 Ill. 293.

⁴⁷Brooks v. Whitson, 7 Sm. & M. (Miss.) 513.

⁴⁸Alabama.—First National Bank v. Dawson, 78 Ala. 67.

Georgia.—Clark v. Bryce, 64 Ga. 486; Cleghorn v. Robison, 8 Ga. 559.

Illinois.—Stricklin v. Cunningham, 58 Ill. 293.

Iowa.—Daniels v. Gower, 54 Iowa 319, 3 N. W. 424, 6 N. W. 525.

Kentucky.—Murphy v. Hubble, 2 Duv. (Ky.) 247; Bivins v. Helsley, 4 Metc. (Ky.) 78; Coffman v. Wilson, 2 Metc. (Ky.) 542.

Minnesota.—German-Amer. Nat. Bank v. People's Gas & Elec. Co., 63 Minn. 12, 65 N. W. 90; Yellow Medicine County Bank v. Tagley, 57 Minn. 391, 59 N. W. 486.

New York.—Twenty-Sixth Ward Bank v. Stearns, 148 N. Y. 515, 42 N. E. 1050; Miller v. Gamble, 4 Barb. (N. Y.) 146; Alexander v. Wilkes, 11 Lea (Tenn.) 221.

Texas.—Reynolds v. Dechaums, 24 Tex. 174.

Washington.—Seattle v. Griffith Realty & Bkg. Co., 28 Wash. 605, 68 Pac. 1036; Young v. Smith, 14 Wash. 565, 45 Pac. 45.

English.—Leaf v. Gibbs, 4 Car. & P. 466. Compare Garrison v. Nelson (Tex. 1892), 19 S. W. 248, holding that a maker cannot defend against a note payable to a creditor

a note as surety and leaves it with the principal payor, on condition that the signature of another be obtained before delivering the same, it may be shown in an action by the payee or holder with notice that the instrument was delivered in violation of such condition, as the payor will be regarded as the agent of the surety in such a case.⁴⁹ And where a note is signed by a surety for a principal who is to sign as maker, and it is delivered to the payee to obtain such signature and to hold for his debt when so signed, the failure to obtain the signature of the principal will discharge the surety as between the parties.⁵⁰ And the discharge of a surety on account of the breach of such a condition will operate as a discharge of subsequent co-sureties.⁵¹ Again the fact that paper has been so delivered may be shown as against a transferee without a valuable consideration or after maturity.⁵² So the transfer of a note by the maker, with the name of an indorser thereon, to a third party, without any act of transfer from the payee and without his knowledge, does not impress upon the signature of the indorser the legal quality of a full indorsement or invest the holder with a legal title thereto, and in an action by him against the indorser, the latter may show that the note was intrusted to the maker upon the express condition that the signature of the defendant was not to be considered as an indorsement unless the indorsement of the payee should also be procured at once.⁵³

§ 316. Same subject continued.—This question as to the liability of a party who has signed negotiable paper on the condition that the signature of another person be obtained where it has been delivered in violation of such condition has generally arisen where a person has affixed his name to a note as a surety under an agreement that another

on the ground that a condition, that another party was to sign the note as maker, had been broken and distinguishing between the case of sureties and indorsers and those primarily liable. The court said in this case, per Davidson, J.: "The distinction in such cases between one originally liable for the debt and partners or indorsers primarily liable, is, in our opinion, one of a most material character. As to such former parties, that is, parties primarily liable for the debt, we are

of opinion that they cannot claim immunity from liability upon the ground that other parties equally liable with them failed to sign the note as obligors."

⁴⁹ *Hubble v. Murphy*, 1 Duv. (Ky.) 278.

⁵⁰ *Knight v. Hurlbut*, 74 Ill. 133.

⁵¹ *Daniels v. Gower*, 54 Iowa 319, 3 N. W. 424, 6 N. W. 525.

⁵² *Merchants' Exchange Bank v. Luckow*, 37 Minn. 542, 35 N. W. 434.

⁵³ *Gibson v. Miller*, 29 Mich. 355, 18 Am. Rep. 98.

person shall sign the same before it is to become binding against the former as surety. In this class of cases it is a general rule that such a defense is not available to defeat an action by a payee without notice or a *bona fide* holder against a party to the instrument who has signed the same upon such a condition.⁵⁴ Where, however, a non-negotiable note is signed by a surety on the condition that the signatures of other persons as sureties be obtained if the note is delivered to the payee without a compliance with such condition and comes into the hands of a holder without notice it is held that the delivery in violation of the agreement may be shown as a defense even in an action by such a holder.⁵⁵

§ 317. **Delivery in escrow.**—It may be shown in defense to an action by the payee that the instrument was delivered in escrow to a third party, who has delivered the same to the payee in violation of the conditions imposed and of which the payee had knowledge. Evidence to this effect does not contradict or vary the terms of the written instrument but rather shows that as between the parties thereto it has

⁵⁴ *Arkansas*.—Craighead v. Building & Loan Ass'n, 69 Ark. 332, 63 S. W. 668; Tabor v. Merchants' National Bank, 48 Ark. 454, 3 S. W. 805, 3 Am. St. R. 241.

Georgia.—Clark v. Bryce, 64 Ga. 486; Bonner v. Nelson, 57 Ga. 433.

Indiana.—Whitcomb v. Miller, 90 Ind. 384; Deardorff v. Foresman, 24 Ind. 481.

Iowa.—Micklewait v. Noel, 69 Iowa 344, 28 N. W. 630.

Kentucky.—Smith v. Moberly, 10 B. Mon. (Ky.) 266, 52 Am. Dec. 543.

Minnesota.—Ward v. Hackett, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187.

Missouri.—North Atcheson Bank v. Gay, 114 Mo. 203, 21 S. W. 479; Bank of Missouri v. Phillips, 17 Mo. 29.

Nebraska.—Brumbach v. Bank, 46 Neb. 540, 65 N. W. 198.

New Hampshire.—Merriam v. Rockwood, 47 N. H. 81.

North Carolina.—Gwyn v. Patterson, 72 N. C. 189.

Tennessee.—Lookout Bank v. Aull, 93 Tenn. 645, 27 S. W. 1014, 42 Am. St. R. 934.

Texas.—Davis v. Gray, 61 Tex. 506.

Vermont.—Farmers' & M. Bank v. Humphrey, 36 Vt. 554, 86 Am. Dec. 671; Dixon v. Dixon, 31 Vt. 450, 76 Am. Dec. 128; Passumpsic Bank v. Goss, 31 Vt. 315.

See Dair v. United States, 16 Wall. (U. S.) 1.

Compare Ayres v. Milroy, 53 Mo. 516, 14 Am. Rep. 465.

Effect of Subsequent Verbal Promise.—Where a note has been delivered in violation of such a condition a subsequent verbal promise by a surety to pay the note, made without any consideration, will not be sufficient to bind him. Loving v. Dixon, 56 Tex. 75.

⁵⁵ Daniels v. Gower, 54 Iowa 319, 6 N. W. 525.

never acquired any binding force by reason of the fact that there has been no legal delivery thereof.⁵⁶ And such a defense may also be available against an indorsee with notice.⁵⁷ But where a payee is ignorant of a condition attached to the delivery of such paper, as where the signature of another is to be obtained before it is delivered and it is delivered without obtaining such signature, it is held to be no defense against the payee, who, in such a case, is said to occupy the position of a *bona fide* holder,⁵⁸ against whom the defense that a note was placed in escrow to be delivered on the performance of some condition or the occurrence of some event and that it has been delivered in violation of the conditions imposed, cannot be set up.⁵⁹ So it has been declared that: "It is perfectly well settled that any arrangement made between parties that a bond or instrument is to be held in escrow and not to be delivered except in certain contingencies would be binding between the parties to the arrangement; but the law, as applied to negotiable paper, is equally well settled that if the note passes for value to a third person without notice of such arrangement, he is to be protected."⁶⁰ And if a note when executed is by agreement of the parties

⁵⁶ *Davis v. Bower*, 29 Colo. App. 422, 68 Pac. 292; *Mills v. Williams*, 16 S. C. 593. "It is well settled that where a writing obligatory is placed in the hands of a third party to be held in escrow, and to be delivered to either party upon conditions to be performed by him, a delivery to him without such performance will not constitute a delivery as to the other party, and as to such party the instruments will be without force." Per Zollars, C. J., in *Stringer v. Adams*, 98 Ind. 539, 541. Compare *Martin v. Witty*, 104 Mo. App. 262, 78 S. W. 829.

⁵⁷ *Boutelle v. Wheaton*, 13 Pick. (Mass.) 499; *Brown v. Willis*, 13 Ohio 26.

⁵⁸ *Jordan v. Jordan*, 10 Lea (Tenn.) 124, 43 Am. Rep. 294.

⁵⁹ *District of Columbia v. Hutchinson v. Brown*, 19 Dist. Col. 136.

Indian Territory.—*Garrett v. Campbell*, 2 Ind. Terr. 301, 51 S. W. 956.

Iowa.—*Graff v. Logue*, 61 Iowa 704, 17 N. W. 171.

Massachusetts.—*Fearing v. Clark*, 16 Gray (Mass.) 74, 77 Am. Dec. 394.

Nebraska.—*Morris v. Morton*, 14 Neb. 358, 15 N. W. 725.

New York.—*Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Moore v. Miller*, 6 Lans. (N. Y.) 396; *Woodhull v. Holmes*, 10 Johns. (N. Y.) 231.

In some cases, however, it is held that delivery is essential to render the instrument operative and that in such a case there has never been a delivery of such a character as will bind a party, in the absence of further facts which would charge him with negligence in allowing the instruments to be negotiated.

Wisconsin.—See *Roberts v. Wood*, 38 Wis. 60; *Roberts v. McGrath*, 38 Wis. 52; *Chipman v. Tucker*, 38 Wis. 43, 20 Am. Rep. 1.

⁶⁰ *Hutchinson v. Brown*, 19 Dist. Col. 136, per Mr. Justice Cox.

delivered to a third person by whom delivery is to be made to the payee upon the performance of a condition precedent, the delivery is held to become complete upon the performance of the condition, though this does not occur until after the death of the maker.⁶¹ Upon proof that a bill was delivered in escrow the holder then has the burden of showing that he is a *bona fide* holder.⁶²

§ 318. **Same subject—Payee without notice.**—The fact that there was an agreement between a maker and his co-makers or an indorser, surety or guarantor that the instrument is to be delivered to the payee upon the performance of some condition or happening of some event will be no defense to an action by the payee on the instrument to whom it was delivered with no notice or knowledge of such agreement.⁶³ The

⁶¹ *Gandy v. Bissell's Estate* (Neb. 1904), 100 N. W. 803, citing *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66.

BUT SEE *In re Helfenstein*, 77 Pa. St. 328, 18 Am. Rep. 449, holding that where a note is delivered to a third person to be in force upon the acceptance by the payee of certain conditions and such conditions are not accepted by the payee until after the maker's death, it is to be construed as an offer merely which is countermanded by the death of the maker and that there can be no recovery on the same.

⁶² *Vallett v. Parker*, 6 Wend. (N. Y.) 615.

See *Flour City Bank v. Connery*, 12 Man. R. 305, wherein, under the Bills of Exchange Act, 1890, § 30, sub sec. 2 (53 Vict. 33), providing that "every holder of a bill is *prima facie* deemed to be a holder in due course; but, if in an action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is such a holder in due course shall be on him, unless and until he

proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course," it was decided that in an action by the indorsee against the maker of a note the latter was entitled to defend without giving evidence to rebut presumption that plaintiff was not a holder in due course where he had filed an affidavit that the note had been handed by him to another to hold in escrow until certain accounts between him and the payee had been settled and that it had been delivered over to the payee in violation of such condition. And it was decided also that in such a case the burden rests on the plaintiff to show both that he had given value and had done so in good faith.

⁶³ *Alabama*.—*Sharp v. Allgood*, 100 Ala. 183, 14 So. 16.

Georgia.—*Clark v. Bryce*, 64 Ga. 486.

Indiana.—*Whitcomb v. Allen*, 90 Ind. 384; *Deardorff v. Foresman*, 24 Ind. 481.

Iowa.—*Nicklewait v. Noel*, 69 Iowa 344.

Kansas.—*Carter v. Moulton*, 51 Kan. 9, 32 Pac. 633.

following from the opinion in a case in Kansas, in which this question is considered, is pertinent in this connection: "Where a negotiable promissory note, perfect in form, executed by a number of persons, is entrusted to one of the makers by all, we think there is a presumption that the party so holding the note has authority to deliver it to the payee. When a note so executed is presented by the principal to the payee without any notice to the payee of any understanding between the makers affecting the right of the principal to deliver to the payee, we think he is justified in assuming that the parties who so signed the note intended to be bound thereby, and that he may receive the note and deliver to the principal the consideration therefor, without first making inquiries of the other parties to the instrument for the purpose of learning whether there are any secret agreements or understandings affecting the instrument."⁶⁴

§ 319. Same subject—Where paper taken as security for an antecedent debt.—As against one who has taken paper merely as security for an antecedent debt, without any other consideration, it has been decided that an indorsee may set up the defense that he signed the paper under an agreement in respect to its delivery on the performance of some condition, and that it has been delivered in violation of such condition, the holder in this case being declared not to be a *bona fide* holder for value.⁶⁵

§ 320. That instrument is to be void or payable on contingency. A note which is absolute upon its face, providing unconditionally for the payment of a specified sum of money, and which is a complete and perfect instrument cannot be varied by parol evidence of an independent collateral agreement showing that it was to be either void or

Kentucky.—*Gano v. Farmers' Bank*, 103 Ky. 508, 45 S. W. 519.

Missouri.—*North Atchison Bank v. Gay*, 114 Mo. 203, 21 S. W. 479.

Nebraska.—*Brumback v. Bank*, 46 Neb. 540, 65 N. W. 198.

New Hampshire.—*Merriam v. Rockwood*, 47 N. H. 81.

South Carolina.—*Fowler v. Allen*, 32 S. C. 229, 10 S. E. 947, 7 L. R. A. 745.

Tennessee.—*Jordan v. Jordan*, 10 Lea (Tenn.) 124.

Texas.—*Davis v. Gray*, 61 Tex. 506.

Compare *Dunn v. Smith*, 12 Sm. & M. (Miss.) 602.

⁶⁴ Per *Allen, J.*, in *Carter v. Moulton*, 51 Kan. 9, 32 Pac. 63, 27 Am. St. R. 259, 20 L. R. A. 309.

⁶⁵ *Prentiss v. Graves*, 33 Barb. (N. Y.) 621.

See as to such transfer, § 246 herein.

payable only upon the performance of some condition or the happening of some contingency.⁶⁶ So in an action on a note evidence is not admissible of an oral agreement that the note should be void in case there was a total failure of crops on the land for the rent of which the obligation was given.⁶⁷ And a verbal agreement at the time notes were executed that in case the makers should dissolve partnership the notes should be returned to them and that the partnership was subsequently dissolved is held not admissible in evidence to defeat an action by the payee.⁶⁸ So it was held proper to exclude evidence of an agreement that the note sued upon "was not to be paid unless called for during the lifetime of" the payee,⁶⁹ or, in the case of a note given for money advanced to carry on a partnership business, that the note was only to be paid in the event that the affairs of the co-partnership should prove to be prosperous,⁷⁰ or, in an action upon notes given to attorneys, that they were not to be paid unless the payees should be successful in a suit they were to bring, and for the bringing of which the note was given,⁷¹ or, in the case of a note and mortgage given to secure the purchase money for certain real estate upon which there was a mill, that the maker was only to be liable if the property should

⁶⁶ *Federal*.—*Gorrell v. Home Life Ins. Co.*, 63 Fed. 371, 11 C. C. A. 240.

Connecticut.—*Converse v. Moulton*, 2 Root (Conn.) 195.

Georgia.—*Stafford v. Staunton*, 88 Ga. 298, 14 S. E. 479; *Adams v. Robinson*, 69 Ga. 627.

Illinois.—*Walker v. Crawford*, 56 Ill. 444, 8 Am. Rep. 701; *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246; *Harlow v. Boswell*, 15 Ill. 57; *Remy v. Graves*, 12 Ill. 287.

Michigan.—*Hyde v. Tenwinkel* 26 Mich. 85.

Minnesota.—*Curtice v. Hokanson*, 38 Minn. 510, 38 N. W. 694.

Missouri.—*Henshaw v. Dutton*, 59 Mo. 139, 143.

Nebraska.—*Western Mfg. Co. v. Rogers*, 54 Neb. 456, 74 N. W. 849; *Van Etten v. Howell*, 40 Neb. 850, 59 N. W. 859.

New York.—*Erwin v. Saunders*, 1

Cow. (N. Y.) 249, 13 Am. Dec. 520; *Ely v. Kilborn*, 5 Denio (N. Y.) 514.

Pennsylvania.—*Rogers v. Donovan*, 13 Phila. (Pa.) 51.

Vermont.—*Hatch v. Hydes*, 14 Vt. 25, 39 Am. Dec. 203; *Farnham v. Ingham*, 5 Vt. 514.

English.—*Rawson v. Walker*, 1 Starkie 161; *Free v. Hawkins*, 8 Taunt. 92, 1 Moore 535.

But see *Lyons v. Stills*, 97 Tenn. 514, 37 S. W. 280.

⁶⁷ *Neverman v. Bank of Cass County*, 14 Okla. 417, 78 Pac. 382 (action by holder with notice).

⁶⁸ *Oppenheimer v. Kruckman* (N. Y. App. Div. 1903), 84 N. Y. Supp. 129.

⁶⁹ *Boody v. McKenney*, 23 Me. 517, 522.

⁷⁰ *Jones v. Shaw*, 67 Mo. 667.

⁷¹ *West v. Kelly's Ex'rs*, 19 Ala. 353, 54 Am. Dec. 192.

be destroyed by fire,⁷² or, that the payment of the note should be conditional upon the allowance by the ordinary of a claim against the estate by the payee,⁷³ or that the makers would not be called upon to pay it unless the money should be actually needed and required for the support of the payee during her lifetime,⁷⁴ or that at the time the maker signed and delivered the note it was agreed that the same should not be payable unless he should be found to have certain funds sufficient to pay it,⁷⁵ or that he would not be obliged to pay it unless he received the amount thereof from a third party.⁷⁶ Again where a contemporaneous contract is to be construed as a part of a note a defendant cannot introduce evidence in an action by the payee of a collateral understanding or agreement, inconsistent with the terms of the contract, that the note is to be payable only upon the happening of a contingency.⁷⁷ But where a person took paper with notice of an agreement that it was not to be paid by the acceptors until the maker should collect a certain claim from the county for building a courthouse, which condition was omitted from the instrument by mistake, and the claim had not been collected, and due diligence was being used by the maker to collect it, it was held that the indorsee could not recover against the acceptor.⁷⁸ Again where an order for the payment of money is payable out of a certain payment to which the maker will be entitled under a contract with the acceptor the latter may show in defense to an action thereon that the maker was never entitled to such payment by reason of his failure to perform certain conditions which were conditions precedent to his right thereto.⁷⁹

§ 321. Same subject—Happening of contingency prevented by act of maker.—If the time of the payment of a note is actually dependent

⁷² *Farmer v. Perry*, 70 Iowa 358, 30 N. W. 752.

⁷³ *McGrath v. Barnes*, 13 S. C. 328, 36 Am. Rep. 687.

⁷⁴ *Osborn v. Taylor*, 58 Conn. 439, 20 Atl. 605.

⁷⁵ *Adams v. Wilson*, 12 Met. (Mass.) 138, 45 Am. Dec. 240.

⁷⁶ *Torpey v. Tebo*, 184 Mass. 307, 68 N. E. 223.

⁷⁷ *Prouty v. Adams*, 141 Cal. 304, 74 Pac. 545, so holding where the defendant sought to introduce evidence, outside of the contract, of an agreement that the note need not be

paid "unless it was established" in court that the plaintiff was the owner of the land for the rent of which it was given.

⁷⁸ *Greer v. Bently*, 19 Ky. Law R. 1251, 43 S. W. 219. The court, however, declared in this case that it did not decide that there could eventually be no recovery if the claim was not paid.

⁷⁹ *Glidden v. Massachusetts Hospital L. I. Co.*, 187 Mass. 538, 73 N. E. 538. See §§ 343-346 herein as to conditions in note.

upon the happening of some contingency either by reason of a contemporaneous agreement which may be construed with the note, or from the terms of the note itself, and the happening of such contingency is prevented by some act of the maker he cannot avail himself of the fact that it has not happened as a defense to an action against him.⁸⁰ So where there was an agreement between the parties that a note was not to be paid if certain mines belonging to the maker should yield no profits and before they had yielded any he sold and conveyed them to a stranger it was held that he had voluntarily committed an act which rendered it impossible for the contingency upon which the note would become due and payable to ever arise and that when he did that he violated his contract and the note at once became due and payable.⁸¹ And where it was conditioned that payment of a note need not be made in case a certain decision was rendered against the maker, it was decided that the latter could not avail himself of such condition as a defense to an action on the instrument where he had rendered the fulfillment of such condition impossible by a compromise of the suit by his own voluntary act.⁸² And in this connection it has been decided that one who accepts a bill on the condition that he can, prior to its maturity, sell certain goods of the drawer, may show in defense to an action against him on his acceptance that the goods have been attached by the drawer's creditors.⁸³

§ 322. **Conditions affecting consideration.**—While parol evidence is not admissible to vary the terms of an instrument yet it is competent to show a want or failure of consideration in actions between the parties and therefore in an action on a note by a payee evidence will be admitted, for such a purpose, of a failure to perform a contemporaneous agreement which was the consideration for the note.⁸⁴ It is

⁸⁰ *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687; *Vandelmal v. Dougherty*, 17 Mo. 277; *Clark v. Condit*, 11 Mo. 79.

⁸¹ *Wold v. Marsh*, 54 Cal. 228.

⁸² *Rightor v. Aleman*, 4 Rob. (La.) 45.

⁸³ *Brown v. Coit*, 1 McCord (S. C.) 408.

⁸⁴ *Alabama*.—*Barlow v. Fleming*, 6 Ala. 146.

Arkansas.—*Gale v. Harp*, 64 Ark. 462, 43 S. W. 144.

California.—*Stockton Savings & L. Soc. v. Giddings*, 96 Cal. 84, 30 Pac. 1016, 21 L. R. A. 406, 31 Am. St. R. 181; *Braly v. Henry*, 71 Cal. 481, 11 Pac. 385, 12 Pac. 623, 60 Am. Rep. 543; *Goodwin v. Nickerson*, 51 Cal. 166.

Georgia.—*Lightfoot v. West*, 98 Ga. 546, 25 S. E. 587.

Idaho.—*Maydole v. Peterson*, 7 Idaho 502, 63 Pac. 1048.

Illinois.—*Hill v. Enders*, 19 Ill. 163; *Penny v. Graves*, 12 Ill. 287.

said in this connection that although a note is absolute in its terms, it is competent for the maker in an action brought on it, either by the payees or their indorsees, with notice of the original agreement under which it was made, to avail himself of any defense of want or failure of consideration growing out of such agreement and consequently to show what were the terms thereof.⁸⁵ And a transferee after maturity

Indiana.—Booth v. Fitzer, 82 Ind. 66; Jeffries v. Lamb, 73 Ind. 202.

Iowa.—Simpson College v. Bryan, 50 Iowa 293.

Kansas.—Dodge v. Oatis, 27 Kans. 762.

Kentucky.—McVicker v. Shropshire, 6 J. J. Marsh (Ky.) 328.

Massachusetts.—Shoe & Leather National Bank v. Wood, 142 Mass. 563, 8 N. E. 753; Hawks v. Truesdell, 12 Allen (Mass.) 564.

Michigan.—Brown v. Smedley, 136 Mich. 65, 98 N. W. 856; Fink v. Chambers, 95 Mich. 508, 55 N. W. 375; Sutton v. Beckwith, 68 Mich. 303, 36 N. W. 79, 13 Am. St. R. 344.

Minnesota.—Slater v. Foster, 62 Minn. 150, 64 N. W. 160; Wager v. Brooks, 37 Minn. 392, 34 N. W. 745.

New Hampshire.—Shepherd v. Temple, 3 N. H. 455.

New York.—Juilliard v. Chaffee, 92 N. Y. 529; O'Brien v. McDonald, 78 Hun (N. Y.) 420, 60 N. Y. St. R. 748, 29 N. Y. Supp. 191; Small v. Smith, 1 Denio (N. Y.) 583.

North Carolina.—Sydnor v. Boyd, 119 N. C. 481, 26 S. E. 92, 37 L. R. A. 734; Sayre v. Mohny, 30 Oreg. 238, 47 Pac. 197.

Pennsylvania.—Clinch Valley Coal & I. Co. v. Willing, 180 Pa. St. 165, 36 Atl. 737, 57 Am. St. R. 626; Claridge v. Kleet, 15 Pa. St. 255.

Wisconsin.—Smith v. Carter, 25 Wis. 283.

United States.—Brown v. Noyes, 2 Woodb. & M. (U. S.) 75, Fed. Cas. No. 2023. See Weeks v. Medler, 20 Kan. 57.

If a collateral agreement which forms the consideration of a note is not performed, and the condition is that upon non-performance, the note shall be returned, the terms of the condition should be performed. If the note is transferred to another, the maker may pay the same and recover as damages from the transferor the amount so paid not in excess of the principal and interest. Serviss v. Stockstill, 30 Ohio St. 418.

⁸⁵ Dulles v. De Forest, 19 Conn. 190, per Storrs, J. See also Small v. Smith, 1 Denio (N. Y.) 583. But see Jennings v. Todd, 118 Mo. 296, 24 S. W. 148, 40 Am. St. R. 373, in which the court distinguished between notice of a condition to be performed and knowledge at time of purchase of a breach of such a condition and says: "We think, however, that no well considered case can be found in which a collateral contemporaneous agreement, providing that the note should not be paid in the event that an executory contract, which was consideration of the note, should not be performed, has been allowed to defeat the negotiability of the note in the hands of an indorsee, though he had notice of such agreement. A great part of the improvement of the country, and of business generally, is carried on with money raised by the discount of notes given upon executory contracts, and if the maker could be allowed to defend against such notes, in case of a

is also subject to this defense.⁸⁶ So a maker of a note may also show in defense to an action thereon that it was given in consideration of an executory contract by the payee which is impossible of performance.⁸⁷ If, however, the consideration of a note is an agreement by the payee to subsequently perform some act at the request of the maker, the latter must, in order to establish the defense of want or failure of consideration, show that he requested the payee to do such act and that he failed to do it. This is subject, however, to the exception that it is sufficient to show an incapacity on the part of the payee to do the promised act, constituting the consideration, and if the payee was legally incapable of doing the act, it would be unnecessary to make the request.⁸⁸ In such cases the burden does not rest upon the payee to show that he has performed the condition which was the consideration for the note but upon the maker to show that he has not.⁸⁹

§ 323. Same subject—Application of rule generally.—Where a promissory note was given in consideration of an agreement to furnish a policy of insurance on the life of the maker's wife of which the husband was to be the beneficiary, the failure to perform such agreement will be a good defense to an action against the maker on the note.⁹⁰ And where a note and bond are to be construed as forming parts of the one and same contract and it is apparent that the note would not have been given without the bond, which formed the principal if not the entire inducement to the making of the note, and the stipulations of the bond have not been performed, it constitutes a failure of consideration which may be shown to defeat an action by any one not a *bona fide*

breach of contract, on the ground that the indorsee, though in other respects *bona fide*, had knowledge of the transaction out of which the notes grew, all confidence in such notes as negotiable paper would be destroyed and such business would be paralyzed. By making and delivering a negotiable note the maker is held to intend that it may be put in circulation and that no defenses against it exist. * * * If the breach had occurred to the knowledge of the indorsee when he purchased, he would not, of course, be protected." Per Macfarlane, J.

⁸⁶ Billings v. Everett, 52 Cal. 661; Perkins v. Gilman, 8 Pick. (Mass.) 229; Hill v. Huntress, 43 N. H. 480; Rogers v. Broadnax, 24 Tex. 538.

⁸⁷ German American Security Co's Assignee v. McCulloch (Ky. C. A. 1905), 89 S. W. 5.

⁸⁸ Nelson v. Lovejoy, 14 Ala. 568.

⁸⁹ Jennison v. Stafford, 1 Cush. (Mass.) 168, so holding where the consideration for the note was an agreement to forbear to sue a third person for a certain period.

⁹⁰ Sydnor v. Boyd, 119 N. C. 481, 26 S. E. 92, 37 L. R. A. 734.

holder.⁹¹ So where a surety signed a note upon a condition that the payee should advance the principal a sum of money which he failed to do it was held that there was a failure of consideration, of which the surety might avail himself as a defense to an action by the payee.⁹² And where a person indorsed a note under an agreement that certain collateral should be deposited to secure the payment of the note it was decided that, in an action by the indorsee, who was a party to such agreement, it might be shown that such collateral had not been deposited.⁹³ And in such an action against an indorser it has been held improper to exclude evidence showing that the defendant indorsed the note as collateral security for a debt owing to the plaintiff by the maker upon the former agreeing to discontinue a suit therefor against the maker which, however, he did not do but proceeded to obtain a judgment and execution and to have a levy made upon the goods of the debtor.⁹⁴ Again it has been decided, where a note was given for part of the consideration for the lease of certain lands and by the terms of the lease contract the entire possession and use of the leased premises was guaranteed for a certain time, that in an action on the note the defendant, upon proof of a breach of such agreement, was entitled to an offset therefor.⁹⁵

§ 324. **Same subject—When not a defense.**—Where the promises are independent of each other and the collateral agreement did not constitute the whole consideration for the note but is separable from the other parts thereof it has been decided that a non-performance of such agreement, not amounting to an entire failure or want of con-

⁹¹ *Griffith v. Shipley*, 74 Md. 591, 601, 22 Atl. 1107, 14 L. R. A. 405.

⁹² *Bushley v. Reynolds*, 31 Ark. 657.

⁹³ *Baumgardner v. Reeves*, 35 Pa. St. 250.

⁹⁴ *Bookstaver v. Jayne*, 60 N. Y. 146.

⁹⁵ *Stirling v. Gray* (Tex. Civ. App. 1904), 81 S. W. 789.

⁹⁶ *Comelander v. Bird*, 11 Ala. 913, holding where a note was given for the purchase of a brickyard, that the breach of an agreement not to make bricks in the same town, will not defeat recovery. *Key v. Hen-*

son, 17 Ark. 254, holding, where a note was given for the purchase of land, that the breach of an agreement to release certain encumbrances thereon was no defense. *Clough v. Baker*, 48 N. H. 254, holding, where a note was given for the purchase price of a dentist's business, that the breach of an agreement not to practice dentistry within certain limits was no defense. *SEE Stewart v. Anderson*, 59 Ind. 375; *Gibson v. Newman*, 1 How. (Miss.) 341; *Plumb v. Niles*, 34 Vt. 230.

sideration, will not be a defense to an action on the instrument.⁹⁶ So it has been said that: "There is a class of cases where the agreement does not go to the whole consideration on both sides, and where the supposed condition is distinctly separable from other parts of the agreement, so that much of the contract may be performed on both sides, as though the condition were not there, it will be held as a stipulation, the breach of which only gives an action to the injured party."⁹⁷

So where a promissory note was payable absolutely it was held to be no defense that the consideration therefor was a sale of a horse upon the condition that if the purchaser was dissatisfied with the horse he might return it within three months and that he was dissatisfied and had offered to return it within the time specified. The transfer of the possession of the horse in this case was declared to be sufficient consideration for the note, it being said that the consideration had never failed and that the evidence of such agreement would, if competent, prove an agreement to give up the note on the happening of a contingency thus engrafting a condition upon an absolute promise and by force thereof defeating a recovery.⁹⁸ And where a new agreement is entered into by the original parties to a note as a substitute for the old one the failure of the original consideration will be no defense to an action by a *bona fide* holder against the maker.⁹⁹ Nor are defenses of this character available to defeat an action by a *bona fide* holder.¹⁰⁰ It has also been held to be no defense to an action against one who has accepted a bill of exchange in consideration of certain payments being made by the payee that he has violated the agreement, it being declared that there is no failure of consideration so long as he is by such promise legally obligated to make the payments.¹⁰¹ And similarly

⁹⁷ Hickman v. Rayl, 55 Ind. 551, 558, per Biddle, J.

⁹⁸ Allen v. Furbish, 4 Gray (Mass.) 504, 64 Am. Dec. 87.

⁹⁹ Young v. Grundy, 7 Cranch (U. S.) 548, 3 L. Ed. 435.

¹⁰⁰ Cowing v. Cloud, 16 Colo. App. 326, 65 Pac. 417; Martina v. Muhlke, 186 Ill. 327, 57 N. E. 954; Beattyville Bank v. Roberts, 25 Ky. Law Rep. 1796, 78 S. W. 901; Cunningham v. Potter, 23 Ky. Law Rep. 847, 64 S. W. 493. Compare Schnabel v. German-American Title Co., 21 Ky. Law Rep. 1063, 53 S. W. 1031, hold-

ing that, where paper is of a character which makes it a common law obligation and it is not placed upon the footing of bills of exchange, it may be shown even as against a *bona fide* holder that there has been a non-performance of the conditions in consideration of which it was given. That non-performance of agreement or condition is no defense against a *bona fide* holder generally, see §§ 307, 308, herein.

¹⁰¹ Vanstrum v. Liljengren, 37 Minn. 191, 33 N. W. 555.

where a note is given to a person in consideration of his promise to pay a certain note due from the maker to a third person it has been decided that the payment of the latter note is not a condition to be performed before the payee can sue on the note to him.¹⁰²

§ 325. Same subject—Performance prevented by maker—Non-performance by maker.—And a maker cannot avail himself of a failure of consideration by reason of the non-performance of such an agreement where he was the cause of such failure.¹⁰³ So where a bond was given for the conveyance of certain lands to the obligee upon his payment of certain notes when they came due, and upon his failure to pay such notes the obligor conveys away the land he cannot enforce the notes, since having elected to claim a forfeiture by conveying the land, he cannot subsequently enforce notes given in consideration of such a conveyance to the maker.¹⁰⁴ And it is no defense to an action on a note given on account of a claim under an agreement that a certain judgment should be discharged "when notes to be agreed upon are given" that there has been no satisfaction of the judgment entered, it not having been proven that such other notes had been given.¹⁰⁵ Again where the consideration for a note is an agreement that there shall be a stay of proceedings against the maker and that a satisfaction on the judgment shall be entered when certain notes to be agreed upon are given it is held that an action on the note cannot be defeated by proof of such agreement and that it has not been performed by the payee where there is no evidence showing that the other notes have been given.¹⁰⁶

¹⁰² *Logan v. Hodges*, 6 Ala. 699.

¹⁰³ *Cook v. Whitfield*, 41 Miss. 541; *Wheeler v. Bancroft*, 18 N. H. 537, so holding where a note was given for a conveyance of a right of flowage, such conveyance to be void on failure of the maker of the note to pay certain sums secured thereby at the times specified, and the condition of the conveyance was broken by his failure to pay. The court said in this case: "If the purchaser omit to pay, the vendor may enforce the contract by a suit upon the notes, and the defendant cannot say that, by failing to pay at the day, he has lost the benefit of the purchase, and the notes are, there-

fore, without consideration. * * *

The moment one party fails to perform, he forfeits the right to exact the consideration from the other; but that does not deprive the latter of the power of enforcing a compliance; nor does it absolve him, having enforced it, from rendering the equivalent that would have been due upon a prompt and seasonable compliance." Per *Gilchrist, J.*

¹⁰⁴ *Little v. Thurston*, 53 Me. 86. See *McKeen v. Page*, 18 Me. 140; *Arbuckle v. Hawks*, 20 Vt. 538; *Porter v. Vaughn*, 26 Vt. 624.

¹⁰⁵ *Klett v. Claridge*, 31 Pa. St. 106.

¹⁰⁶ *Klett v. Claridge*, 31 Pa. St. 106. See *Shepherd v. Merrill*, 20 N. H.

§ 326. **Same subject—Agreement not to do certain acts.**—Where a note is given in consideration of an agreement not to do certain acts the non-performance of such agreement will constitute a failure of consideration which will be a good defense to an action on the note by the payee. Thus it has been so held in the case of a note given in consideration of an agreement not to sell any more patent rights during the life of the payor;¹⁰⁷ or not to sell a certain class of merchandise at a specified place;¹⁰⁸ or not to take possession of mortgaged property or foreclose the same for a certain length of time.¹⁰⁹ Such a defense, however, cannot be set up against a *bona fide* holder for value and without notice.¹¹⁰

§ 327. **Same subject—Purchase price notes.**—In the case of a purchase price note evidence is often admissible of a contemporaneous agreement, which is to be construed with the note as one contract, for the purpose of showing that there has been a failure of consideration as a defense to an action thereon.¹¹¹ So in such an action evidence was held admissible of a contemporaneous agreement that if part of the trade should fail the whole contract should terminate and that the notes need not be paid unless the trade was consummated.¹¹² And where a purchaser of a threshing machine had given a note therefor, he was permitted to show that there was an agreement between him and the seller that the latter would take the machine back if it did not work satisfactorily and that it had not so worked, and that he had so notified the plaintiff and had offered to return it.¹¹³ And where an action is brought on a note given in consideration of a contract to convey lands by the payee, the latter cannot recover without showing a performance of the contract, that is, the execution and delivery of a deed

415, in which it is declared that in all mutual covenants or agreements, if the party who is the first to perform fails, he becomes by such failure disabled to require the other party to perform, who is thereby in a position in which he may elect to abandon the contract entirely or to sue the delinquent party or to accept his tardy compliance with its terms, if tendered. Per Gilchrist, J.

¹⁰⁷ Ray v. Moore, 24 Ind. App. 480, 56 N. E. 937.

¹⁰⁸ Mader v. Cool, 14 Ind. App. 299, 42 N. E. 945.

¹⁰⁹ Kenney v. Wells, 23 Ind. App. 490, 55 N. E. 774.

¹¹⁰ Mader v. Cool, 14 Ind. App. 299, 42 N. E. 945.

¹¹¹ Bailey v. Cromwell, 4 Ill. 71; Jessup v. Trout, 77 Ind. 194; Hubbard v. Galusha, 23 Wis. 398.

¹¹² Ela v. Kimball, 30 N. H. 126.

¹¹³ Marion Mfg. Co. v. Harding, 155 Ind. 648, 58 N. E. 194. See Westinghouse Co. v. Gainor, 130 Mich. 393, 90 N. W. 52.

as called for by the contract or a tender of performance such as the law requires.¹¹⁴ So where the agreement under which notes are given is rescinded by the payee the whole transaction is terminated and he cannot recover thereon as the consideration for which they were given has failed.¹¹⁵ Again where the consideration of a note was a lease under seal, of a machine, and both instruments together with an oral agreement as to the time and place of delivery of the machine were all parts of one transaction it was decided that the presence of the seal on the lease would not operate to prevent the defendant from showing a failure of consideration by non-delivery of the machine within the time specified.¹¹⁶ On the other hand, where it is a condition of the contract that it shall be void if the notes are not paid when due, if the payee elects to confirm the contract and brings suit on the notes, it is decided that the defendant cannot set up the fact that they were not paid.¹¹⁷ If, however, a notice of the failure of consideration is by the agreement a condition precedent to the right to set it up as a defense, such notice must be given.¹¹⁸ And if one makes a written contract as agent of another, for the conveyance of an interest in lands, on the payment of a promissory note, which is given as a consideration therefor, and the contract does not bind the principal to make the conveyance, but the agent is personally responsible for damages for the breach of the contract, the payment of the note cannot be avoided for want or failure of consideration.¹¹⁹ In an action, however, on a note given in pursuance of a covenant it has been held that the maker cannot impeach the consideration thereof.¹²⁰

§ 328. Same subject—Purchase price notes—Subsequent holders.

Evidence of the breach or non-performance of a collateral condition or agreement for the purpose of showing a want or failure of consideration is not admissible to defeat an action on a purchase price note by one who is a *bona fide* holder.¹²¹ And it has also been held that an as-

¹¹⁴ *Hoag v. Parr*, 13 Hun (N. Y.) 95, 98. See also *May v. Cole*, 8 Blackf. (Ind.) 479.

¹¹⁵ *Campbell Printing Press & Mfg. Co. v. Hickok*, 140 Pa. St. 290, 21 Atl. 362; *Flewelling v. Hale*, 6 Yerg. (Tenn.) 515. See also *Ewing v. Wightman*, 28 App. Div. (N. Y.) 326, 51 N. Y. Supp. 268.

¹¹⁶ *Burns v. Goddard* (S. C., 1905), 51 S. E. 915.

¹¹⁷ *Lane v. Manning*, 8 Yerg. (Tenn.) 435, 29 Am. Dec. 125.

¹¹⁸ *Pritchard v. Johnson*, 60 Ga. 288.

¹¹⁹ *Dyer v. Burnham*, 25 Me. 9.

¹²⁰ *Fay v. Richards*, 21 Wend. (N. Y.) 626.

¹²¹ *Wilensky v. Morrison* (Ga. 1905), 50 S. E. 472; *Handy v. Wilson*, 75 Ga. 840; *Bates v. Kemp*, 13 Iowa 223; *Louisiana Mutual Ins. Co.*

signee before maturity is not subject to such a defense.¹²² But it is available against an assignee of non-negotiable paper,¹²³ or against one who is not a *bona fide* holder,¹²⁴ or an assignee with notice.¹²⁵

§ 329. Same subject—Agreement to render services or labor.

Where the consideration for a note is an agreement to perform certain labor or services in the future a non-performance of such agreement constitutes a failure of consideration which will defeat a recovery on the note by the payee.¹²⁶ Performance is a condition precedent in such cases and if prevented by the death of the one obligated to perform there can be no recovery.¹²⁷ It is no defense, however, to an action on such a note that the amount specified therein is in excess of the value of the services rendered.^{127*} And it has been decided that a *bona fide*

v. Batt, 22 La. Ann. 621; Allen v. Furbish, 4 Gray (Mass.) 504, 64 Am. Dec. 87; Coakley v. Christie, 20 Neb. 509, 31 N. W. 73; Brockway v. Mason, 29 Vt. 519.

¹²² Baldwin v. Killian, 63 Ill. 550; Nebraska National Bank v. Pen-nock, 55 Neb. 188, 75 N. W. 554. Compare Weber v. Orton, 91 Mo. 677, 4 S. W. 271.

¹²³ Benton v. Klein, 42 Mo. 97. See Second National Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963.

¹²⁴ Westinghouse Co. v. Gainor, 130 Mich. 393, 90 N. W. 52; Wright v. Irwin, 33 Mich. 32.

¹²⁵ Johnson v. First National Bank, 24 Ill. App. 352; Gorham v. Peyton, 3 Ill. 363. See Pope v. Hays, 19 Tex. 375.

¹²⁶ Corbin v. Sistrunk, 19 Ala. 203; Wood v. Kendall, 7 J. J. Marsh. (Ky.) 212. See Easton Packing Co. v. Kennedy, 131 Cal. XVIII, 63 Pac. 130; Richardson & Morgan Co. v. Gudewill, 61 N. Y. Supp. 1120.

¹²⁷ Voe v. Smith, 1 Smith (Ind.) 88.

Compare Hardin v. McKittrick, 5 J. J. Marsh. (Ky.) 667, holding, where a note was given to an attorney in consideration of his defend-

ing a certain suit, that his death before a decision was rendered did not show a failure of consideration, it appearing that the case was decided in favor of his client, and there being no evidence that other counsel were employed, or that the suit was not fully prepared by the attorney, or that he could have done anything further.

^{127*} Forbes v. Williams, 13 Ill. App. 280. It was declared in this case that where a note is given, without fraud or imposition, for property or services which are not of certain value fixed by law, market or custom, nor exactly ascertainable by comparison with others of like general character, the maker will be bound by his own estimate of it, however extravagant or capricious, and though such amount is based upon an estimate by the party for whom they are rendered, far beyond the value of others of general like kind, since one may bind himself to pay a larger sum to one person than that for which he could procure like services from another. Per Pleasants, J.

See Headley v. Good, 24 Tex. 232.

holder of a note given for services of a physician cannot be defeated in an action to recover thereon by proof that the physician is not qualified to practice.^{127**} Nor will it be any defense to an action on such a note that there has been a failure of consideration by reason of the non-performance of the agreement to render services where performance has been prevented by the act of the maker.¹²⁸ And the death of the maker before the services were rendered is held to be no defense.¹²⁹ So where a person indicted for a crime employed counsel and executed his note for the amount of the fee, and then before his trial committed suicide, the fact that the lawyer did not perform the principal service for which the note was executed, that is, the defense of the criminal on his trial, was held to be no ground for the impeachment of the consideration either at law or in equity because the non-performance resulted from the act of the obligor himself.¹³⁰ It has also been decided that if, at the request of the party with whom he deals, one makes his promissory note, which is to be a partial payment for a piece of work to be done for him, payable to a third party, who is a creditor of the party with whom he contracts for the work, and it is credited by the payee to such party, in good faith, the maker cannot set up a failure of consideration as between himself and the party with whom he deals, in defense of a suit upon such note in the name of the payee.¹³¹

§ 330. Note not to be negotiated.—A contemporaneous oral agreement that a note, payable to a certain person, shall not be transferred by the payee, cannot be shown in defense to an action on the instrument, as to allow such proof would be to contradict the written contract.¹³² Nor can the makers of a note defeat a recovery by the payee by showing that it has been negotiated contrary to its terms or the agreement of the parties where the makers themselves have put it into circulation.¹³³

^{127**} Roach v. Davis (Tex. App. 1900), 54 S. W. 1070.

¹²⁸ Adam v. Johnson, 11 Ky. Law Rep. 137, so holding where a note was given to an attorney under an agreement that he should defend the maker in a certain criminal action and the latter left the state and was never tried.

¹²⁹ Hoadley v. Good, 24 Tex. 232.

¹³⁰ Mitcherson v. Dozier, 7 J. J. Marsh. (Ky.) 53, 22 Am. Dec. 116.

¹³¹ South Boston Iron Co. v. Brown, 63 Me. 139.

¹³² Johnson v. Washburn, 98 Ala. 258, 13 So. 48; Dolson v. De Ganah, 70 Tex. 620, 8 S. W. 321; Knox v. Clifford, 38 Wis. 651, 20 Am. Rep. 28.

Compare State Bank of Indiana v. Cook, 125 Iowa 111, 100 N. W. 72.

¹³³ Wardell v. Hughes, 3 Wend. (N. Y.) 418.

§ 331. **As to place of payment.**—Where a bill or note contains no place for payment it will be presumed that it was to be paid in the state in which it was executed and delivered and parol evidence is not admissible to show that it was to be paid in another state. In such a case the laws of the state, of execution and delivery, control both as to interest and otherwise, and to permit the introduction of such evidence would be a violation of the rule that parol evidence is not admissible to vary or contradict the terms of a written contract.¹³⁴ So in an action brought in Georgia on a note in which no place of payment was designated it was held that evidence that the note was by agreement to be paid in Chicago where the payee resided was properly excluded.¹³⁵

§ 332. **As to amount.**—Where the amount of a note is specified therein parol evidence is not admissible to show that by an agreement between the parties a different sum than that stated was to be paid.¹³⁶ So it cannot be shown that in a certain event only one-half of the amount stated therein is to be paid,¹³⁷ or that by such an agreement a certain sum was to be indorsed thereon as paid,¹³⁸ or that an account which the maker held against the payee should be deducted therefrom,¹³⁹ or that it was agreed that, though the note bears interest at a specified rate, none would have to be paid.¹⁴⁰ And a maker of a note cannot show in an action against him that there was an oral agreement that a certain sum should in the future be credited thereon and that the note should only be obligatory upon him for the balance.¹⁴¹

¹³⁴ *Moore v. Davidson*, 18 Ala. 209.
Examine Specht v. Howard, 16 Wall.
 (U. S.) 564.

¹³⁵ *Ray v. Anderson*, 119 Ga. 926,
 47 S. E. 205.

¹³⁶ *Alabama*.—*Caldwell v. May*, 1
Stew. (Ala.) 425.

Indiana.—*Potter v. Earnest*, 45
Ind. 418; *Swank v. Nichols*, 24 *Ind.*
 199.

Iowa.—*Atherton v. Dearmond*, 33
Iowa 353.

Massachusetts.—*Shed v. Pierce*, 17
Mass. 623.

Minnesota.—*Harrison v. Morri-*
son, 39 *Minn.* 319.

Missouri.—*Lane v. Price*, 5 *Mo.*
 67.

Wisconsin.—*Gregory v. Hart*, 7
Wis. 532.

¹³⁷ *Smith v. Thomas*, 29 *Mo.* 307.

¹³⁸ *Walters v. Armstrong*, 5 *Minn.*
 448. See *Featherston v. Wilson*, 4
Ark. 154.

¹³⁹ *Eaves v. Henderson*, 17 *Wend.*
 (N. Y.) 190.

¹⁴⁰ *Tinsdale v. Mallett (Ark. 1904)*,
 88 *S. W.* 481.

¹⁴¹ "Whatever appellant may be ready to say about the terms of his promise is but descriptive of that which is before the court in physical form, descriptive of itself; no matter soever what he may claim about promises to pay, and amounts, the senses of the court cannot fail to discover that he has promised to pay \$840 'three months after date,' and this being written, permits the proof of no contrary oral promise as

§ 333. **As to mode or manner of payment.**—A collateral independent agreement that a note is to be discharged or paid by doing something other than by paying money or in a manner different from that specified therein, so long as it remains unperformed is inoperative and will be no defense to an action on the note by the payee,¹⁴² or by an assignee.¹⁴³ It is neither payment nor accord and satisfaction until performed.¹⁴⁴ So it has been held proper to exclude oral testimony to show an executory agreement that a note was to be paid only out of a certain fund,¹⁴⁵ or in labor,¹⁴⁶ or by an exchange of other

a substitute." *Knight v. Walker Brick Co.*, 23 App. D. C. 519, 524, per Mr. Justice Wright.

¹⁴² *Alabama*.—*Tuscaloosa Cotton Seed Oil Co. v. Perry*, 85 Ala. 158, 4 So. 635; *Powe v. Powe*, 42 Ala. 113; *Thompson v. Rawles*, 33 Ala. 29; *Hair v. La Brouse*, 10 Ala. 548.

Georgia.—*Harper v. Wrigley*, 48 Ga. 495.

Illinois.—*Moore v. Prussing*, 165 Ill. 319, 46 N. E. 184.

Indiana.—*Goldthwait v. Bradford*, 36 Ind. 149.

Maine.—*Cushing v. Wyman*, 44 Me. 121; *Merrill v. Mowry*, 33 Me. 455.

New York.—*Woodin v. Foster*, 16 Barb. (N. Y.) 146.

North Carolina.—*McRae v. McNair*, 69 N. C. 12.

Texas.—*Haley v. Harvey*, 1 White & W. Civ. Cas. (Tex. Ct. App.), § 1096.

Vermont.—*Follett v. Eastman*, 16 Vt. 19.

See *Harmon v. Adams*, 120 U. S. 363; *Brown v. Spofford*, 95 U. S. 474.

Compare *State Bank v. Whitlow*, 6 Ala. 135.

¹⁴³ *Alabama*.—*Sawyer v. Hill*, 12 Ala. 575.

Indiana.—*Goldthwait v. Bradford*, 36 Ind. 149.

Missouri.—*Bircher v. Payne*, 7 Mo. 462.

New Hampshire.—*Odiorne v. Sargent*, 6 N. H. 401.

New York.—*Tredwell v. Lincoln*, 52 Hun (N. Y.) 614, 5 N. Y. Supp. 341; *Franc v. Dickinson*, 52 Hun (N. Y.) 373, 5 N. Y. Supp. 303.

Compare *Braly v. Henry*, 71 Cal. 481, 11 Pac. 385, 60 Am. Rep. 543.

Though the note was acquired by the holder after its maturity such an agreement has been held no defense. *Crosly v. Tucker*, 21 La. Ann. 512. But see *Shore v. Martine*, 85 Minn. 29, 88 N. W. 254.

¹⁴⁴ *Tuscaloosa Cotton Seed Oil Co. v. Perry*, 85 Ala. 158, 167, 4 So. 635.

¹⁴⁵ *Gorrell v. Home Life Ins. Co.*, 63 Fed. 371, 11 C. C. A. 240. The court here said: "The contract before us—the note in suit—is complete in its terms. It contains an absolute promise to pay on demand a stated sum, and the consent of the maker is expressed that several commissions accruing to his account may be retained by the company and applied in liquidation of the obligation. The rule that where an oral agreement has been but partially reduced to writing the whole agreement is open to proof is not applicable. The proof proposed here was of an agreement inconsistent with the writing, which in itself is complete and unambiguous. The writ-

¹⁴⁶ *Odiorne v. Sargent*, 6 N. H. 401.

notes held by the maker against the payee,¹⁴⁷ or by any legal claim which the maker might obtain against the payee.¹⁴⁸ Where, however, the agreement and note are mutual and dependent and are to be construed as one contract such a defense is held to be available as against an indorsee of an overdue note who does not occupy the position of a *bona fide* holder,¹⁴⁹ or against the payee.¹⁵⁰ And an agreement made at the maturity of a note may be available as a defense where made upon a sufficient consideration.¹⁵¹

§ 334. Same subject—Continued.—Such an agreement with the attorney of the payee by which the maker was to perform certain services for the attorney and the money due therefor was to be applied in payment and discharge of the note cannot be set up in defense to an action thereon.¹⁵² Nor can the maker defeat recovery on a note by proof that it was given in payment for stock of a corporation and that it was to be paid out of dividends on such stock and that no dividends had ever been declared or paid.¹⁵³ Nor can it be shown that the note in suit was to be paid in trade, the payee to have the privilege of hiring or otherwise using the horses and carriages belonging to the maker and of not paying cash for such use, but the price therefor to be charged up against the payee from time to time until the full amount of the note was paid.¹⁵⁴ Again, the non-performance of a contemporaneous

ten promise to pay is absolute. By the proposed proof that promise would have been nullified, and the note converted into an agreement that the sum named should be paid out of accruing commissions and not otherwise." Per Woods, C. J.

But see *Saffer v. Lambert*, 111 Ill. App. 410.

¹⁴⁷ *Sawyer v. Hill*, 12 Ala. 575.

¹⁴⁸ *Goldthwait v. Bradford*, 36 Ind. 149.

¹⁴⁹ *Hill v. Huntress*, 43 N. H. 480.

¹⁵⁰ *State Bank of Indiana v. Cook* 125 Iowa 111, 100 N. W. 72, holding that in such an action evidence is admissible of a contemporaneous written agreement that the notes were to be paid by dividends from the stocks for which they were given.

¹⁵¹ *Gleason v. Saunders*, 121 Mass. 436.

¹⁵² *Pioneer Press Co. v. Gossage*, 13 S. D. 624, 84 N. W. 195.

¹⁵³ *Fuller v. Law*, 207 Pa. St. 101, 56 Atl. 333.

¹⁵⁴ *Zinsser v. Columbia Cab Co.*, 66 App. Div. (N. Y.) 514, 73 N. Y. Supp. 287. In this case the court said: "If there is anything left of the rule that a contemporaneous verbal agreement, which contradicts in terms a written obligation sought to be enforced, is not valid as a defense to an action to enforce the obligation, it would seem that this ruling of the court below was correct. By it the defendant agreed to pay so many dollars at a time and place specified. The obligation is in writing signed and delivered, and

parol agreement, made at the time of the execution of a note, given for the amount of a mortgage, to secure the reduction of interest thereon, whereby the payee agreed to deliver the bond and mortgage to the maker upon payment by the latter of the note has been held no defense to an action on the note where it did not appear that there had been a tender of the money due thereon and a demand for the assignment according to the agreement.¹⁵⁵ And in an action on a note which is absolute in its terms, evidence is not admissible, to bind the plaintiff, to an agreement, signed by special agents of his in their individual capacity, and which does not purport to bind him, that if the maker is unable to pay the note at maturity he may surrender a life insurance policy for the premium of which the note was given and thus cancel the latter obligation.¹⁵⁶ And it has been held that an action by an indorsee after maturity cannot be defeated by showing that the note was a voluntary subscription to a college and was to be paid only as his daughter should obtain the worth of it by way of yearly tuition.¹⁵⁷

§ 335. Same subject—Note to administrator.—An administrator at a sale made by him of property belonging to the estate can make no terms with a purchaser which the orders of the court or the laws of the land do not warrant, and an unauthorized condition made by him as to the mode in which a note given by a purchaser at such a sale shall be paid will be no defense to an action thereon.¹⁵⁸

§ 336. Executed agreement as a defense.—A distinction is made between those cases where there is a merely executory agreement that

the making, execution, and delivery of this obligation is admitted. The contemporaneous oral agreement sought to be proved contradicts this written obligation. By it the defendant was not to pay this sum of money at the time and place specified, but was to pay it by hiring horses and carriages to the plaintiff and applying the amounts charged therefor to the payment of the note. * * * There is no question as to the liability of the defendant to pay the plaintiff this sum of money, but it is alleged that the plaintiff, who was concededly entitled to recover from the defend-

ant the full amount of this note, promised when the note was given that it should not be payable according to its tenor. But this oral agreement was entirely without consideration. * * * There seems to me to be no doubt but that such an agreement was entirely insufficient as a defense to an action upon the note." Per Ingraham, J.

¹⁵⁵ *Story v. Kinzler*, 73 App. Div. (N. Y.) 372, 77 N. Y. Supp. 64.

¹⁵⁶ *Thomas v. Bagley & Co.*, 119 Ga. 778, 47 S. E. 177.

¹⁵⁷ *Jewett v. Salisbury*, 16 Ind. 370.

¹⁵⁸ *Hamilton v. Pleasants*, 31 Tex. 638, 98 Am. Dec. 551.

the note may be discharged in a manner other than by the payment of money as specified in the instrument,¹⁵⁹ and those where such an agreement has been executed. In this latter class of cases it is a general rule that where there is a contemporaneous oral agreement that a bill or note is to be discharged by the doing of something other than the payment of money and it appears that such agreement has been performed it will operate as a discharge of the written obligation and as a defense to an action by the payee or holder with notice to recover the money. It is a payment not in money but in something which has been received as substitute therefor.¹⁶⁰ So where a note was given in satisfaction of an injury done to the plaintiff by the circulation of injurious reports, supposedly by the defendant, in reference to the plaintiff's wife, it was held that the defendant might show by parol that at the time he gave the note it was agreed between him and the payee that the latter would give up the note to the former if he would satisfy the payee that he did not originate such reports and that he had satisfied the plaintiff in accordance with such agreement.¹⁶¹ And where defendant, having subscribed for certain stock, deposited some cash and gave his note for the balance, it was held in an action against him on the note that he might show, except as against a *bona fide* holder, that there was an agreement that he might within one year forfeit the cash

¹⁵⁹ Such an agreement is no defense. See §§ 333-335 herein.

¹⁶⁰ Patrick v. Petty, 83 Ala. 420, 3 So. 779; Bradley v. Marshall, 54 Ill. 173; Saunders v. Richardson, 2 Sm. & M. (Miss.) 90; Juilliard v. Chaffee, 92 N. Y. 529; Gilson v. Gilson, 16 Vt. 464; Stevens v. Thacker, 1 Peake's Cas. 187. See Mitchell v. Sullivan, 5 Md. 376.

A defense of this kind is frequently spoken of as an accord and satisfaction. Patrick v. Petty, 83 Ala. 420, 3 So. 779.

¹⁶¹ Sanders v. Howe, 1 D. Chip. (Vt.) 363, in which the court said: "The evidence admitted by the judge, to prove the contract made at the time the note was executed, that in case the defendant would make it appear to the satisfaction of the plaintiff, that he, the defendant, did

not originate, as was alleged, reports injurious to the character of the plaintiff's wife, he, the plaintiff, would give up said note to the defendant, was legally and properly admitted. And, as it was proved to the jury that the plaintiff was satisfied that the defendant did not originate such reports, the defendant was clearly entitled to a verdict, which ought not to be disturbed. The evidence did not at all contradict the note but proved that the parties had agreed on a mode by which the defendant might satisfy the note by the performance of a future act; and when that act was performed by the defendant the note was as clearly paid and satisfied as though the defendant had paid the amount in money."

paid and the shares of stock and be discharged of all liability on the note if he so elected, and that notice of said right to elect a forfeiture had been duly given.¹⁶² So it may be shown that the note sued upon was given to secure the performance of an agreement to support and take care of another in consideration of the conveyance of certain property, and that such agreement has been performed by the maker,¹⁶³ or that merchandise was to be accepted in payment of the note and that it has been so paid,¹⁶⁴ or that the defendant was to dispose of certain property held by him and that upon the payment of the avails thereof to the payee the note would be satisfied and discharged and that the defendant has performed such contract.¹⁶⁵ And in an action against the maker of a note, payable on the death of a widow, brought by the administrator of the promisee, evidence was held admissible of an agreement between the latter and the defendant that the note was to be void if an estimated value of one-third of the land of which the widow was dowerable was expended by defendant in her support, and that such amount had been expended.¹⁶⁶ Again it has been held that it may be shown in an action by the payee of a note against the maker that the note was to be paid by the application, in satisfaction of the note, of the first money the maker should earn as agent of the payee and that sufficient has been earned by the former but has not been applied according to such agreement.¹⁶⁷ The fact, however, that there has been a part performance of an agreement will not be a bar to a recovery on the instrument though a party may be entitled to an allowance therefor in some cases, as where the maker bound himself, his heirs, executors and assigns, to make certain quarterly payments amounting in all to the amount of the note, in which event the note should be cancelled, and he made such payments up to the time of his death and none were afterward made, in which case it was held the note was a valid obligation against his estate, but that such payments as had been made might be deducted on account of the debt.¹⁶⁸

§ 337. **Agreements not to sue.**—It may be shown in defense to an action on a note against a maker or indorser that the plaintiff had en-

¹⁶² *Lancaster v. Collins*, 7 Fed. 338.

¹⁶⁶ *Crosman v. Fuller*, 17 Pick.

¹⁶³ *Howard v. Stratton*, 64 Cal. 487, (Mass.) 171.

2 Pac. 263.

¹⁶⁷ *New York Life Ins. Co. v.*

¹⁶⁴ *Buchanan v. Adams*, 49 N. J. L. 636, 10 Atl. 662, 60 Am. Rep. 666.

Smucker (Mo. App. 1904), 80 S. W. 278.

¹⁶⁵ *Carpenter v. McClure*, 37 Vt.

¹⁶⁸ *Blake v. Blake*, 110 Mass. 202.

tered into an agreement with the defendant that he would never sue him.¹⁶⁹ And it has been decided that it may be shown in defense to an action on a note that the plaintiff had agreed not to sue the defendant except on future contracts, where it appears that the note was indorsed prior to such agreement but not taken up by the plaintiff until after such time.¹⁷⁰ But a covenant by an indorsee with one maker never to sue the latter, with a reservation of all rights as to other parties, has been held no defense to an action against such parties,¹⁷¹ nor will a covenant by one joint holder not to sue a party on a debt due him be a release in bar of an action by such holder and another for a debt due them jointly.¹⁷²

§ 338. Same subject—Where simultaneous or subsequent and for a limited time.—An agreement entered into without consideration at the time of the execution of a note or subsequent thereto by which the payee or holder agrees not to sue on the instrument until a time subsequent to its maturity is to be regarded as a collateral and merely executory agreement which will be no defense to an action on the paper.¹⁷³ So in an action where the defendant set up in defense a covenant not to sue for a limited time after the maturity of the note the court said: "This covenant, to be a bar to the action, must be construed to be in the nature of a release. But it will not bear that construction. If it were a covenant never to sue the defendant on the two notes it would have the effect of a release on the principle of avoiding a multiplicity

¹⁶⁹ *Clopper v. Union Bank*, 7 Har. & J. (Md.) 92, 16 Am. Dec. 294; *Simmons v. Thompson*, 29 App. Div. (N. Y.) 559, 51 N. Y. Supp. 1018; *Pike v. Street, Moody & M.* 226.

¹⁷⁰ *Cuyler v. Cuyler*, 2 Johns. (N. Y.) 186.

¹⁷¹ *Kenworthy v. Sawyer*, 125 Mass. 28.

¹⁷² *Walmseley v. Cooper*, 11 Adol. & E. 216.

¹⁷³ *Illinois*.—*Hill v. Enders*, 19 Ill. 163.

Indiana.—*Williams v. Scott*, 83 Ind. 405; *Murphy v. Robbins*, 17 Ind. 422; *Smith v. Grabill*, 15 Ind. 267; *Lowe v. Blair*, 6 Blackf. (Ind.) 282.

Maryland.—*Clopper v. Union Bank*, 7 Har. & J. (Md.) 92.

Massachusetts.—*Allen v. Kimball*, 23 Pick. (Mass.) 473; *Walker v. Russell*, 17 Pick. (Mass.) 280; *Perkins v. Gilman*, 8 Pick. (Mass.) 229.

Mississippi.—*Herndon v. Henderson*, 41 Miss. 584.

Missouri.—*Bridge v. Tiernan*, 36 Mo. 439; *Atwood v. Lewis*, 6 Mo. 392.

New York.—*Peabody v. King*, 12 Johns. (N. Y.) 426.

English.—*Thimbleby v. Barron*, 3 Mees. & W. 210.

Compare *Hutchins v. Nichols*, 10 Cush. (Mass.) 299; *Brick v. Campbell*, 50 N. J. L. 282, 13 Atl. 255.

of suits.¹⁷⁴ It is not, however, a covenant of that description. It is only an agreement not to sue for a limited time; and the law is settled that such an agreement is no bar to an action brought before the expiration of the time given. Damages may be recovered for a breach in such case but the covenant cannot have the effect of a release."¹⁷⁵ So where, at the maturity of a note, a bank indorsed thereon the words "renewed for three months" and no new note was given it was held that the bank was not thereby prevented from suing on the note prior to the expiration of the three months.¹⁷⁶ But where the holder of an overdue note agrees for a valid consideration not to sue thereon for a specified time it is held that such agreement will be a defense to an action brought within such time.¹⁷⁷

§ 339. **As to time of payment.**—Where a bill or note is payable unconditionally and at a time certain parol evidence is not admissible to prove that the plaintiff entered into an agreement contemporaneous with or antecedent to the execution of the instrument, stipulating that it might be paid at a time later than that specified therein.¹⁷⁸ So where a note is payable on demand it cannot be varied by evidence of an agreement entered into contemporaneous with its execution that the money shall not be demandable at the time the note purports.¹⁷⁹ And

¹⁷⁴ Citing 5 Bac. Abr. 683; Berry v. Bates, 2 Blackf. (Ind.) 118; 2 Wms. Saund. 48, note.

¹⁷⁵ Mendenhall v. Lenwell, 5 Blackf. (Ind.) 125, 33 Am. Dec. 458, per Blackford, J.

¹⁷⁶ Central Bank v. Willard, 17 Pick. (Mass.) 150, 28 Am. Dec. 284.

¹⁷⁷ Pearl v. Wells, 6 Wend. (N. Y.) 291, 21 Am. Dec. 328.

¹⁷⁸ *Federal*.—Kessler & Co. v. Periloux, 132 Fed. 903.

Alabama.—Doss v. Peterson, 82 Ala. 253, 2 So. 644.

Arkansas.—Borden v. Peay, 20 Ark. 293.

Illinois.—Dawson v. Bank, 5 Ill. 56.

Indiana.—Trentman v. Fletcher, 100 Ind. 105; Irons v. Woodfill, 32 Ind. 40.

Maine.—Ockington v. Law, 66 Me. 551; Eaton v. Emerson, 14 Me. 335.

Massachusetts.—Dow v. Tuttle, 4 Mass. 414, 3 Am. Dec. 226.

Missouri.—Blackburn v. Harrison, 39 Mo. 303; Bond v. Worley, 26 Mo. 253; Atwood v. Lewis, 6 Mo. 391.

Nebraska.—Van Etten v. Howell, 40 Neb. 850, 59 N. W. 389.

New York.—Skiller v. Richmond, 48 Barb. (N. Y.) 428; Fleury v. Roget, 5 Sandf. (N. Y.) 646.

Pennsylvania.—Clark v. Allen, 132 Pa. St. 40, 18 Atl. 1071.

Tennessee.—Ellis v. Hamilton, 36 Tenn. 512; Campbell v. Upshaw, 26 Tenn. 184, 46 Am. Dec. 75.

Wisconsin.—Union National Bank v. Cross, 100 Wis. 174, 75 N. W. 992.

English.—Webb v. Salmon, 19 L. J. Q. B. N. S. 34; McQueen v. McQueen, 9 Up. Can. Q. B. 536.

¹⁷⁹ Sice v. Cunningham, 1 Cow. (N. Y.) 397; Mosely v. Hanford, 10 Barn. & Cr. 729.

where no time of payment is specified in a note it is held the law judges it payable immediately and parol evidence is not admissible to show a different time.¹⁸⁰ So it is no defense to an action by a subsequent indorsee that there was an agreement between the maker and the payee that the note should be renewed.¹⁸¹ And evidence is not admissible of an alleged contemporaneous agreement that a note may be paid by the payee before maturity.¹⁸² It has, however, been determined that the time when a bill or note is payable may be controlled as between the parties by the terms of a contemporaneous agreement which is to be construed with the former instrument as a part of the same contract.¹⁸³ So where a party sent to his creditor a note in settlement of his indebtedness but blank as to time of payment, and the latter sent it back with a request that the time for payment be specified therein by the debtor, who again returned it blank but accompanied by a letter stating that he would pay it as soon as able, it was held that the letter and note were to be construed together and that the obligation was one to pay when he was able.¹⁸⁴ And where, by a contemporaneous agreement, the payee may enforce the note if another note is not paid by a certain day, payment of the latter note on or before the date specified is a condition precedent to the right of the maker to de-

¹⁸⁰ *Thompson v. Ketcham*, 8 Johns. (N. Y.) 190, 5 Am. Dec. 332.

¹⁸¹ *Hoare v. Graham*, 3 Camp. 57. Lord Ellenborough here said: "I don't think I can admit evidence of this sort. What is to become of bills of exchange and promissory notes if they may be cut down by a secret agreement that they shall not be put in suit? The parol condition is quite inconsistent with the written instrument. This purports to be a promissory note payable two months after date. You say it was not payable at the end of that time, and that when the two months had expired the payees, instead of the money, were to have another promissory note. I will receive evidence that the note was indorsed to the plaintiffs as a trust; but the condition for a renewal entirely contradicts the instrument which the de-

fendants have signed. Such an agreement rests in confidence and honor only, and is not an obligation of law. There may, after a bill is drawn, be a binding promise for a valuable consideration to renew it when due, but if the promise is contemporaneous with the drawing of the bill the law will not enforce it. This would be incorporating with a written contract an incongruous parol condition—which is contrary to just principles."

¹⁸² *Strachan v. Muxlow*, 24 Wis. 21.

¹⁸³ *Duvall v. Farmers' Bank of Maryland*, 9 Gill & J. (Md.) 31; *Jacob v. Mitchell*, 46 Ohio St. 601, 22 N. E. 768.

Compare *Robinson v. Smith*, 14 Cal. 94.

¹⁸⁴ *Glass v. Adone* (Tex. Civ. App. 1905), 86 S. W. 798.

feat recovery on the former by setting up such condition.¹⁸⁵ And it has been decided that in an action against sureties on notes and to foreclose a mortgage that evidence is admissible of a contemporaneous agreement, between the plaintiff and the principal as a part of the consideration of the mortgage sought to be foreclosed, extending the time of the payment of said notes.¹⁸⁶

§ 340. **Subsequent agreements extending time.**—A valid agreement subsequent to the execution of a note or after its maturity by which an extension of time for its payment is given to one party to the instrument may operate as a discharge of other parties whose signatures have been affixed thereto in reliance upon the terms and conditions as expressed in the original contract and they may avail themselves of such an agreement in an action against them. In the application of this rule it has been decided that a drawer of a bill may set up in defense to an action against him an extension of time so given to the acceptor,¹⁸⁷ or to the maker,¹⁸⁸ or a surety an extension to the principal debtor;¹⁸⁹ or an accommodation maker an extension to the ac-

¹⁸⁵ *Tufts v. Kidder*, 8 Pick. (Mass.) 537.

¹⁸⁶ *Moroney v. Coombes* (Tex. Civ. App. 1905), 88 S. W. 430. The court declared in this case: "We think there was no error in the admission of this testimony. It is settled law that the liability of a surety or guarantor is limited to and controlled by the very terms of the contract out of which his obligation arises. If the contract be materially changed by the principals thereto without his consent, he will be released, without regard to whether he has been benefited or prejudiced by such change, and it follows that parol evidence is admissible under proper pleadings to show such change. * * * Falling within the above rule is a contract by the principal obligor in a promissory note extending the time of payment of such note upon a valuable consideration, without the consent of the surety sought to be

held. Such an extension creates a new and binding contract, and is such an alteration of the old contract as will release a surety thereon if made without his consent." Per Talbot, J.

¹⁸⁷ *High v. Cox*, 55 Ga. 662.

¹⁸⁸ *Nightingale v. Meginnis*, 34 N. J. L. 461; *Gould v. Rolson*, 8 East 576.

¹⁸⁹ *Georgia*.—*Parmelee v. Williams*, 72 Ga. 42.

Idaho.—*Maydole v. Peterson*, 7 Idaho 502, 63 Pac. 1048.

Indiana.—*Starrett v. Burkhalter*, 86 Ind. 439.

Louisiana.—*Ade v. Metoyer*, 1 La. Ann. 254.

Missouri.—*St. Joseph Fire & M. I. Co. v. Hauck*, 71 Mo. 465.

New Hampshire.—*Bailey v. Adams*, 10 N. H. 162.

New York.—*Hubbard v. Gurney*, 64 N. Y. 457.

Washington.—*Nelson v. Flagg*, 18 Wash. 39, 50 Pac. 571.

accommodation payee by a holder with knowledge of the accommodation;¹⁹⁰ or an accommodation acceptor an extension to the drawer who is the principal debtor.¹⁹¹ An extension of time, however, to an accommodation payee will be no defense to an action against the accommodation maker where he was not known to have signed as such.¹⁹² And it is held that an extension of time to a surety will be no defense to an action against the principal brought before the expiration of the period allowed.¹⁹³ Nor will the fact that time has been so given to one of several joint makers discharge the others, though the latter are, in fact, sureties, where the party granting it had no knowledge thereof.¹⁹⁴

§ 341. Same subject—What essential to render such an agreement a defense.—In order that an agreement for an extension of time to one party may operate as a discharge of another and therefore be a defense to an action against the latter, it is essential that it should be based on some consideration and be a valid binding one; that is, such as will preclude the party granting the extension from enforcing the obligation prior to the expiration of the extended period. It must have the effect of disabling him from suing.¹⁹⁵ So in order that a surety

Federal.—*Vary v. Norton*, 6 Fed. 808.

English.—*Pooley v. Harradine*, 7 El. & Bl. 430.

¹⁹⁰ *Taylor v. Burgess*, 5 Hurl. & N. 1.

Compare *Bank of Montgomery Co. v. Walker*, 9 Serg. & R. (Pa.) 229, 11 Am. Dec. 709.

¹⁹¹ *Davies v. Stainbank*, 6 DeGex, M. & G. 679; *Laxton v. Reat*, 2 Camp. 185, holding that if an indorsee of a bill of exchange having notice it was accepted without consideration, receives part payment from the drawer and gives him to pay the residue he thereby discharges the acceptor.

See *Bank of Upper Canada v. Jardine*, 9 Up. Can. C. P. 332.

¹⁹² *Hoge v. Lansing*, 35 N. Y. 136, holding that a *bona fide* holder taking paper with no other knowledge than it furnishes has the right to treat the parties thereto in the same

order and to same extent as they appear on the paper.

See *Pinney v. Kimpton*, 46 Vt. 80.

¹⁹³ *Williams v. Scott*, 83 Ind. 405.

¹⁹⁴ *Mullendore v. Wertz*, 75 Ind. 431, 39 Am. Rep. 155; *Nichols v. Parsons*, 6 N. H. 30, 23 Am. Dec. 706. See *Anthony v. Fritts*, 45 N. J. L. 1, holding it is no defense even in action by payee with knowledge. *Pintard v. Davis*, 20 N. J. L. 205; *Davidson v. Bartlett*, 1 Up. Can. Q. B. 50.

¹⁹⁵ *Arkansas.*—*Key v. Fielding*, 32 Ark. 56.

Connecticut.—*Boardman v. Larabee*, 51 Conn. 39; *Continental Life Ins. Co. v. Barber*, 50 Conn. 569.

Florida.—*Fridenberg v. Robinson*, 14 Fla. 130.

Illinois.—*Payne v. Weible*, 30 Ill. 166.

Indiana.—*Davis v. Stout*, 126 Ind. 12, 25 N. E. 862, 22 Am. St. R. 865;

may be released by an extension of the time of payment it is declared that there must be an agreement between the payee or holder of the instrument and the principal maker for a definite and fixed time of extension, made without the knowledge or consent of the surety, founded upon a new consideration and with a knowledge of the suretyship on the part of such payee or holder.¹⁹⁶ So an indorser or surety will not be discharged by an agreement which has no consideration to support it,¹⁹⁷ or which is based upon a consideration which is not good.¹⁹⁸ Such an agreement, however, to operate as a defense, need not be in express words, it being sufficient if there is a mutual understanding and intention to the effect that the claim is not to be enforced for a definite, certain and specific time and is based upon a valuable consideration.¹⁹⁹ But a mere forbearance or indulgence which does not amount to such an agreement will be no defense.²⁰⁰ As is said in one case of such a

Nelson v. White, 61 Ind. 139; *Newkirk v. Neild*, 19 Ind. 194, 81 Am. Dec. 333.

Massachusetts.—*Central Bank v. Willard*, 17 Pick. (Mass.) 150, 28 Am. Dec. 284; *Hunt v. Bridgham*, 2 Pick. (Mass.) 581, 13 Am. Dec. 458.

Michigan.—*Ferris v. Johnson* (Mich. 1904), 98 N. W. 1014.

Missouri.—*Warrenburg Co-Operative Bldg. Assn. v. Zoll*, 83 Mo. 94.

New Hampshire.—*Bailey v. Adams*, 10 N. H. 162.

New York.—*Kellogg v. Olmsted*, 28 Barb. (N. Y.) 96; *Myers v. Welles*, 5 Hill (N. Y.) 463; *Curry v. Van Wagner*, 32 Hun (N. Y.) 453; *Miller v. Holbrook*, 1 Wend. (N. Y.) 317.

Ohio.—*Holzworth v. Koch*, 26 Ohio St. 33.

Pennsylvania.—*Humberger v. Golden*, 99 Pa. St. 34; *Ashton v. Sproule*, 35 Pa. St. 492; *Dundas v. Sterling*, 4 Pa. St. 73.

Rhode Island.—*Thurston v. James*, 6 R. I. 103.

Tennessee.—*Robertson v. Allen*, 3 Baxt. (Tenn.) 233; *Cherry v. Miller*, 7 Lea (Tenn.) 305.

English.—*McManus v. Bark*, L. R. 5 Exch. 65; *Hewett v. Goodrick*, 2 Car. & P. 468; *Margesson v. Goble*, 2 Chit. 364; *Orme v. Young*, 1 Holt's N. P. 87; *Price v. Edmunds*, 10 Barn. & Cr. 578; *Thompson v. McDonald*, 17 Up. Can. Q. B. 304; *Shaw v. Crawford*, 16 Up. Can. Q. B. 101. See *Zobel v. Bauersachs*, 55 Neb. 20, 75 N. W. 43; *Britton v. Fisher*, 26 Up. Can. Q. B. 338.

An agreement to give time made between the holder and one not a party to the instrument will not operate as a release of other parties. *Frazer v. Jordan*, 8 El. & B. 303.

See also *Low v. Warden*, 77 Cal. 94, 19 Pac. 235.

¹⁹⁶ *Starrett v. Burkhalter*, 86 Ind. 439, 441, per Zollars, J.

¹⁹⁷ *Tuskaloosa Cotton Seed Oil Co. v. Perry*, 85 Ala. 158, 4 So. 635; *Ives v. Bbsley*, 35 Md. 262; *Russ v. Hobbs*, 61 N. H. 93. See *Howard v. Fletcher*, 59 N. H. 151.

¹⁹⁸ *Jennings v. Chase*, 10 Allen (Mass.) 526.

¹⁹⁹ *Brooks v. Wright*, 13 Allen (Mass.) 72.

²⁰⁰ *Massachusetts*. — *Haydenville*

plea: "It states only that the holder of the note has given time to the principal debtor, not that he has by any agreement bound himself to do so. What is set up is a mere forbearance or indulgence shewn to the principal debtor, and this alone has never been held to discharge the surety."²⁰¹ Again it has been decided that the fact that previous obligors are released will not release one who signs an existing note in consideration of an extension of payment, the latter being bound as on a new contract.²⁰²

§ 342. Agreement to release from or limit liability.—Parol evidence is not admissible, in an action on a bill or note by a *bona fide* holder against a maker, indorser, or surety, of any declaration or independent collateral agreement which is inconsistent with the terms of the instrument. This rule is founded upon the principle that the writing is presumed, when complete, to embody therein the agreement of the parties and that resort can only be had to the instrument itself to determine the rights and liabilities of the parties.²⁰³ So a mere agreement between an indorser and indorsee that the words "without recourse" shall be written over the signature of the former, will be no defense to an action by one who is an indorsee of the paper for value and without notice.²⁰⁴ And where a note was given to a director of a bank

Savings Bank v. Parsons, 138 Mass. 53; *Hunt v. Bridgham*, 2 Pick. (Mass.) 581, 13 Am. Dec. 458.

Missouri.—*Benson v. Harrison*, 39 Mo. 303.

New York.—*Atlantic National Bank v. Franklin*, 55 N. Y. 235.

Ohio.—*Ward v. Wick*, 17 Ohio St. 159.

United States.—*McLemore v. Powell*, 12 Wheat. (U. S.) 554.

Federal.—*Allen v. O'Donald*, 28 Fed. 17.

²⁰¹ *Thompson v. McDonald*, 17 Up. Can. Q. B. 304.

²⁰² *Rumley Co. v. Wilcher*, 23 Ky. Law Rep. 1745, 66 S. W. 7.

²⁰³ *Missouri*.—*Ewing v. Clark*, 8 Mo. App. 570.

New York.—*Mayer v. Mode*, 14 Hun (N. Y.) 155; *Bruce v. Carter*, 7 Daly (N. Y.) 37.

North Carolina.—*Hill v. Shields*, 81 N. C. 250, 31 Am. Rep. 499.

Pennsylvania.—*Lindsey v. Casselberry*, 3 Wkly. Notes Cas. (Pa.) 42.

Tennessee.—*Rice v. Ragland*, 10 Humph. (Tenn.) 545, 53 Am. Dec. 737.

Texas.—*Dwiggins v. Merchants' National Bank* (Tex. Civ. App.), 27 S. W. 171.

Wisconsin.—*Davey v. Kelly*, 66 Wis. 452, 29 N. W. 232.

Federal.—*Union Bank v. Crine*, 33 Fed. 809.

²⁰⁴ *Lewis v. Dunlap*, 72 Mo. 174. See § 348 herein.

But where it was agreed that an indorsement should be without recourse it was held that it might be shown, in an action by a holder with notice, that the indorsement was by mistake written "with re-

it was decided, in an action thereon by the receiver of the bank, which was owner of the note, that evidence was not admissible of a parol agreement between the defendant and such director that the former was not to be held liable thereon.²⁰⁵ And the fact that there was such an agreement is held to be no defense to an action by an indorsee with knowledge thereof;²⁰⁶ or by an assignee after maturity,²⁰⁷ and this is also the generally accepted rule in action by a payee of a note or bill.²⁰⁸ The words of the court in a leading case in New Jersey, in which such a defense was set up, are pertinent in this connection as showing the principle underlying this class of cases. It was there said: "There is no rule better settled than that evidence of contemporaneous parol declarations is inadmissible to vary the terms of a written contract. In the enforcement of this rule there is often a strong tendency to dis-

course" instead of without recourse as was intended. *Johnson v. Wil-liard*, 83 Wis. 420, 53 N. W. 776.

²⁰⁵ *Western Carolina Bank v. Moore* (N. C. 1905), 51 S. E. 79.

²⁰⁶ *Pennsylvania Safe Dep. & T. Co. v. Kennedy*, 175 Pa. St. 160, 34 Atl. 659, 38 Wkly. Notes Cas. 177. Compare *Shufeldt v. Gillilan*, 124 Ill. 460, 16 N. E. 879.

²⁰⁷ *Jewett v. Salisbury*, 16 Ind. 370.

But see *Bircleback v. Wilkins*, 22 Pa. St. 26, holding that such a defense may be set up to an action on a non-negotiable note by an indorsee.

²⁰⁸ *Illinois*.—*Weaver v. Fries*, 85 Ill. 356.

Indiana.—*Moore v. Beem*, 83 Ind. 219.

Kentucky.—*Deposit Bank v. Peak*, 23 Ky. Law Rep. 19, 62 S. W. 268.

Massachusetts.—*Smith v. Bartholomew*, 1 Metc. (Mass.) 276, 25 Am. Dec. 365.

Missouri.—*Ewing v. Clark*, 76 Mo. 545; *Reed v. Nicholson*, 37 Mo. App. 646; *Frissell v. Mayer*, 13 Mo. App. 331.

New York.—*Mead v. Pawling National Bank*, 89 Hun (N. Y.) 102, 34

N. Y. Supp. 1054; *Cowles v. Gridley*, 24 Barb. (N. Y.) 301.

Texas.—*Todd v. Roberts*, 1 Tex. Civ. App. 8, 20 S. W. 722.

Vermont.—*Gillett v. Ballou*, 3 Williams (Vt.) 296.

But see *Barber v. Gordon*, 2 Root (Conn.) 95, holding a covenant never to demand or to deliver up a note to the promissor is a good bar to an action on the note. *Porter v. Webb*, 22 Ky. Law R. 917, 59 S. W. 1, holding, where a note was given to a wife for money borrowed which was in fact the property of the husband, that in an action by the wife against the maker he might show an agreement between him and the husband that he would look to a third party for payment.

So it has been held no defense that the note and a mortgage were executed on the understanding that the money was not to be collected as long as certain dues mentioned in two policies of insurance and the interest on the loan were paid, such an agreement being inconsistent with the written contract. *Allen v. Thompson*, 22 Ky. Law Rep. 164, 56 S. W. 823.

regard its effect induced by a feeling of the inequity of holding a party to the strict performance of an agreement into which he has entered, upon assurance that it would not be enforced according to its terms. This feeling has led the courts sometimes to recognize the parol declaration, upon the ground that it amounted to an equitable estoppel.²⁰⁹ But the rule of evidence that when the contract is reduced to writing, the writing is the only evidence of the contract, excludes any evidence of the parol declarations. The rule is recognized as a wholesome doctrine by which men are enabled to place their agreements in shape undisturbable by the uncertainty of oral testimony. The weight of authority is overwhelming in favor of holding, in the language of the American editors of the *Duchess of Kingston's* case that 'a person who is so ill advised as to execute a written contract in reliance upon an assurance that it shall not be literally enforced, must submit to the loss if he is deceived, and cannot ask that a principle of great moment to the community shall be made to yield for the sake of relieving him from the consequences of his indiscretion.'"²¹⁰ In an action, however, by the payee of a note with notice against an accommodation maker or indorser, it is decided that it may be shown in defense thereto that there was no consideration for the note and that it was agreed between the parties that the defendant should not be held liable.²¹¹ And where a surety on an accommodation note expresses a willingness to pay the same after maturity, if he is to be held liable, as he can at the time get security therefor from the maker, he may show in defense to a subsequent action by the payee that the latter stated at such time that he would exonerate the defendant and look to the principal.²¹² Again where a maker may be discharged from liability by electing to do some act it is decided that he must make such election prior to the maturity of the note.²¹³

²⁰⁹ *Notes to Duchess of Kingston's Case*, 3 *Smith's Lead. Cas.* 729.

²¹⁰ *Per Reed, J.*, in *Wright v. Remington*, 41 *N. J. L.* 48, 54, 32 *Am. Rep.* 180.

²¹¹ *Higgins v. Ridgway*, 153 *N. Y.* 130, 47 *N. E.* 32; *Garfield National Bank v. Colwell*, 57 *Hun (N. Y.)* 169; *Brenerman v. Furniss*, 90 *Pa. St.* 186, 35 *Am. Rep.* 651; *First National Bank v. Cleaver*, *Fed. Cas. No.* 4800.

But compare *Webber v. Alderman*, 102 *Mich.* 638, 61 *N. W.* 57,

holding that in an action against an accommodation indorser on the firm the statement of one member of a firm that he had the means to pay the note and would pay it and release the plaintiff, was not the statement of the firm, and would be no defense to the action.

²¹² *Harris v. Brooks*, 21 *Pick. (Mass.)* 195, 32 *Am. Dec.* 254.

²¹³ *Draper v. Fletcher*, 26 *Mich.* 154. See *Upham v. Smith*, 7 *Mass.* 265.

§ 343. **Effect of conditions in note.**—Where conditions are expressed in a note the promises therein are mutual and dependent and should be construed as a whole.²¹⁴ Though it may be payable at a specified time yet if it contains a condition that it is not to take effect as a binding obligation except upon the happening of a certain contingency, it will be a defense to an action on the instrument that such contingency has never happened, such condition being in the nature of a condition precedent.²¹⁵ So though the first part of a note may by itself show a promise to pay in a specified time, yet if added stipulations or conditions clearly manifest the intention that the note is an installment note payable monthly, the time of payment will be controlled by such provisions.²¹⁶ And a note may by its terms be payable upon a certain contingency and it may be shown in defense to an action thereon that such contingency has never happened.²¹⁷ So where a con-

²¹⁴ *Lasher v. Union Central L. I. Co.*, 115 Iowa 231, 88 N. W. 375; *Costelo v. Crowell*, 134 Mass. 280.

²¹⁵ *Indiana*.—*McComas v. Haas*, 107 Ind. 512, 8 N. E. 579.

Iowa.—*Clark v. Ross* (Iowa), 60 N. W. 627; *Thompson v. Oliver*, 18 Iowa 417.

Kentucky.—*Hodges v. Coleman*, 2 Dana (Ky.) 396.

Massachusetts.—*Gleason v. Saunders*, 121 Mass. 436.

Nebraska.—*Grimison v. Russell*, 20 Neb. 337, 30 N. W. 249.

New York.—*Gildersleeve v. Pelham R. Co.*, 11 Daly (N. Y.) 257.

Pennsylvania.—*Benninger v. Hawkes*, 61 Pa. St. 343.

Application of rule. It may be shown that there has been no performance of a condition that certain services should be rendered. *Taylor v. Rhea*, Minor (Ala.) 414; or that a certain title should be confirmed. *Sanders v. Whitesides*, 10 Cal. 89; or certain incumbrances removed. *Williams v. Benton*, 10 La. Ann. 158; or a certain note paid. *Henry v. Coleman*, 5 Vt. 402; or that the payee should assist in a criminal prosecution. *Drawer v. Cherry*, 14 La. Ann. 694.

Such a note is non-negotiable and an equitable assignee takes it subject to defenses existing between the original parties, and it may be shown in an action by him that such a contingency has not happened unless he has made inquiry of the debtor and the latter is estopped from setting up such defense. *Faull v. Tinsman*, 36 Pa. St. 108.

See also *McComas v. Haas*, 107 Ind. 512, 8 N. E. 579; *Brooks v. Whitson*, 7 Sm. & M. (Miss.) 513.

²¹⁶ *Crowe v. Beem* (Ind. App. 1905), 75 N. E. 302.

²¹⁷ *Hempler v. Schneider*, 17 Mo. 258.

A plaintiff cannot recover on such an instrument in the absence of proof that the event referred to has occurred. *Quinn v. Aldrich*, 70 Hun (N. Y.) 205, 24 N. Y. Supp. 33. See *McComas v. Haas*, 107 Ind. 512, 8 N. E. 579.

Such a provision is binding on the maker and upon the happening of the contingency referred to he will be bound. So where a purchaser of belting was dissatisfied with the same and the seller gave him a note in compromise of his claim with a condition there-

tractor who was erecting a building gave an order for the payment of a certain sum of money providing that said sum was due when the house was plastered and referred to a building contract which provided for the making of the second payment at such time it was decided that the order was to be construed as payable when the amount of the second payment on the contract became due as specified therein and that such payment was never earned, never became due, and the order never became payable.²¹⁸ And the rule has been applied in the case of a due bill which states that the amount specified is to be paid on the "final settlement" of a certain transaction between the parties.²¹⁹ Where, however, the happening of a contingency referred to in a note has been prevented by the agency of the defendant he cannot avail himself of the fact that it has not happened as a defense.²²⁰ If the instrument contains a condition that a certain act is to be done, the condition should be construed with reference to the facts existing at the date of the note and a fact based upon a change of circumstances cannot be set up to defeat an action on the note.²²¹ Nor can a condition be extended by implication so as to include matters which are not clearly within the contract.²²² And a condition in the body of a check to which the payee is not a party will not be binding on him.²²³

in that if he should decide after three years' use that he was not satisfied with it the note was to be payable on demand, it was held that, in the absence of fraud, the maker was bound thereby. *Tennessee Mfg. Co. v. Haines*, 16 R. I. 204, 14 Atl. 853.

²¹⁸ *Fuller v. Wilde*, 151 Mass. 412, 24 N. E. 209. See *Glidden v. Massachusetts Hospital L. I. Co.*, 187 Mass. 538, 73 N. E. 538.

Compare *Robbins v. Blodgett*, 124 Mass. 279, holding that where an order given by a contractor provides for payment when certain work is finished and the owner accepts the order without qualification, he cannot set up in defense to an action thereon that such work was not finished by the contractor and that there may be a recovery

by the payee where the work was finished by another to whom the building was sold by the defendant.

²¹⁹ *Rhodes v. Pray*, 36 Minn. 392, 32 N. W. 86.

²²⁰ *Vandemal v. Dougherty*, 17 Mo. 277.

²²¹ *Davenport R. Co. v. Rogers*, 39 Iowa 298, so declaring where a note was payable on the condition "that a depot be established within eighty rods of present town of Wheatland" and the limits of the town were subsequently extended, it being held that the contract was to be governed by the recorded plat at the time of the execution of the note.

²²² *Blackman v. Dowling*, 63 Ala. 304.

²²³ *Citizens' Bank of Louisiana v. Grand*, 33 La. Ann. 976.

§ 344. **Same subject—Continued.**—Where a note contains a condition that it may be paid or satisfied other than by the payment of money, the maker is obligated to do the act which will exonerate him if he desires to avail himself of the benefit of such condition. There must either be a performance by him or a sufficient tender and a failure to make a demand will not release him therefrom.²²⁴ If there is a provision in a note that if it is not paid at maturity certain collateral shall be forfeited or the payee may at his option return the collateral to the maker and sue him, it has been decided that the return of the collateral is not a condition precedent to the right to sue.²²⁵ Again where a note provides that it is to be paid out of the proceeds of the sale of certain property, such provision is held not to be such an appropriation as will create a lien thereon and it is no defense to an action by an indorsee against the payee that the property was removed after the maturity of the notes and the maker subsequently became insolvent.²²⁶

§ 345. **Same subject—Substantial performance of condition.**—A substantial compliance with the condition on a note may in some cases be sufficient to enable a payee to recover thereon.²²⁷ So where the liability of the makers of a note was dependent upon a condition that the payees should sustain their case against certain persons and should find such persons indebted to them to the amount of the note, it was decided that the condition was sufficiently fulfilled if the case was legally sustained, though certain formalities were not complied with,

²²⁴ *Biscoe v. Moore*, 12 Ark. 77, so holding where there was a stipulation that a note might be discharged in Arkansas bank paper at its value. *Borah v. Curry*, 12 Ill. 66, so holding where note could be discharged by payment in personal property. *Dumas v. Hardwick*, 19 Tex. 238, so holding where a note could be discharged in groceries at cash prices. But see as to making demand, *Smith v. Corn*, 3 Head (Tenn.) 116.

²²⁵ *Knipper v. Chase*, 7 Iowa 145.

²²⁶ *Franklin v. Browning* (Ind. Terr. 1901), 64 S. W. 563.

²²⁷ *Stowell v. Stowell*, 45 Mich. 364, 8 N. W. 70. See *McLaughlin*

v. Clausen, 85 Cal. 322, 24 Pac. 636; *Bellows v. Folsom*, 2 Rob. (N. Y.) 138.

This principle has been most frequently applied in the case of notes which have been given to aid in the construction of railroads. See *Fraser v. Stuart*, 46 Iowa 15; *Gardner v. Burch*, 101 Mich. 261, 59 N. W. 613; *Gardner v. Walsh*, 95 Mich. 505; *Toledo & Ann Arbor R. R. Co. v. Johnson*, 55 Mich. 456. Compare *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638.

In this class of cases, however, each case must be determined from its own particular facts. *Fraser v. Stuart*, 46 Iowa 15.

as where the judgment and decree was rendered on an agreed statement of facts.²²⁸

§ 346. **Same subject—Condition that contract be completed to acceptance of agent.**—If a note is conditioned upon the completion of a contract to the acceptance of an agent it will be no defense to an action thereon that it was not completed in strict compliance with the terms of the contract, where the agent has accepted performance and there was no fraud on the part of the plaintiff.^{228*}

§ 347. **Conditional acceptance.**—One who accepts an instrument conditionally may, in an action against him, show a non-performance of the condition or non-occurrence of the contingency upon which his liability was dependent, provided the condition upon which he accepted constitutes a part of the contract either by reason of express words in the instrument or by a contemporaneous agreement which is to be construed as a part thereof.²²⁹ In such a case the performance of the condition or the happening of the event is generally regarded as a condition precedent to the liability of the acceptor.²³⁰ So where an acceptance was conditioned to be paid out of money coming into the hands of the acceptor as assignee it was held that plaintiff must show that funds had been received and were subject to the claim of the drawer.²³¹ An acceptor cannot, however, set up such a defense where it appears that the performance of the condition or the happening of the contingency has been prevented by him.²³²

²²⁸ *Sawyer v. Child*, 68 Vt. 360, 35 Atl. 84.

^{228*} *Shed v. Miller*, 12 Me. 318.

²²⁹ *Crowell v. Plant*, 53 Mo. 145 (holding that where one accepts an instrument stating it is payable out of a certain fund he may show that such fund never became due). See *Lindon v. Beach*, 6 Hun (N. Y.) 200.

An acceptance which is upon its face absolute cannot be shown to be conditional by parol evidence. *Haines v. Nance*, 52 Ill. App. 406; *Heaverin v. Donnell*, 7 Sm. & M. (Miss.) 244, 45 Am. Dec. 302.

²³⁰ *Illinois*.—*Cummings v. Hum-*

Kansas.—*Liggett v. Weed*, 7 Kan. 273.

Mississippi.—*Shackleford v. Hooker*, 54 Miss. 716.

Missouri.—*Ford v. Angelrodt*, 37 Mo. 50, 88 Am. Dec. 174.

Federal.—*Read v. Wilkinson*, 2 Wash. C. C. 514, Fed. Cas. No. 11611. See also *Rice v. Porter*, 16 N. J. L. 440; *Lamon v. French*, 25 Wis. 37.

²³¹ *Cummings v. Hummer*, 61 Ill. App. 393.

²³² *Herter v. Goss & Edsall Co.*, 57 N. J. L. 42, 30 Atl. 252; *Risley v. Smith*, 64 N. Y. 576.

§ 348. **Conditional or restricted indorsement.**—A conditional or restricted indorsement operates as a notice, to a subsequent holder, of such condition.²³³ And an indorsement that the instrument will be payable on a contingency is held not to affect the negotiation of the paper but to operate as a notice to subsequent parties of such fact.²³⁴ In this class of cases parol evidence is not admissible to charge the ordinary and popular meaning of the term or words used,²³⁵ though where a restrictive indorsement is ambiguous it may be shown by parol, as between the parties, what their intent was.²³⁶ In the application of the general rule it has been decided that where the indorsement provides that the indorser is in no way liable as such, the indorsee takes it subject to any legal defense against the indorser.²³⁷ And this is also the rule in case of an indorsement to the payee's own use,²³⁸ or to another for the "account of" the payee,²³⁹ or to the holder "for collection."²⁴⁰ And an acceptor who pays the drawer in disregard of the condition imposed by the payee when indorsing the instrument before acceptance may be liable to also pay the payee.²⁴¹ The fact, however, that one indorses a note without recourse will not be a complete defense to an action on a note as even in such case he is held to warrant that the instrument is the valid legal obligation of those whose signatures appear on the paper.²⁴² The right, however, of a *bona fide* holder

²³³ Leary v. Blanchard, 48 Me. 269; Tappan v. Ely, 15 Wend. (N. Y.) 362; Sigourney v. Lloyd, 8 Barn. & Cr. 622.

See in this connection Neg. Instr. Law, § 69 in appendix.

²³⁴ Tappan v. Ely, 15 Wend. (N. Y.) 362.

Compare Aniba v. Yeomans, 39 Mich. 171, holding that the negotiable character of a note is destroyed by an indorsement by the payee transferring only "his right, title and interest" in it to another, and the indorsee is not a *bona fide* holder without notice of the defenses thereto.

²³⁵ Leary v. Blanchard, 48 Me. 269.

²³⁶ United States Bank v. Geer, 53 Neb. 67, 73 N. W. 266.

²³⁷ Ayer v. Hutchins, 4 Mass. 370. But see Russell v. Ball, 2 Johns. (N. Y.) 50.

²³⁸ Wilson v. Holmes, 5 Mass. 543; Sigourney v. Lloyd, 8 Barn. & Cr. 622.

²³⁹ Leary v. Blanchard, 48 Me. 269. See Treutel v. Barandon, 8 Taunt. 100. Compare U. S. Nat. Bank v. Geer, 55 Neb. 462, 75 N. W. 1088, 70 Am. St. Rep. 390.

²⁴⁰ Barker v. Prentiss, 6 Mass. 430. As to an indorsement by the payee "for collection" it is said in a recent case that it "is not strictly a contract of indorsement, but rather the creation of a power, the indorsee being the mere agent of the indorser to receive and enforce payment for his use." Smith v. Boyer (Oreg. 1905), 79 Pac. 497, 498, per Bean, J.

²⁴¹ Robertson v. Kensington, 4 Taunt. 30.

²⁴² Illinois.—Drennan v. Burne, 124 Ill. 184, 16 N. E. 100.

Iowa.—Watson v. Cheshire, 18 Iowa 202, 87 Am. Dec. 382.

Kansas.—Challis v. McCrum, 22 Kan. 157, 31 Am. Rep. 181.

cannot be affected by any secret agreements or undisclosed restrictions between the parties.²⁴³ So where a note is indorsed in blank for collection, the want of ownership of the indorsee cannot be shown against such a holder.²⁴⁴ Nor is evidence admissible of a parol agreement to show that the indorsement was to be without recourse.²⁴⁵ Nor can an indorser who, by his own unauthorized act, has prevented the performance of the condition or the happening of the contingency upon which the taking effect of the instrument was conditioned avail himself of such a defense.²⁴⁶

§ 349. Indorsement of condition to enforce which would be illegal.

Where an indorsement is made upon a note of a condition to enforce which would be in violation of the law, the fact that such condition has not been complied with will be no defense to an action against the maker. So in an action by a receiver of an insurance company to enforce a capital stock note, declared to be such on its face and providing that "payment thereof is subject to the conditions and obligations of the insurance law of the state of New York" which law was specifically referred to by designation of the particular statute, it was held that the maker could not set up in defense thereto the breach of a condition indorsed on the back of the note, that unless his property should be kept insured for five years the note should be null and void.²⁴⁷

Vermont.—*Hannum v. Richardson*, 48 Vt. 508, 21 Am. Rep. 152.

Federal.—*Seeley v. Reed*, 28 Fed. 164. SEE *Collier v. Mahan*, 21 Ind. 110; *Fitchburg Bank v. Greenwood*, 2 Allen (Mass.) 434.

²⁴³ *Fawcett v. Insurance Co.*, 97 Ill. 11.

²⁴⁴ *Coors v. Bank*, 14 Colo. 202, 23 Pac. 328.

²⁴⁵ *Skinner v. Church*, 36 Iowa 91; *Lewis v. Dunlap*, 72 Mo. 174; *Hill v. Shields*, 81 N. C. 250. See *Second National Bank v. Woodruff*, 113 Ill. App. 6; *Smith v. Boyer* (Oreg. 1905), 79 Pac. 497.

²⁴⁶ *United States Wind Engine &c. Co. v. Simonton*, 84 Wis. 545, 54 N. W. 1021.

²⁴⁷ *Regener v. Warner*, 56 N. Y. Supp. 310. The court said, per Mc-

Adam, J.: "To sustain such a contention would be to sanction a fraud upon the insurance laws of the state, as well as the creditors whom such notes were intended to secure. The representatives of the corporation, as special agents thereof, could not by any act of theirs assent that any condition be attached to the capital stock notes which would contravene the operation of the laws of the state, and the defendant must have known this as well as the officers of the company. Capital stock notes given under the insurance laws cannot have strings to pull them back from creditors when seeking their lawful remedy upon them, and the legerdemain conditions indorsed upon the back of the note herein must be regarded as in-

§ 350. **Waiver of conditions.**—One who is to receive the benefit of a valid and enforceable condition or agreement attending the execution, delivery or terms of a note may waive the same and in case of a waiver by him he cannot avail himself of the non-performance of such agreement or condition as a defense to a subsequent action on the instrument.²⁴⁸ But where a person signs a note conditionally there is held to be no waiver of his right to avail himself of a breach of such condition as a defense by the fact that he had an agency or was active in getting a payment indorsed thereon.²⁴⁹ And it has been decided that the fact that one who promised to accept an instrument conditionally has received and retained a sum raised thereon, which is less than its amount will not operate as a waiver of his right to refuse to accept the same because of a non-compliance with the condition.²⁵⁰

effectual against creditors and the receiver who represents them, because contrary to the policy and the spirit of the legislative enactment, whose benefits the defendant invoked when he made the obligation. There is no merit in the defense, and nothing to commend it to judicial favor.”

²⁴⁸ *Federal*.—First National Bank v. Portland & O. R. Co., 2 Fed. 831.

California.—Witmer Bros. v. Weid, 108 Cal. 569, 41 Pac. 491.

Illinois.—Iglehart v. Gibson, 56 Ill. 81.

Louisiana.—Wimbish v. Wade, 21 La. Ann. 180.

Minnesota.—Stout v. Watson, 45 Minn. 454, 48 N. W. 195.

Missouri.—Whittemore v. Ohear, 58 Mo. 280.

Nebraska.—Westheimer v. Phillips, 11 Neb. 54, 7 N. W. 525.

²⁴⁹ *Miller v. Gambie*, 4 Barb. (N. Y.) 146.

²⁵⁰ *Lewis v. Kramer*, 3 Md. 265.

CHAPTER XV.

COLLATERAL SECURITY.

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| <p>Sec.</p> <p>351. Original parties.</p> <p>352. Surety—Guaranty—Indemnity.</p> <p>353. Accommodation paper—Maker—<i>Bona fide</i> holder.</p> <p>354. Accommodation paper—Indorser—<i>Bona fide</i> holder.</p> <p>355. Bills—Accommodation acceptor.</p> <p>356. Form of assignment, when immaterial—<i>Bona fide</i> holder.</p> <p>357. When note not collateral security but independent obligation.</p> <p>358. Note payable to order, assigned but not indorsed.</p> <p>359. Contemporaneous or future loans—Advances—<i>Bona fide</i> holder.</p> <p>360. Same subject—Instances.</p> <p>361. Agreements and conditions.</p> <p>362. Same subject.</p> <p>363. Security for the performance of illegal contract.</p> <p>364. Note secured by mortgage—Mortgagee against maker—Surety.</p> <p>365. Note secured by mortgage or other instrument—<i>Bona fide</i> holder—Pledgee.</p> <p>366. Same subject.</p> | <p>Sec.</p> <p>367. Same subject—Knowledge or notice.</p> <p>368. Transferee of note and mortgage—Payment of or collateral security for pre-existing debt.</p> <p>369. Receiving or surrendering collateral—Exhausting collateral.</p> <p>370. Paper given or indorsed for specific purpose—Principal and agent.</p> <p>371. Defense subsequent to indorsement—<i>Bona fide</i> holders.</p> <p>372. Transferee after maturity—Pledgee.</p> <p>373. Pledgor and pledgee—Laches, negligence or tortious acts—Statute of limitations.</p> <p>374. Priority of transfer—Different notes.</p> <p>375. Renewals—Continuance of security—Extinguishment of debt.</p> <p>376. Extent of recovery—<i>Bona fide</i> holders.</p> <p>377. Same subject—Collateral for pre-existing debt.</p> <p>378. Same subject—Accommodation paper.</p> |
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§ 351. Original parties.¹—Upon the principle that any instrument, though absolute upon its face, may be shown by parol to be a security only, it is competent, in an action by an indorsee from the payee of the note as collateral security, to show that the payee had himself

¹ As to collateral security for pre-existing debt—*bona fide* holders, see §§ 246-249 herein.

taken the note as collateral security merely for the repayment of a loan or advances, and the plaintiffs having taken the note after maturity and as collateral for a prior indebtedness they had no better rights than the payee and were subject to the defenses of the maker against the payee, so that their recovery was limited to the payee's interest.² So it may be shown that as between the original parties the note was given to be used as collateral.³ But it is also decided that in an action by the payee against the maker a plea which sets up the execution and delivery of the notes as collateral security is subject to demurrer.⁴ Again, notes may be validly transferred as security for indorsements previously made.⁵

§ 352. Surety—Guaranty—Indemnity.—If the indorsee of a promissory note receives it without notice of equities, before maturity as collateral security in consideration of his becoming surety for another note, which he afterward was compelled to pay, he is a holder for a valuable consideration in the ordinary course of business and is discharged from such equities.⁶ And where a note and mortgage are as-

As to payment of pre-existing debt, see §§ 241, 242, 243, 287 herein.

² Kelly v. Ferguson, 46 How. Pr. (N. Y.) 411.

³ McCrady v. Jones, 36 S. C. 136, 15 S. E. 430.

⁴ Moore v. Prussig, 165 Ill. 319, 322, 46 N. E. 184. The court, per Phillips, J., said: "The second plea attempted to set up that the execution and delivery of the notes were as collateral security merely, and set up substantially the same facts as pleaded in the plea failure of consideration. Whilst a person signing a note has a right to prove by parol the capacity in which he signs the paper, and such proof is not an attempt to vary the terms of the written instrument, yet where the note is accepted as a separate and independent contract an attempt to vary the terms of the contract by parol is not admissible,

and the plea attempting to set up that the note signed was accepted as collateral security could not change the legal effect of the instrument, as a liability would exist according to the terms of the contract, and the attempt to set up such an agreement constituted no defense. As the sole makers of the note, defendants cannot show that they only signed as sureties. To permit proof of that fact would be to vary by parol the contract itself and contradict its terms. Harris v. Galbraith, 43 Ill. 309; Miller v. Wells, 46 Ill. 46."

⁵ Noyes v. Landon, 59 Vt. 569, 10 Atl. 342.

As to becoming absolute owner of accommodation note pledged as collateral, see Beacon Trust Co. v. Robins, 173 Mass. 261, 53 N. E. 868.

⁶ Stotts v. Byers, 17 Iowa 303.

See Winship v. Bank, 42 Ark. 24;

signed to a person as indemnity for performing an act, as in case of indemnifying sureties in a recognizance of bail, it may be shown that the liability of the sureties has been discharged without their being indemnified, and the assignee in such case is a *bona fide* holder for the purpose of indemnity only, and neither he nor his assignee after maturity can recover.⁷ But a negotiable instrument received from the payee, before maturity, as an indemnity against future losses on a suretyship then existing on the part of the holder for the payee, is not a transfer in the usual course of trade so as to preclude the maker from availing himself of a latent equity between him and the payee.⁸

§ 353. **Accommodation paper—Maker—Bona fide holder.**⁹—If a note is made merely for the accommodation of a person for the purpose of giving him credit and such note is transferred as collateral security and upon its faith a large discount is obtained, the transfer being made before maturity of the note, the transferee becomes the holder in good faith, for value.¹⁰ But while want of consideration is not a de-

Trustees v. Hill, 12 Iowa 462; Roxborough v. Meesick, 6 Ohio St. 448.

But examine Bertrand v. Bartram, 13 Ark. 150; Ruddick v. Lloyd, 15 Iowa 441.

⁷ Coleman v. Post, 10 Mich. 422, 82 Am. Dec. 49.

⁸ Bank of Mobile, Hallett v. Hall, 6 Ala. 639, 41 Am. Dec. 72.

⁹ See §§ 383-391 herein.

¹⁰ *Louisiana*.—President, etc., of Louisiana State Bk. v. Gaiennie, 21 La. Ann. 555 (holding also that the pledgee of a promissory note, payable to the drawer's own order and by him indorsed in blank, may sue and recover on the note without the indorsement of the pledgor).

Maryland.—Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 629 (an agreement between maker and indorser that note is not to be used for precedent debts, but only to secure future discounts, and the rule does not apply unless the indorsee has knowledge of the infirmities or invalidating facts).

New York.—Schepp v. Carpenter, 51 N. Y. 602, affirming 49 Barb. 542; Grocers' Bank v. Penfield, 7 Hun (N. Y.) 279, affirmed, 69 N. Y. 502 (if accommodation paper is diverted to another purpose, the holder must show that it was taken in good faith, and for value. But if the paper is used for a purpose consistent with the object for which it was executed, an action lies by the holder even though it is based on no new consideration and is held only as collateral security); Atlantic National Bank v. Franklin, 64 Barb. (N. Y.) 449, 453; in this case the court, per Fancher, J., said: "Conceding that the notes in question are accommodation paper, loaned by the defendant to Van Suan & Co., in the absence of evidence showing a restriction as to the mode of using them, it was competent for that firm to pledge them as security for their debt, and in such case the maker of the notes has no defense against their pay-

ment. The plaintiff is a *bona fide* holder for value, sufficient to enable the plaintiff to recover on the notes. *Schepp v. Carpenter*, 49 Barb. (N. Y.) 542; *Cole v. Saulpaugh*, 48 Barb. (N. Y.) 104; 1 Pars. on Bills, 226; *Rutland Bank v. Buck*, 5 Wend. (N. Y.) 66; *Grandin v. LeRoy*, 2 Paige (N. Y.) 509; *Lathrop v. Morris*, 5 Sand. (N. Y.) 7; *Mohawk Bank v. Corey*, 1 Hill (N. Y.) 513; *Boyd v. Cummings*, 17 N. Y. 101; *De Zeng v. Fyfe*, 1 Bosw. (N. Y.) 335; *Lord v. Ocean Bank*, 2 Penn. 384. In the latter case it was held that the maker of an accommodation note cannot set up the want of consideration as a defense against it in the hands of a third person, though it be there as collateral security merely"); *Cole v. Saulpaugh*, 48 Barb. (N. Y.) 104 (where there is no limitation or restriction the rule applies); *East River Bank v. Butterworth*, 45 Barb. (N. Y.) 476, 30 How. Prac. (N. Y.) 44, affirmed, 51 N. Y. 637 (rule applied where no restriction); *DeZeng v. Fyfe*, 1 Bosw. (N. Y.) 335 (rule applied in cases exempt from fraud); *Mechanics' & Traders' Bank v. Livingston*, 6 Misc. Rep. 81, 26 N. Y. Supp. 25, aff'g 4 Misc. Rep. 255, 23 N. Y. Supp. 814; *Continental Nat. Bank v. Crosby*, 1 N. Y. Supp. 256, 48 Hun (N. Y.) 621; *Moyer v. Urtel*, 9 N. Y. St. Rep. 667; *Wallach v. Bader*, 7 N. Y. St. Rep. 375; *Inglis v. Kennedy*, 6 Abb. Prac. 32. See *Brewster v. Shrader*, 57 N. Y. Supp. 606, 609, 26 Misc. 403, where the changes in the New York law and the prior rule are considered.

Pennsylvania.—*Second Nat. Bank v. Dunn*, 151 Pa. St. 228, 25 Atl. 80, 31 Wkly. Notes Cas. 112 (as to ac-

commodation judgment note, it may be taken as collateral for precedent debt in the absence of restrictions; otherwise where there are restrictions, as in such latter case any defense except want of consideration is available as to original party); *National Union Bank v. Todd*, 132 Pa. St. 312, 19 Atl. 218; *Hart v. U. S. Trust Co.*, 118 Pa. St. 565, 12 Atl. 561 (agreement here not performed; plaintiff had no notice thereof; there was no such fraudulent diversion as to constitute a defense, and recovery was allowed); *Lord v. Ocean Bank*, 20 Pa. St. 384, 59 Am. Dec. 728 (also deciding that it constitutes no defense that holder had other collateral securities for same debt, but from which the debt had not been realized); *Beckhaus v. Commercial Nat. Bank* (Pa. 1888), 12 Atl. 72, 22 Wkly. Notes Cas. 53.

Vermont.—*Pinney v. Kimpton*, 46 Vt. 80.

But see *Bramhall v. Beckett*, 31 Me. 205; *Royer v. Keystone Nat. Bank*, 82 Pa. St. 248 (diversion of note; the intervention of fraud in procurement or use, precludes pledgee from holding as security for antecedent debt, from sustaining claim that he is holder for value, nor can recovery be had on renewal note).

Pledgee as garnishee cannot defend although drawer might where accommodation paper pledged for specific purposes. *Kirkpatrick v. Oldham*, 38 La. Ann. 553.

Note not strictly accommodation paper, maker is precluded from defense where paper is based on valuable consideration, even though given as security for a pre-existing debt. *Barker v. International Bank of Chicago*, 80 Ill. 96.

fense in such case,¹¹ and, although the payment of a security debt is held a sufficient consideration for the transfer of an accommodation note where no consideration had passed between the payee and the makers, still a *bona fide* indorsee for value may recover thereon.¹² It is also decided, however, that some consideration must have passed from the holder.¹³ Again, where there are no restrictions as to a note for the indorser's accommodation, such note may be used by him for accommodation, and a recovery may be had upon it by the holder to any amount to which he holds it as security, not exceeding the sum named in the note, even though he knew its origin.¹⁴ But it is also determined that one who receives such a note is not a *bona fide* holder

¹¹ *Schepp v. Carpenter*, 51 N. Y. 602, aff'g 49 Barb. (N. Y.) 542; *Smith v. Hine*, 179 Pa. St. 260, 36 Atl. 221 (where an accommodation note is held by a third party as collateral for a precedent indebtedness, want of consideration is not available as a defense; but the maker or indorser of such paper may avail himself of fraud in the procuring or use of the note, since in this respect the rules are applicable that apply to commercial paper generally, but the latter parties cannot set up as a defense that the note was given without consideration and pledged for a pre-existing debt); *Carpenter v. Bank*, 106 Pa. St. 170; *Work v. Kase*, 34 Pa. St. 138.

¹² *Bondurant v. Bladen*, 19 Ind. 160. In this case the maker and indorser were defendants.

¹³ *Bank v. Vanderhorst*, 1 Rob. (N. Y.) 211, 216 (declaring that the law of New York is settled that a promissory note, taken in payment of an antecedent debt, and the prior indebtedness extinguished is deemed to be taken for value so as to constitute it a valid security in the hands of the holder. The court also said the principle is, that if the holder parts with something at the time he receives the note, it affords

a sufficient consideration to make his holding *bona fide*. If, therefore, he extinguishes the prior debt, or surrenders the prior security, or advances money upon the credit of the new, it will constitute him a holder for value. But it does not appear that merely receiving a promissory note or bill of exchange of a third person, as security for a precedent debt, without extinguishing the prior debt, or parting with any money or security at the time, is sufficient to constitute a holding for value); *Grocers' Bank v. Penfield*, 7 Hun (N. Y.) 279, aff'd, 69 N. Y. 502 (the holder would have no greater rights than the payee, in the absence of a consideration, and a bank which has surrendered nothing of value, nor parted with money or property for such notes, nor suspended its remedy for the debt secured thereby, cannot recover thereon; an implied agreement, however, for the extension of time of credit of an existing debt is a sufficient consideration).

See *Atkinson v. Brooks*, 26 Vt. 569, 575, 584, 62 Am. Dec. 592.

¹⁴ *East River Bank v. Butterworth*, 46 Barb. (N. Y.) 476, 30 How. Pr. 444, aff'd, 51 N. Y. 637.

for value, and that fraud may be availed of to impeach the paper.¹⁵ And if, after maturity of an accommodation note, a new note is given as independent security therefor, the claim against the maker of the latter note is not affected, except there be a payment or release between the accommodation indorser and the original maker, and it is no defense thereto that a mortgage was given to the indorser as security therefor.¹⁶

§ 354. **Accommodation paper—Indorser—Bona fide holder.**—If a note indorsed for accommodation of the maker is transferred as collateral to secure a pre-existing debt, an indorser cannot defend against a *bona fide* holder on that ground, there being neither fraud or diversion in such transfer, and no restriction;¹⁷ and the rule has been ap-

¹⁵ *Cummings v. Boyd*, 83 Pa. St. 372; *Royer v. Keystone Nat. Bank*, 83 Pa. St. 248.

¹⁶ *Mosser v. Criswell*, 150 Pa. St. 409, 24 Atl. 618.

¹⁷ *Connecticut*.—*Bridgeport City Bank v. Welch*, 29 Conn. 475.

New York.—*Boyd v. Cummings*, 17 N. Y. 101; *Weaver v. Farrington*, 7 Misc. 405, 27 N. Y. Supp. 971, aff'g 6 Misc. Rep. 54, 26 N. Y. Supp. 78.

Ohio.—*Pitts v. Foglesong*, 37 Ohio St. 676, 41 Am. Rep. 540.

Pennsylvania.—*Newbold v. Boraef*, 155 Pa. St. 227, 26 Atl. 305.

United States.—*Molson v. Hawley*, 1 Blatchf. (U. S. C. C.) 409, Fed. Cas. No. 9702.

See *German-American Savings Bk. of Burlington v. Hanna*, 124 Iowa 374, 100 N. W. 56, 59, relying upon *Iowa State Bank v. Mason Hand Lathe Co. (Iowa)*, 90 N. W. 612.

But examine *First National Bank v. Schnur*, 57 Mo. App. 176 (where the maker's notes are held by the payee for the amount of his indebtedness and are not surrendered and no other consideration exists for the

new notes, an accommodation indorser is not obligated thereby); *Prentiss v. Graves*, 33 Barb. (N. Y.) 621 (where a draft was due and unpaid, and in order to take it up the drawer procured an indorsement of a note for accommodation to the holders of the draft, but it was accepted merely as collateral security and not as payment, and there was no new consideration, nor any agreement to extend the draft, but the drawer was still held liable to its prosecution, it was decided that they were not holders for value); *Cummings v. Boyd*, 83 Pa. St. 372 (a holder of accommodation paper pledged as collateral security for an antecedent debt without restriction is not a holder for value, and is subject to defenses for fraud in its making or procurement. But the proposition that accommodation paper may be pledged as collateral security for an antecedent debt where the paper contains no restrictions as to the manner of its use, was admitted by the court). Examine also §§ 383-391 herein.

plied, even though knowledge of the circumstances¹⁸ or notice of the character of the indorsement exists on the part of the transferee.¹⁹ And a creditor holding the paper for value is entitled to recover from the indorser, notwithstanding an agreement not to negotiate the note, where he is not chargeable with notice of said agreement.²⁰ Again, where one of two joint accommodation indorsers has satisfied a judgment on a note so indorsed, in a suit for contribution it is no defense that there was an independent agreement as to collateral security whereby a discount was enabled to be obtained upon a note by the party for whose accommodation the paper was made.²¹ And where negotiable notes are indorsed over as collateral security for other notes then and there discounted by the indorsee for the indorser on the faith and credit of the notes indorsed as collateral the indorsee of such notes is to be regarded as a purchaser for value; therefore no prior indorser, as against such indorsee, can avail himself of the fact that he is an accommodation indorser only. If a suit is brought by such indorsee against such prior indorser, the defendant can introduce no evidence which does not prove or tend to prove actual payment of the notes to the indorsee.²²

§ 355. **Bills—Accommodation acceptor.**—Where a bill is drawn for the accommodation of the drawee for the special and sole purpose of sustaining his professional business and financial credit, and of aiding him in his operations connected therewith, the legal consequences of such facts is that such paper is not enforceable as between drawer and drawee; nor as between drawer and payee unless the latter purchased it *bona fide* for a valuable consideration and without notice of the purpose for which it was drawn. A payment of a pre-existing debt being inconsistent with the vital spirit of the drawer's sole object, a pawnee who receives such bill as collateral security for a debt is not a *bona fide* holder.²³ Again, it is decided that where a note or bill is taken in

¹⁸ Varnum v. Bellamy, 4 McLean (U. S. C. C.) 87, Fed. Cas. No. 16886.

¹⁹ Bonsall v. Bauer, 2 Wkly. Notes Cas. (Pa.) 298; Molson v. Hawley, 1 Blatchf. (U. S. C. C.) 409, Fed. Cas. No. 9702.

²⁰ Boyd v. Cummings, 17 N. Y. 101.

²¹ Newcomb v. Gibson, 127 Mass. 396.

²² Miller v. Pollock, 99 Pa. St. 202.

²³ Thompson v. Poston, 1 Duv. (62 Ky.) 389, 392.

That transferee is not holder for value in Kentucky, where he takes it before maturity as collateral security for an antecedent debt, see Alexander & Co. v. Springfield Bk., 2 Metc. (59 Ky.) 534; Lee v. Smead, 1 Metc. (58 Ky.) 628. Examine Kentucky Nat. Bk. v. Martin, 15

due course of business as collateral security for a pre-existing debt by the indorsee, he is *prima facie* a holder for value and may recover against an accommodation acceptor, whom he did not know was such acceptor when the bill was taken by him.²⁴ And where plaintiffs had received a draft as collateral security for a pre-existing debt and it was accepted for their own accommodation, upon an agreement that they should protect it, it was determined that in an action against the acceptor that all equities between the maker and acceptor were available and precluded a recovery.²⁵

§ 356. Form of assignment, when immaterial—Bona fide holder.—

Under the law of Texas it matters not how a negotiable note has been assigned. Though the transfer be not evidenced by a writing it is placed upon the same footing as a transfer by indorsement. If transferred without notice of any defenses as against the transferor it is subject to none, and this applies to the holder of such a note transferred or deposited with him as collateral security for a loan to the payee.²⁶

§ 357. When note not collateral security but independent obligation.—A note is not collateral security but an independent obligation, and is a promise in writing to pay the debt of another, where it is given to release a levy upon chattels under execution, issued in an action to which the maker of the note was not a party, said note being given upon the understanding that it should be paid at maturity and the execution held in the meantime; not that the execution would be paid and the note held as security. In such case the note is the primary obligation and the execution the secondary.²⁷

§ 358. Note payable to order, assigned but not indorsed.—Where a promissory note, payable to order of a named payee and not indorsed or otherwise assigned in writing so as to vest the legal title in the person to whom the same is delivered as collateral, is, by the payee, before its maturity, delivered to another who takes the same *bona fide*, either as a purchaser or for the purpose of holding it as collateral security, but by mistake or inadvertence, the note is not indorsed or

Ky. L. Rep. 646, 24 S. W. 1067. See ²⁰ National Bk. of Commerce v. Kenney, 98 Tex. 293, 83 S. W. 368, further §§ 246-249, 383-391 herein.

²⁴ Atkinson v. Brooks, 26 Vt. 569, rev'g 80 S. W. 585.

62 Am. Dec. 592.

²⁷ So held in Lockner v. Holland

²⁸ Fale v. Dart, 19 N. Y. Supp. 389. (County Court), 81 N. Y. Supp. 730.

otherwise transferred in writing, the holder takes it subject to all the equities between the original parties to the note existing at the time of such delivery and which arose out of the transaction upon which the note was given. This is true, although at the trial the note was transferred in writing by the original payee to the usee.²⁸

²⁸ *Benson v. Abbott*, 95 Ga. 69, 75-78, 22 S. E. 127. The court said: "It has been for a long time well-settled law that one who, without indorsement, though for value and without notice, takes a note payable to order, takes it subject to all defenses which would have prevailed against the original payee. It will be observed that the rule under consideration, and which protects the holder against such equities, applies only to commercial paper which is negotiable. Unless a promissory note is made payable to bearer, it is not *proprio vigore* negotiable in the strict legal sense; it is wanting in the final requisite, which imparts to it the quality of negotiability, namely, indorsement. By this act alone can it become negotiable; and therefore it follows that he who receives it before indorsement does not take it as a negotiable paper, and not being thus negotiable, he takes subject to the equities between the parties. Except in case of negotiable securities, the law indulges no presumptions in favor of the holder; he is not presumed to be such either *bona fide* or for value; but, on the contrary, it charges him with notice of, and he takes subject to, all defenses which, originating in the contract, might be set up by the maker. Not only is this true where the purpose is to invest the holder with the absolute unqualified title to the paper, but it is likewise true where it is intended only to pledge it as collateral to another liability. In either case the negotiability of

the paper is the very essence of the holder's claim to protection against equities. * * * The code, § 2138, declares that promissory notes and other evidences of indebtedness may be delivered in pledge; and § 2139 declares the receiver in pledge of promissory notes is such a *bona fide* holder as will protect him under the same circumstances as a purchaser, from equities between the parties. Section 2788 declares that the holder of a note as collateral security for a debt stands upon the same footing as a purchaser. He is thus placed upon the same plane as a purchaser. The right of a purchaser for value is to be protected against equities only when, by indorsement, the paper is rendered negotiable, and he is invested with the legal title. So with a pledgee. So with the person who holds the paper as collateral security;—they all stand upon the same footing. In each case indorsement is the condition of absolution. It is true that notes of the character now under consideration may be pledged as collateral security by manual tradition only, but for such delivery to be effective as against pre-existing equities it must be accompanied with the legal requisites to transmission of title. The pledgee must be a holder, a *bona fide* holder in due course of trade; and a regular indorsement by the payee is necessary to constitute him such. Our attention is directed to the case of *Smith et al. v. Jennings*, reported in 74 Georgia Reports, page 551, as

§ 359. **Contemporaneous or future loans—Advances—Bona fide holder.**—It is held in certain jurisdictions that one who accepts a negotiable note without notice of defense as collateral security for a pre-existing debt in excess of the note is a *bona fide* holder for value;²⁹ and also that an indorsee is a purchaser for value of a note where he holds the same as collateral to secure a debt, where he has no notice

bearing upon and ruling a principle otherwise than is herein expressed. In that case the proceeding was in equity to enforce the alleged lien of a judgment against certain land, a deed to which, together with a promissory note for the purchase money thereof, had been delivered in pledge. Whether or not the deed alone could have been delivered in pledge so as to vest an interest in the pledgee is not material. When accompanied, however, by the note for the purchase money, its delivery had the effect to vest in him an equity, and in a contest between this judgment creditor and the pledgee, the latter was entitled, under the rule that he who seeks the aid of a court of equity in vindication of a supposed equitable right, must do equity to have his debt first paid before the thing pledged could be appropriated to the payment of other debts of the pledgor. As between the judgment creditor and the pledgee, the equity of the latter was superior. His interest in the thing pledged had vested prior to the rendition of the judgment. The lien of the judgment, assuming that it could attach at all, would attach only to the interest of the defendant in execution in the thing bailed, and that interest was an equity of redemption. In that case the equities of the judgment creditor arose outside the contract. In this the equity of the surety inheres in the contract itself. In that case notice or want

of notice could not affect the lien of the judgment. In this case notice or want of notice is the one potential circumstance to charge the holder of this paper with, or absolve him from, the equities between the parties. In that case the right of the maker to make his defenses to an unindorsed promissory note was not called in question. Here it is the direct issue between the parties. So it appears that there is no conflict between the principle there declared and that here ruled. Indeed, it is apparent that the two cases involve the application of distinct principles, each equally well established. The views herein expressed, defining the rights of the holder of an unindorsed promissory note made payable to order, are in perfect harmony with the great current of approved authority; and we are thus led to conclude that in the case now under review, the paper in question having gone into the hands of the usee without indorsement or assignment (whether this occurred through inadvertence or otherwise is immaterial), they took it charged with notice of, and subject to, the pre-existing equities, and though an assignment was in fact executed at the trial, this could not avail as against equities in favor of the maker which sprang out of and inhered in the contract itself."

²⁹ *Lashmet v. Prall* (Neb. 1902), 96 N. W. 152, 153.

of any fraud or misrepresentation inducing the execution of the note, or that the consideration had failed.³⁰ In other jurisdictions, however, the contrary rule prevails.³¹ It is also decided that persons are not indorsees in due course for value of a note taken for a pre-existing debt where they assume no new obligation, duty or responsibility and part with no value when taking the note, and the debt very largely exceeds the amount of the note, and the latter is not an immediate obligation and the payee has indorsed the note by a written guaranty of payment before maturity.³² But notwithstanding those decisions which hold that indorsees who take a note as collateral security for a pre-existing debt are not *bona fide* holders, it is a conceded rule that a transferee is a holder for value where the negotiable paper is received as collateral security for a present or contemporaneous loan or for fresh advances or upon a new consideration afterwards, in due course, without notice and in good faith.³³ Or, to state the rule in other

³⁰ *Watzlavick v. D. & A. Oppenheimer* (Tex. Civ. App. 1905), 85 S. W. 855. See §§ 246-249 herein.

³¹ See §§ 246-249 herein.

³² *Porter v. Andrus*, 10 N. D. 558, 88 N. W. 567. See §§ 246-249 herein.

³³ *Arkansas*.—*Estes v. German National Bank*, 62 Ark. 7, 34 S. W. 85 (where there is a sale of land the lien of the purchase money passes with the notes as collateral security); *Brown v. Callaway*, 41 Ark. 418 (holding also that when there are defenses to the note as against the transferer, the holder can recover on it not exceeding the amount of his loan note. The court, per Eakins, J., said: "Such a *bona fide* holder of paper taken as collateral at the time of the loan, or upon a new consideration afterward, is, by all the authorities, held entitled to the protection of an indorsee. The only conflict of authority, and that is very great, arises in cases of paper taken as additional security for a pre-existing debt without new consideration. In this case the collateral was taken at the time of the loan").

Georgia.—*Partridge v. William's Sons*, 72 Ga. 807; *Exchange Bank v. Butner & Edgeworth*, 60 Ga. 654; Code, § 2788. (Indorsee of note before due, as collateral security for money loaned, is *bona fide* holder, and not subject to plea of failure of consideration as a defense); *Bonaud v. Genesi*, 42 Ga. 639.

Illinois.—*Humble v. Curtis*, 160 Ill. 193, 43 N. E. 740 (party is also no less a *bona fide* holder because note secured by mortgage or deed of trust).

Indiana.—*Valette v. Mason*, 1 Ind. 288.

Iowa.—*Wendlebone v. Parks*, 18 Iowa 546 (a case of transfer of old securities).

Kansas.—*Best v. Crall*, 23 Kan. 482, 33 Am. Dec. 185; *State Sav. Assoc. v. Hunt*, 17 Kan. 532.

Louisiana.—*Louisiana State Bank v. Galennie*, 21 La. Ann. 555; *King v. Gayoso*, 8 Mart. N. S. (La.) 370.

Maryland.—*Gwynn v. Lee*, 9 Gill (Md.) 137.

Missouri.—*Lee v. Turner*, 89 Mo. 489, 14 S. W. 505 (transferee from apparent owner will be protected);

words, when the note of a third person is transferred *bona fide* before due as collateral security and for value, such as a loan or further advancement, or a stipulation, express or implied, of further time to pay

Deere v. Marsden, 88 Mo. 512, 514 (the court, per Black, J., said: "One who takes a note as collateral security for a debt then created is a holder for value. *Logan v. Smith*, 62 Mo. 455. As to a pre-existing debt, if there is an express agreement on the part of the creditor to forbear suit until the collateral shall mature, the agreement to delay constitutes the transferee a holder for value. *Dan. Neg. Inst.* (3 Ed.), § 829; *Oates v. National Bank*, 100 U. S. 247. The extension of time for the payment of the past indebtedness, if for a day only, constitutes a new and sufficient consideration. *Smith v. Worman*, 19 Ohio St. 148. The agreed facts in this case are far from being clear, but taking them in connection with the pleadings, we conclude some time was given Jones by the note taken from him by Marsden for the past indebtedness. This being so, Marsden was clearly a purchaser for value. *Goodman v. Simonds*, 19 Mo. 107, only holds that one who takes a bill merely as a collateral security for a pre-existing debt, having given no value or consideration for it, holds it liable to the equities of the original parties"). *Logan v. Smith*, 62 Mo. 455.

Nebraska.—*Connecticut Trust & Safe Deposit Co. v. Trumbo* (Neb. 1902), 90 N. W. 216 (contemporaneous loan); *Connecticut Trust & Safe Deposit Co. v. Fletcher*, 61 Neb. 166, 172, 85 N. W. 59; *Hayden v. Lincoln City Elec. Ry. Co.*, 43 Neb. 680, 62 N. W. 73; *Helmer v. Commercial Bank*, 28 Neb. 474, 44 N. W. 482.

New Hampshire.—*National State Capitol Bank v. Noyes*, 62 N. H. 35.

New York.—*American Exchange Nat. Bank v. New York Belting & Packing Co.*, 148 N. Y. 698, 43 N. E. 168 (in substitution for other notes is holder for value of substituted notes); *Brookman v. Metcalf*, 32 N. Y. 591; aff'g 5 Bosw. (N. Y.) 429; *Bank v. Vanderhorst*, 32 N. Y. 553, aff'g 1 Rob. (N. Y.) 211; *Atlantic National Bank v. Franklin*, 64 Barb. (N. Y.) 449, 453; *Crook v. Mali*, 11 Barb. (N. Y.) 205; *Williams v. Smith*, 2 Hill (N. Y.) 301 (future indebtedness); *Scott v. Johnson*, 5 Bosw. (N. Y.) 213; *Ogden v. Andre*, 4 Bosw. (N. Y.) 583; *Watson v. Cabot Bank*, 5 Sandf. (N. Y.) 423; *Pearce & Miller Eng. Co. v. Brouer*, 10 Misc. (N. Y.) 502, 31 N. Y. Supp. 195 (*bona fide* holder to extent of loan); *Irving Nat. Bank v. Duryea*, 1 City Ct. R. (N. Y.) 317.

Pennsylvania.—*Miller v. Pollock*, 99 Pa. St. 202 (holding that where negotiable notes are indorsed over as collateral security for other notes then and there discounted by the indorsee for the indorser, on the faith and credit of the notes indorsed as collateral, the indorsee of said notes is to be regarded as a purchaser for value); *Smith v. Hogeland*, 78 Pa. St. 252; *Housum v. Rogers*, 40 Pa. St. 190; *Work v. Kase*, 34 Pa. St. 138; *Munn v. McDonald*, 10 Watts (Pa.) 270.

Rhode Island.—*Trafford v. Hall*, 7 R. I. 104, 82 Am. Dec. 580.

South Carolina.—*McCrady v. Jones*, 36 S. C. 136, 15 S. E. 430.

Tennessee.—*Memphis Bethel v. Bank*, 101 Tenn. 130, 45 S. W. 1072;

a pre-existing debt, or a further credit, or a change of securities of a pre-existing debt, or the like, the assignee of such collateral will be protected from infirmities affecting the instrument before it was transferred.³⁴ So it is declared in an Alabama case that "where one honestly receives a negotiable bill or note before maturity as collateral security for a debt contracted simultaneously or in pursuance of a previous agreement made at the time the debt was contracted, it is quite well settled that he is entitled to protection against secret equities or defects of which he had no notice."³⁵

§ 360. **Same Subject—Instances.**—When a bank in good faith and before maturity advances money upon municipal coupon bonds, and their negotiability is not rescinded and there are no circumstances necessitating inquiry, such pledgee may assert a special property therein to the extent that they stand as security for the moneys loaned.³⁶ So where a bank has been accustomed to make loans to a customer and to take promissory notes as collateral security, the fact that it has permitted him to draw upon moneys paid in upon maturing collaterally upon depositing other collaterals to take their place, is no proof that the bank is not the *bona fide* holder of a collateral note so taken

Gosling v. Griffin, 1 Pick. (Tenn.) 737, 3 S. W. 642; First National Bank v. Stockell, 1 Pick. (Tenn.) 252, 21 S. W. 523.

Texas.—Kauffman & Runge v. Robey, 60 Tex. 308, 48 Am. Rep. 261 (case of money advanced in addition to pre-existing debt).

Vermont.—Tarbell v. Sturtevant, 26 Vt. 513.

Washington.—Peters v. Gay, 9 Wash. 383, 37 Pac. 325.

Wisconsin.—Curtis v. Mohr, 18 Wis. 615; Lyon v. Ewings, 17 Wis. 61; Crosley v. Roub, 16 Wis. 616; Bond v. Wiltse, 12 Wis. 611.

United States.—Black v. Reno, 59 Fed. 917; Doane v. King, 30 Fed. 106.

England.—Foster v. Pearson, 1 Cromp. M. & R. 849, 5 Tyrw. 255. See:

Louisiana.—McPherson v. Boudreau, 48 La. Ann. 431, 19 So. 550.

North Dakota.—Security Bank v. Kingsland, 5 N. D. 263, 65 N. W. 697 (sub-pledgee).

Vermont.—Pinney v. Kimpton, 46 Vt. 80.

Contra, see Williams v. Little, 11 N. H. 66.

As to illegality being defense to a note so taken, see Caswell v. Railroad Co., 50 Ga. 70.

³⁴ Roxborough v. Messick, 6 Ohio St. 448, 453, 67 Am. Dec. 346, per Swan, J.

³⁵ Miller & Co. v. Boykin, 70 Ala. 469, 477, citing 1 Parsons' Bills & Notes, 219; Watts v. Burnett, 56 Ala. 340; Coleman v. Smith, 55 Ala. 368.

³⁶ Manhattan Sav. Inst. v. New York Nat'l Exch. Bk., 170 N. Y. 58, 88 Am. St. Rep. 147, 59 N. Y. Supp. 51, aff'g 53 App. Div. 635.

before maturity; although such may not be the bank's method of doing business with its other customers.³⁷ And where one of the notes of defendant was pledged by his bank with a clearing house committee to secure the daily balance, and the bank failed, the committee was held to be holder of the note for value and that he could apply it in payment of additional loans.³⁸ So an agreement to forbear action on a pre-existing indebtedness founded on a consideration of a delivery of the security makes the holder a *bona fide* holder for value.³⁹

§ 361. **Agreements and conditions.**—A holder and a party to a note cannot defend upon the ground that the note was payable, under a contemporaneous parol agreement, out of a surplus of certain assets from goods pledged to secure the payor, it appearing that the assets were less than the debt.⁴⁰ And where a note with others has been delivered to secure plaintiff as to the payee's indebtedness, the writing evidencing such fact cannot be varied by parol proof of different conditions.⁴¹ It is also decided, in an action by the payee against the maker, that it cannot be shown by parol that the note was conditional or delivered as a pledge or collateral security for the performance of a parol agreement.⁴² But if a note is given as collateral security for a certain agreement, after the expiration of the time in which the note is payable, and after its breach by the maker, he is liable thereon, he having received advances for the amount of the paper.⁴³ Where, however, a note is deposited by one party in the hands of a third person as collateral security on a contract to secure its fulfillment, the other party to the contract has no right to bring suit upon such note merely for his fulfillment of the contract so long as it is not agreed that the note shall be liquidated damages for non-performance, and the damages have not been determined in a suit on the contract.⁴⁴ And where a contract between the transferor and transferee of a demand note does not show that the note was held as collateral security but appears to be an absolute transfer with a conditional guaranty, the transferee is not subject to the defense of failure of consideration.⁴⁵

³⁷ Mahaska Bank v. Crist, 87 Iowa 415, 54 N. W. 450.

³⁸ Philler v. Jewett & Co., 166 Pa. St. 456, 31 Atl. 204.

³⁹ Milins v. Kauffmann, 104 App. Div. 442, 93 N. Y. Supp. 669.

⁴⁰ Guy v. Bibend, 41 Cal. 322.

⁴¹ Hardie v. Wright, 83 Tex. 345, 18 S. W. 615.

⁴² Walker v. Crawford, 56 Ill. 444.

⁴³ Costelo v. Crowell, 134 Mass. 280.

⁴⁴ Rumney v. Coville, 51 Mich. 186, 16 N. W. 372.

⁴⁵ Sawyer v. Phaley, 33 Vt. 69.

§ 362. **Same subject.**—Although the pledgor fraudulently suppresses certain facts as a means to obtain the indorsement, and the indorsee or pledgee had no knowledge thereof, he can recover notwithstanding he failed to make inquiries.⁴⁶ And even though a note is entrusted to one upon condition and in violation thereof and without authority he transfers it to another in payment or as security for a debt, the transferee without notice is protected as a *bona fide* holder for value.⁴⁷ Again, under a “syndicate” and “bondholder’s” agreement a certain amount was agreed to be loaned as specified, secured by notes. The terms of the notes were to control the times of payment subject to certain contingencies, certain bonds were attached as collateral, but the notes were the principal obligations and the bonds merely incidents in the nature of security for their payments. The defendant had the privilege of substituting as collateral for the notes a certain new and contemplated issue of bonds; such new bonds, however, were not issued so that any covenant of the syndicate concerning them ever became the subject of default on the part of the plaintiffs. There was therefore no breach of condition or duty by the plaintiffs and no default by them which precluded enforcing the obligations owned by them and no reason why they should be held liable to defendants. Under a clause in the “syndicate” agreement in the event of the non-purchase of a certain waterworks system and non-payment of defendant’s note then the syndicate was to act as a unit for their mutual interests. The purchase not being made, the defendants urged that the loans could be enforced by the syndicate only after all the members thereof had voted to enforce them. It was held that the syndicate agreement was no bar to the action on the notes and was immaterial as a matter of defense.⁴⁸

§ 363. **Security for the performance of illegal contract.**—It is a good defense to an action by an indorsee against the indorser of a note, indorsed for the accommodation of the maker, that the indorsee received the note as security for the performance of an illegal contract between him and the maker.⁴⁹

⁴⁶ *Lee v. Whitney*, 149 Mass. 447, 21 N. E. 948. *Rapids Hydraulic Co.*, 18 N. Y. Supp. 783, aff’d 136 N. Y. 655, 32 N. E. 1076.

⁴⁷ *National Bank of St. Joseph v. Dakin*, 54 Kan. 656, 45 Am. St. Rep. 299, 39 Pac. 180. ⁴⁸ *Duncombe v. Bunker*, 2 Metc. (Mass.) 8; *Weimer v. Shelton*, 7 Mo. 237.

⁴⁹ *Coffin v. President &c. of Grand*

§ 364. Note secured by mortgage—Mortgagee against maker—Surety.—Where ordinarily a mortgagee cannot sue and obtain judgment on a note secured by collateral mortgage, except by foreclosure of the mortgage, if he, by his own act or neglect, deprives himself of the right to foreclose the mortgage, he at the same time precludes himself from a right of action upon the note. He will not be permitted, without the consent of the mortgagor, to release the mortgage in order to sue upon the note. He cannot waive the security and bring an action on the indebtedness.⁵⁰ In another case a mortgagee consented to the sale of the mortgaged property by the mortgagor, with the understanding between the mortgagee and the mortgagor and the purchaser that the purchaser should give his note to the mortgagor, with a given person thereon as surety for the purchase price of the property; that the mortgagor should indorse the note to the mortgagee, and that upon its payment it should be credited on the mortgage; and the sale was made, the note given and indorsed by the mortgagor to the mortgagee, in pursuance of such arrangement, the mortgagee taking the note before maturity and without notice of any defects in the property sold, it was held that in suit brought by the mortgagee on the note against the maker and the surety, a failure of consideration could not be set up as a defense.⁵¹

§ 365. Note secured by mortgage or other instrument—Bona fide holder—Pledgee.—It is held that the assignee of mortgages or other securities collateral to negotiable paper takes the collateral subject to defenses in a court of equity, although the paper secured is not subject to defenses at law.⁵² And as against a purchaser of a non-ne-

⁵⁰ *Hibernia Sav. & Loan Soc. v. Thornton*, 109 Cal. 427, 50 Am. St. Rep. 52 and note, 42 Pac. 447.

Examine *Savings Bank of San Diego County v. Central Market Co.*, 122 Cal. 28, 35, 54 Pac. 273; *Donaldson v. Grant*, 15 Utah 231, 241, 49 Pac. 779.

⁵¹ *Graham v. Cambell*, 105 Ga. 839, 32 S. E. 118.

⁵² *Illinois*.—*Towner v. McClelland*, 110 Ill. 542; *Miller v. Larned*, 103 Ill. 562 (holding also that rule does not apply to one pledging a note secured by mortgage not payable to

him); *Bryant v. Vix*, 83 Ill. 11 (exemption as to innocent holder does not attach to mortgage given to secure payment of note); *Haskell v. Brown*, 65 Ill. 29; *White v. Sutherland*, 64 Ill. 181; *Olds v. Cummings*, 31 Ill. 188.

Louisiana.—*Securities Co. v. Talbert*, 49 La. Ann. 1393, 22 So. 762; *Butler v. Slocomb*, 33 La. Ann. 170; *Rouigny v. Fortier*, 17 La. Ann. 121.

Massachusetts.—*Bacon v. Abbott*, 137 Mass. 397.

gotiable note and mortgage the equities of the maker against the payee are available against such purchaser.⁵³ It is also held to be no defense to an action on a note by the payee that the defendant delivered to a third person with the plaintiff's authority another note secured by chattel mortgage as security for the note in suit, and that such third person collected the collateral note by foreclosure where he had no authority from plaintiff to collect it.⁵⁴ And it has been decided that in this respect there is no distinction between mortgages on realty and those on personal property, as the privileged character of negotiable paper does not extend to the mortgage by which it is secured,⁵⁵ although it is held that the purchaser of negotiable notes secured by chattel mortgage may take free of defenses.⁵⁶

§ 366. **Same subject.**—In Wisconsin it is held that an ordinary promissory note secured by a real estate mortgage is negotiable, although it provides that on default in the payment of interest or on non-compliance with the conditions of the mortgage the whole principal shall, at the mortgagee's option, become due and payable. Such note and mortgage each relates to its own subject-matter and does not interfere with the other, even though they form parts of the same transaction, and covenants and conditions in the mortgage are simply agreements for the preservation of the security and are not intended to qualify or affect, and do not enter into the promises of the note or change it, or affect its negotiability, so that a transferee, by indorsement before maturity, takes the note free from all equities.⁵⁷

Ohio.—Bailey v. Smith, 14 Ohio St. 396.

South Carolina.—Dearman v. Trimmier, 26 S. C. 506, 2 S. E. 501.

That the real assignee fraudulently managed sale of property is a defense on a note secured by mortgage. Howard v. Ames, 3 Metc. (44 Mass.) 308.

Assignee when not *bona fide* holder—mortgage. Nashville Trust Co. v. Smythe, 94 Tenn. 513, 29 S. W. 903, 27 L. R. A. 663.

Where note secured by mortgage or deed of trust, purchaser not a *bona fide* holder. Humble v. Curtis, 160 Ill. 193, 43 N. E. 749.

⁵³ Walker v. Thompson, 108 Mich. 686, 2 Det. L. N. 987, 66 N. W. 584.

⁵⁴ St. Paul Co. v. Rudd, 102 Iowa 748, 71 N. W. 417. When no defense generally, see also Wendlebone v. Parks, 18 Iowa 546.

⁵⁵ Oster v. Mickley, 35 Minn. 245, 28 N. W. 710.

⁵⁶ Myers v. Hazard, 50 Fed. 156.

⁵⁷ Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146. The court, at pp. 160-162, per Winslow, J., says: "While we have considered this question as absolutely settled by the negotiable instruments law, it must not be supposed that we have failed to examine and

But while the assignee of a note secured by mortgage may hold un-

carefully consider the numerous cases cited by the appellants, mostly from western courts, as having some bearing upon this question. We have been unable to find that any of these cases really conflict with the general proposition laid down in the beginning, namely, the proposition that the ordinary provisions of a real estate mortgage requiring payment of taxes and other acts by the mortgagor for the preservation of the mortgaged property are not imported into the accompanying note simply because the papers are simultaneously executed as a part of the same transaction. A number of them are cases decided by the Kansas court of appeals, and are, in substance, to the effect that, where a bond or note in terms refers to the mortgage, and declares it to be 'a part of this contract,' and the mortgage contains covenants to pay taxes, insure, keep buildings in repair, and the like, and that the entire sum shall become due in case of default in any of such agreements, this renders the bond or note non-negotiable. Such are the cases of *Lockrow v. Cline*, 4 Kan. App. 716, 46 Pac. 720; *Chapman v. Steiner*, 5 Kan. App. 326, 48 Pac. 607, and *Wistrand v. Parker*, 7 Kan. App. 562, 52 Pac. 59. It goes without saying that such cases have no bearing on the present case, because here there is no clause in the note making the mortgage a part thereof, or adopting its provisions, except the provision authorizing the whole amount to be declared due upon certain contingencies. Another line of cases from Nebraska holds that where a mortgage pro-

vides that the mortgagor shall pay the taxes levied on the mortgagee for or on account of the mortgage, this agreement destroys the negotiability of the note, because it renders the amount uncertain. *Garnett v. Meyers* (Neb.), 94 N. W. 803; *Consterdine v. Moore* (Neb.), 96 N. W. 1021; *Allen v. Dunn* (Neb.), 99 N. W. 680. Such seems also to be the effect of the case of *Brooks v. Struthers*, 110 Mich. 562, 68 N. W. 272. Without stopping to consider whether these decisions should be approved or not, it is enough to say that they are not at all in conflict with the present decision. The agreement to pay taxes was to pay taxes which might be levied on the mortgagee, not the taxes on the mortgaged property; hence the agreement had no connection with the preservation of the security, and was construed by the courts as an agreement to pay an indefinite sum as a part of the note. In the cases of *Donaldson v. Grant*, 15 Utah 231, 49 Pac. 779, and *Gilbert v. Nelson*, 5 Kan. App. 528, 48 Pac. 207, notes containing stipulations very similar to those found in the present case are pronounced negotiable upon what seems to us very unsatisfactory reasoning, which we feel no inclination to follow, especially in view of the positive provisions of our Negotiable Instruments Law before cited. The cases of *Dilley v. Van Vie*, 6 Wis. 209, and *Elmore v. Hoffman*, 6 Wis. 68, are also cited as sustaining appellants' contention, but it is evident that they do not. In the *Dilley* case the note contained an express clause subjecting it to the provisions of another

affected by equities,⁵⁸ yet he is not a *bona fide* holder, as between himself and a prior assignee, where he became the purchaser of one or more of a series of mortgage notes transferred with a preference lien contract.⁵⁹ Where, however, a bank in good faith takes a transfer of a certificate as security for money loaned at the time it acquires a title to the certificate as against the plaintiff as security for the money so loaned upon repayment of the money and interest, the bank would be obligated to return the certificate to the party entitled. The doctrine of estoppel also applies to preclude the real owner from asserting his title against a *bona fide* purchaser from one upon whom the plaintiff has conferred apparent ownership of a non-negotiable chose in action and apparent absolute authority to convey.⁶⁰ Again, it is considered in certain jurisdictions that the collateral is not only negotiable but is free from equities existing in behalf of the mortgagor.⁶¹

agreement, made on the same day, by which it appeared that the payment was subject to certain equities between the parties. The clause was rightly held to deprive the paper of its negotiable character. In the Elmore case it was held that a collateral agreement made between the parties contemporaneously with a note, by which the payee agreed to give day of payment on the note till the happening of a certain named contingency, was admissible in evidence to defeat an action on the note in the hands of one who purchased the note with notice of the contemporaneous agreement. We hold, therefore, that under the present Negotiable Instruments Law the note in the present case is negotiable, and in so holding it is evident that the cases of *Continental Nat. Bank v. McGeoch*, 73 Wis. 332, 41 N. W. 409, and *W. W. Kimball Co. v. Mellow*, 80 Wis. 133, 48 N. W. 1100, are overruled so far, at least, as they hold that such agreements create an uncertainty in the time of payment."

Examine § 368 herein.

⁵⁸ When one is a *bona fide* holder

of negotiable note secured by mortgage, see *Humble v. Curtis*, 160 Ill. 193, 43 N. E. 749; *Christianson v. Farmers' Warehouse Assn.*, 5 N. D. 438, 32 L. R. A. 730, 67 N. W. 300.

⁵⁹ *Nashville Trust Co. v. Smythe*, 10 Pick. (94 Tenn.) 513, 29 S. W. 903.

⁶⁰ *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 44-46.

⁶¹ *Alabama*.—*Thompson v. Maddux*, — Ala. —, 23 So. 157; *Hart v. Adler*, 109 Ala. 467, 19 So. 894; *Spence v. Railway Co.*, 79 Ala. 576.

Indiana.—*Gabbert v. Schwartz*, 69 Ind. 450.

Michigan.—*Cox v. Cayan* (Mich.), 76 N. W. 96; *Barnum v. Phenix*, 60 Mich. 388, 27 N. W. 577; *Helmer v. Krolick*, 36 Mich. 371.

Missouri.—*Borgess Inv. Co. v. Vette*, 142 Mo. 560, 44 S. W. 754; *First Nat. Bank of Mauch Chunk v. Rohrer*, 138 Mo. 369, 39 S. W. 1047; *Mayes v. Robinson*, 93 Mo. 114, 5 S. W. 611; *Hagerman v. Sutton*, 91 Mo. 519, 4 S. W. 73.

New York.—*Gould v. March*, 1 Hun (N. Y.) 566.

United States.—*Carpenter v. Longan*, 16 Wall (U. S.) 271; *Swett v.*

So the terms of a contract or agreement may be such that the holder in pledge of a note and mortgage will be a *bona fide* holder for value with the rights and privileges thereof.⁶²

§ 367. **Same subject—Knowledge or notice.**—In a Nebraska case it is decided that while a note otherwise negotiable is not rendered non-negotiable merely by a provision for or reference to collateral security, still when executed together and as part of one transaction, a note and a mortgage securing it are to be construed together, and as one instrument; so that provisions as to the terms and manner of payment contained in the mortgage may be such as to make the note non-negotiable as to all persons chargeable with notice thereof; and, although the note does not refer to the mortgage, indorsees who take with notice of its provisions are bound thereby, as where the plaintiff obtained the mortgage at the same time he acquired the note.⁶³ So

Stark, 31 Fed. 858 (declining to follow the rule of the state courts in an Illinois case).

⁶² Connecticut Trust & Safe Deposit Co. v. Fletcher, 61 Neb. 166, 172, 85 N. W. 59, Norval, C. J., said: "The contract between the loan company and the trust company, * * * made the trust company the holder for the mortgage and note in trust as security for the payment of the debenture bonds of the loan company. The note and mortgage being held in pledge, that fact entitled the holder, the trust company, to all rights and privileges of a holder for value before maturity. Koehler v. Dodge, 31 Neb. 328. It is also doubtless true that a transfer of collateral security may be made to a third party as trustee by agreement. City Bank v. Perkins, 29 N. Y. 554. But it is claimed by defendant that because the agreement between the two companies obligated the loan company, if the note and mortgage were not paid at maturity, to take them up and substitute others in their place, the transfer was conditional, and

for that reason it could not be considered a holder for value. We cannot so conclude from that fact. The condition was not complied with and the trust company was entitled to hold the papers and to proceed to collect the debt from the mortgagor, exactly as it would have been entitled to collect any note held as collateral security, if the loan secured by them was not paid. Hence we cannot reach the conclusion that the condition was such as to make the trust company any less a holder for value than would be the holder of any paper held as collateral security. The evidence fails to show any act or agreement on the part of the trust company from which a legal conclusion can be reached, that either the loan company or Foss was its agent to collect the principal of this note. The prior foreclosure was not a bar to this suit. Todd v. Cromer, 36 Neb. 430."

⁶³ Roblee v. Union Stockyards Nat. Bk. (Neb., 1903), 95 N. W. 61, citing on the first point, Fleckner v. United States Bk., 8 Wheat. (21 U. S.) 338, 5 L. Ed. 631; Knipper v.

under another decision in that state a note and a mortgage executed at the same time and as part of the same transaction will be construed together and the purchaser of the note and the mortgage will be charged with knowledge of the contents of the mortgage, and such a note being non-negotiable the holder or transferee is in no better position than the payee in the note.⁶⁴ But where a note and mortgage were deposited as collateral security for an indorsee's debt, said indorsee being the husband of the maker, the fact that the pledgee had knowledge of the character of the note as accommodation paper and that the indorsement was without consideration, will not help a defendant who had also indorsed said note for accommodation.⁶⁵

§ 368. Transferee of note and mortgage—Payment of or collateral security for pre-existing debt.—It is held that a transferee of a note and mortgage in payment of pre-existing debt takes free of defenses,⁶⁶ and of collateral vendor's liens.⁶⁷ It is also declared that "the question whether a mortgagee, in a mortgage given for the security of a pre-existing debt, is to be regarded as a purchaser for a valuable consideration, has been decided differently by different courts."⁶⁸ But where a note and mortgage given to secure a payment of part of the

Chase, 7 Iowa 145; *Towne v. Rice*, 122 Mass. 67; *Blumenthal v. Jassoy*, 29 Minn. 177, 12 N. W. 517; *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37; *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356; *Heard v. Dubuque County Bk.*, 8 Neb. 10, 30 Am. Rep. 811. Citing to the second point, *Lincoln Nat. Bk. v. Perry*, 66 Fed. 887, 14 C. C. A. 273; *Phelps v. Mayers*, 126 Cal. 549, 58 Pac. 1048; *Wood v. Ridgeville College*, 114 Ind. 320, 16 N. E. 619; *Muzzy v. Knight*, 8 Kan. 456; *Cabbell v. Knote*, 2 Kan. App. 68, 43 Pac. 309; *American Exch. Bk. v. Blanchard*, 7 Allen (89 Mass.) 333; *Goodenow v. Curtis*, 18 Mich. 298; *Brownlee v. Arnold*, 60 Mo. 79; *Edling v. Bradford*, 30 Neb. 593, 46 N. W. 836; *Hill v. Huntress*, 43 N. H. 480; *Berry v. Wisdom*, 3 Ohio St. 241; *Continental Nat. Bk. v. Wells*, 73 Wis. 332, 41 N. W. 409.

See also *Garnett v. Myers* (Neb., 1903), 94 N. W. 803, rev'g 91 N. W. 400.

Where note transferred as independent instrument, purchaser is put on guard. *Haskell v. Brown*, 65 Ill. 29.

⁶⁴ *Allen v. Dunn* (Neb., 1904), 99 N. W. 680.

⁶⁵ *German American Saving Bank v. Burlington & Hanna* (Iowa, 1904), 100 N. W. 56, 59, relying upon *Iowa State Bank v. Mason Hand Lathe Co.*, — Iowa —, 90 N. W. 612.

⁶⁶ *Bailey v. Seymour*, 42 S. C. 322, 20 S. E. 62 (the question was as to estoppel by recital in a collateral mortgage).

⁶⁷ *Pullen v. Ward*, 60 Ark. 90, 28 S. W. 1084.

⁶⁸ *Work v. Brayton*, 5 Ind. 396, quoted in *Straughan v. Fairchild*, 80 Ind. 598, 600.

purchase price of a tract of land, are assigned as collateral security for a lesser debt, without notice to the assignees of a guaranty by the mortgagee that the land will cut a certain amount of timber, and of his agreement to refund a thousand feet for all shortage, the assignees will be protected as *bona fide* holders of the securities as against any claim under the guaranty to the amount of their debt only.⁶⁹

§ 369. Receiving or surrendering collateral—Exhausting collateral.—It is decided that the fact, that as appears on the face of a note, collateral security was given for its payment, does not destroy negotiability. The giving of such collateral in no wise interferes with the necessary characteristics of the instrument as a promissory note. The promise to pay is still certain and for a certain amount.⁷⁰ Nor are the rights of the holder of a negotiable note, taken in the usual course of business, before it was due, impaired by his holding collateral security for its payment.⁷¹ And the holder who transfers the note will not be discharged, although the indorsee takes security from the maker, and afterward surrenders it.⁷² So if two partners give a joint bill of exchange for a partnership demand and when the bill becomes due, the holder takes the separate bill of the one, the other is discharged.⁷³ Nor is it any defense to a suit on a promissory note that the plaintiff holds the note of a third party as collateral security for the note sued on, and that the maker of the collateral note is solvent and the collateral of greater value than the amount due on the note in suit. Such a creditor cannot be compelled to exhaust the collateral security as a condition precedent to suing the debtor on his note.⁷⁴ Again, if land is conveyed to the payee to secure a note, and he gives his bond providing for a reconveyance upon payment of the note, and the payee devised the land without specifying that the note was to be discharged thereby and the intent to have such devise operate as a release or extinguishment of the debt was not apparent from the words of the will, still extrinsic evidence to show such intent was admitted in connection with the surrounding circumstances and it was held that the debt

⁶⁹ *Anderson v. Bank*, 98 Mich. 543, 57 N. W. 808.

⁷⁰ *Mumford v. Tolman*, 54 Ill. App. 471, 478.

See § 366 herein.

⁷¹ *Bank of Woodstock v. Kent*, 15 N. H. 579.

⁷² *Pitts v. Congdon*, 2 N. Y. 352.

⁷³ *Evans v. Drummond*, 4 Esp. 89,

91.

⁷⁴ *Carson v. Buckstaff*, 57 Neb. 262, 77 N. W. 670, 16 Bkg. L. J. 103.

was discharged.⁷⁵ So where shares of stock are given as collateral security, and there is no request by defendant that they should be sold, the plaintiff is not obligated to sell, even though, if sold within a reasonable time after maturity of the note, they would have been sufficient to pay the note, and such non-sale does not preclude a recovery.⁷⁶ And in equity if the holder surrenders collateral to the principal debtor it will discharge the surety to the amount of property surrendered, where such property given as pledge or security for the debt is parted with against the will of the surety or without his knowledge.⁷⁷ It may also operate to discharge the indorser of another collateral note, whose indorsement was obtained by fraud.⁷⁸

⁷⁵ *Holmes v. Holmes*, 36 Vt. 525.

⁷⁶ *Wood Sons Co. v. Schaefer*, 173 Mass. 443, 445, 53 N. E. 881.

⁷⁷ *Kirkpatrick v. Howk*, 80 Ill. 122.

⁷⁸ *Haas v. Bank*, 41 Neb. 754, 60 N. W. 85. In this case the Bank of O. indorsed to the Bank of C. certain promissory notes as collateral security for an indebtedness incurred in favor of the Bank of C. Among these was a note of H., upon which suit was brought. H. claimed that the note had been procured from him by the Bank of O. by fraud, and the evidence tended to prove that fact. It was decided: (1) That in the action upon the note H. could not require the Bank of C. to first exhaust its other collateral; (2) that the fraud being established, the Bank of C. was only entitled to recover to the extent of the unpaid portion of the indebtedness for which the note was pledged; (3) the Bank of C., having surrendered one of the collateral notes and taken in exchange other notes, secured by mortgage, drawn to the order of itself, it was bound to account as if the original note had been paid in full. The court, per Irvine, C., said: That it was "well established that a creditor holding two or more securities for

the same debt may proceed to enforce either or all of them, and will not, as a general proposition, be required to proceed in any particular order. * * * 'A surety cannot compel the holder to proceed against others before proceeding against himself, and exhaust such other remedies as he may have (quoting from *Proul v. Dorner*, 79 Ill. 331). * * * There is very respectable authority to the effect that it is no defense to a note that it had been pledged with other securities equal in amount, which securities had been, by the pledgee, exchanged and ultimately found worthless, unless it were also shown that the exchange caused a loss to the owner of the collateral (*Girard Fire and Marine Ins. Co. v. Marr*, 46 Pa. St. 504); but we think that the weight of authority is to the effect that if a pledgee, without the consent of the debtor, renews or extends a note pledged as collateral, or surrenders such note and takes new security, he must account to his debtor as if he had collected it in full (*Gage v. Punchard*, 6 Daly [N. Y.] 229; *Nexsen v. Lyell*, 5 Hill [N. Y.] 466; *Southwick v. Sax*, 9 Wend. [N. Y.] 122; *Depuy v. Clark*, 12 Ind. 427). It is quite well set-

§ 370. **Paper given or indorsed for specific purpose—Principal and agent.**—Although a principal may, under certain circumstances, become liable on negotiable paper where his agent has exceeded his authority, yet the rule has no application when the circumstances are such as necessarily put the holder upon inquiry; as where the note was taken as security for a pre-existing debt and the holder knew that the principal had assigned all his property for the benefit of creditors and also that the note showed that it was issued by the agent to himself that it was used for his personal benefit, and in such case the holder being put upon inquiry was chargeable with the equities attached to the note.⁷⁹ Again, if the maker who was also the payee and

tied that where a note is valid as between the original parties, the pledgee may recover the whole amount of the note, retaining any surplus as trustee for the party beneficially entitled; but where the note is invalid as between the original parties, the pledgee may recover only the amount of his advances, provided there be no other party in interest (*Wiffen v. Roberts*, 1 Esp. [Eng.] 261; *Allaire v. Hartshorne*, 21 N. J. Law 665; *Chicopee Bank v. Chapin*, 49 Mass. 40; *Union Nat. Bank v. Roberts*, 45 Wis. 373)."

⁷⁹*Randall v. Rhode Island Lumber Co.*, 20 R. I. 625, 40 Atl. 763, the court (at p. 628), per Stiness, J., said: "The plaintiff knew that, both at the date of the note and at the time of the transfer to him, all of the property of the company was in the hands of an assignee for the benefit of creditors. It could not have had assets in its hands with which to make payment, and the testimony shows that it did not have any. The plaintiff, as a business man engaged in banking, must have known that under such circumstances negotiable paper could not be issued in the ordinary course of business. The company was not in condition to do ordinary business.

The plaintiff testified that he knew the business of the company had stopped; but it appears that in February, 1894, without assets, stock or supplies, except what was in the hands of the assignee, business had been resumed, in a small way, in the company's name. The fact, however, that the plaintiff knew that all the assets of the company were in the hands of an assignee was sufficient to put him upon inquiry. Moreover, the note showed that it was issued by the treasurer to himself, which has been held to be enough to put a holder upon inquiry as to the authority to issue it, when it is used for the personal benefit of the agent. *Chemical Bank v. Wagner*, 93 Ky. 525; *West Bank v. Shawnee Bank*, 95 U. S. 557; *Wilson v. Metropolitan R. R. Co.*, 120 N. Y. 145; *Clafin v. Farmers Bank*, 25 N. Y. 293. The principle of these cases, and many others which might be cited to the same effect, is that the paper shows upon its face that the agent, in making it, is dealing with himself, and the holder knows that the agent is not using the paper in the ordinary course of business to pay a debt of the principal, but for the agent's own debt, and hence that the holder is bound to

pledgor of certain notes secured to the pledgee by a deed of trust is entrusted with such notes for a specific purpose, but violates the confidence imposed and assigns said notes before maturity as collateral security for a *bona fide* debt, the latter transferee holds *bona fide* as against secret equities of the pledgee.⁸⁰ So where an indorsee receives notes as collateral for money due and some of the notes are past due when taken by said holder, the defense is available as to the payee and the first indorser that such notes were indorsed in blank for collection only and delivered to the indorsee without authority to otherwise use them.⁸¹ This subject is, however, more fully considered in another chapter.⁸²

§ 371. Defenses subsequent to indorsement—Bona fide holders.

Equities existing between the original parties to a promissory note, which originated subsequent to the indorsement thereof to the holder as collateral security, are not available by the maker in an action by the indorsee on the note.⁸³

§ 372. Transferee after maturity—Pledgee.—The rule that the transferee of negotiable paper after maturity acquires nothing but the actual right and title of the transferor and takes the paper subject to equities between the maker and the payee has no application to an indorsee who takes the paper from the pledgee after it is due, without actual notice of equities or that the note was held merely as collateral between the payee and his pledgee.⁸⁴ And if a note is indorsed as collateral security for a precedent indebtedness by the payee to the indorsee after maturity, it is not subject to the plea of failure of consideration in favor of the maker.⁸⁵

§ 373. Pledgor and pledgee—Laches, negligence or tortious acts—Statute limitations.—That a pledgee may become liable through his gross negligence or by his tortious dealings with the pledge where the pledgor is injured thereby and that the pledgee of negotiable paper

inquire into the agent's authority. This is a sound and necessary principle."

⁸⁰ First Nat. Bk. of Joliet v. Adam, 138 Ill. 483, 28 N. E. 955.

⁸¹ Mayfield Grocer Co. v. Andrew Price & Co. (Tex. Civ. App., 1906), 95 S. W. 31.

⁸² See Chap. XVI, §§ 379-392 herein.

⁸³ Becker v. Sandusky City Bank, 1 Minn. 311 (Gil. 243).

⁸⁴ Young Men's Christian Ass'n Gymnasium Co. v. Rockford Nat. Bank, 179 Ill. 599, 54 N. E. 297.

⁸⁵ Rohde v. Lodge, 15 Tex. 446.

as collateral security is bound to use ordinary diligence in preserving the legal validity of the pledge, and is answerable for a loss through a corresponding degree of negligence to the extent of such loss, are propositions well established.⁸⁶ It has been held also that where, by the negligence of the pledgee, the collection of collateral securities has been lost by operation of the statute of limitations, and such statutory defense has become perfect, the pledgor may, by a counterclaim, recover the value of his collateral, even though it be not known that his debtor will, when sued on such collateral, plead the statute in defense.⁸⁷

§ 374. **Priority of transfer; different notes.**—If a creditor, holding his debtor's note and also the note of another person as collateral, transfers them to different persons, after the notes are due, the rights of the transferees will depend on the priority of the transfers. A first transfer of the collateral operates to extinguish the original debt *pro tanto*, and the party taking a subsequent transfer of the original note takes it subject to a credit *pro tanto*. But, if the original note is first transferred, the collateral will follow it into whomsoever hands it passes, being subject in them to any defense the maker might have made in first hands.⁸⁸

§ 375. **Renewals—Continuance of security—Extinguishment of debt.**—Where collateral to secure a note is placed in the hands of the creditor and the note is renewed at the same rate of interest with the same parties, the debt is the same and the collateral security remains as securing it.⁸⁹ So it is said in a Maryland decision that: "Wherever collateral security is given for the payment of a debt, the collateral will continue as a security until the debt is satisfied, unless both the parties to the original contract agree to its surrender or the pledgee in some other way discharges or releases it. If the debt be evidenced by

⁸⁶ Citing *Coleb. Coll. Sec.*, § 114 377, 51 N. W. 162, 35 Am. St. Rep. and notes; *Lamberton v. Windom*, 313; *McQueen's Appeal*, 104 Pa. St. 12 Minn. 232 (Gil. 151), 90 Am. Dec. 595, 49 Am. Rep. 592; *Miller v. 301; Jemison v. Parker*, 7 Mich. 355; *Bank*, 8 Watts 192, 34 Am. Dec. 451, *Griggs v. Day*, 136 N. Y. 152, 32 N. note. E. 612, extended note, 32 Am. St. Rep. 718; *Cal. Civ. Code*, § 1714. ⁸⁸ *Ware v. Russell*, 57 Ala. 43, 29 Am. Rep. 710. ⁸⁹ *Partridge v. Williams*, 72 Ga. Brownstone (Cal. 1899), 56 Pac. 468, 807. citing *Bank v. O'Connell*, 84 Iowa

a promissory note and upon the maturity of that note the parties intend by a renewal merely to extend the time for payment and nothing more, then a simple renewal so made will not extinguish the original debt.⁹⁰ The same debt will still remain. Consequently, the collateral pledged for it in the first instance will not be released where the renewal transaction is, and was meant by both parties to be, a mere extension of the time for payment.⁹¹ It equally follows that the *ex parte* unexpressed intention of the pledgor that the collateral shall not apply to and secure a renewal which is, in fact, a mere extension of the time for payment, and not an extinguishment of the original debt, cannot defeat the right acquired by the pledgee under the contract made by both of them when the debt was created. The right so acquired is the right of a *bona fide* holder for value.⁹² And it is a right to retain the collateral until the debt shall be paid or extinguished.⁹³ And in a Wisconsin case a note was indorsed in blank and had been deposited with a person for safe keeping and he gave plaintiff the note as collateral security for borrowed money such pledgee receiving the same in good faith without knowledge of defects in the title of the pledgor. When the note became due the other collaterals in the pledgee's hands were of sufficient value to discharge the indebtedness but it was not discharged. Thereafter the pledgor obtained other loans from the pledgee agreeing that all collaterals in the latter's hands should remain as security for the last as well as for the preceding loans. Subsequently the makers paid the pledgor the amount of the note and took his receipt upon his claim that the note had been mislaid and that he would send it when found. The pledgor became insolvent and the collaterals were insufficient to satisfy his indebtedness to the pledgee. It was decided that the latter might apply the other collaterals to the payment of the second loan and hold the note in question to secure the first for which it was pledged before its maturity.⁹⁴ Under a Maine decision the defendant signed his name on the back of a note at its inception and before its negotiation by the payee, and his signature was above the indorsement of the payee, and the note was discounted by the plaintiff in the regular course of business for its customer, the payee, and without knowledge that the true

⁹⁰ Citing *Flanagan v. Hambleton*, 54 Md. 222.

⁹¹ Citing 3 Rand. Com. Pa., § 1371.

⁹² Citing 1 Danl. Neg. Inst., § 824.

⁹³ *Williams v. National Bank of Baltimore*, 72 Md. 441, 20 Atl. 191.

⁹⁴ *Strong v. Bowes*, 102 Wis. 542, 78 N. W. 921, a question of application of payments.

facts and relations of the parties were otherwise than as disclosed by the note itself. This note was a second renewal of a note of like tenor, by the same parties and in the same order. Upon its maturity a renewal note was executed except that it did not bear the name thereon of the defendant and the holder was requested to continue to hold the note as collateral security for the new note and it was held that the plaintiff could do this without thereby releasing the defendant from the liability which it had assumed as indicated by the note.⁹⁵

§ 376. **Extent of recovery—Bona fide holder.**—Upon the question of the extent of recovery by a *bona fide* holder upon a note held by him as collateral security the general rule seems to be that his recovery is limited to the extent of the amount due on the debt, claim, advances, payments or loan made, and which it was intended to secure by such collateral.⁹⁶ So a party receiving negotiable paper as collateral secur-

⁹⁵ *Merchants' Co. v. Jones*, 95 Me. 335, 50 Atl. 48.

⁹⁶ *Arkansas*.—*Brown v. Callaway*, 41 Ark. 418 (may recover not exceeding amount).

Georgia.—*Laster v. Stewart*, 89 Ga. 181, 15 S. E. 42; *Partridge v. Williams*, 72 Ga. 807; *Exchange Bank v. Butner & Edgeworth*, 60 Ga. 654 (*bona fide* holder to extent of money loaned); *Bealle v. Bank*, 57 Ga. 274.

Illinois.—*Lull v. Stone*, 37 Ill. 224.

Indiana.—*Valette v. Mason*, 1 Ind. 288 (can only recover debt actually due).

Iowa.—*First National Bank v. Werst*, 52 Iowa 684, 3 N. W. 711 (but this was an accommodation note indorsed after maturity).

Louisiana.—*Gardner v. Maxwell*, 27 La. Ann. 561.

Maine.—*Smith v. Hiscock*, 14 Me. 449.

Massachusetts.—*Stoddard v. Kimball*, 6 Cush. (Mass.) 469; *Chicopee Bank v. Chapin*, 8 Metc. (Mass.) 40.

Missouri.—*International Bank v.*

German Bank, 71 Mo. 183, 36 Am. Rep. 408.

Montana.—*Yellowstone Nat. Bank of Billings v. Gagnon*, 19 Mont. 402, 48 Pac. 762.

Nebraska.—*Barmby v. Wolfe*, 44 Neb. 77, 62 N. W. 318.

Nevada.—*Haydon v. Nicoletti*, 18 Nev. 290, 3 Pac. 473.

New York.—*Manhattan Sav. Inst. v. New York Nat. Exch. Bank*, 170 N. Y. 58, 88 Am. St. Rep. 147, 59 N. Y. Supp. 51, aff'g 53 App. Div. 635 (to extent of security for advance); *Mechanics', etc., Bank v. Livingston*, 4 Misc. (N. Y.) 257, 23 N. Y. Supp. 813 (but note was for accommodation).

North Carolina.—*Kerr v. Cowen*, 17 N. C. (2 Dev. Eq. 356) 356.

Ohio.—*Sutton v. Kautzman*, 6 Ohio Dec. 910.

Tennessee.—*Memphis Bethel v. Bank*, 101 Tenn. 130, 45 S. W. 1072 (to extent of amount justly due on debt secured).

Texas.—*Wright v. Hardie*, 88 Tex. 653, 32 S. W. 885; *Texas Banking & Insurance Co. v. Turnley*, 61 Tex. 365.

ity is entitled to be protected as a *bona fide* holder to the same extent as one who becomes an absolute owner and may sue in his own name as the real party in interest. The only difference between the rights of an absolute *bona fide* owner for value and a *bona fide* holder as collateral security, as against the maker, is that the former may recover in full, and the latter, if there be equities, is restricted to the extent of his advances.⁹⁷ Again the extent of recovery is held to be the amount of the original pledgee's debt to his transferee; not otherwise paid or realized from other securities;⁹⁸ or an amount only which is not beyond what will cover indorsements to be made and against which it was designed as security.⁹⁹ So the balance actually due from the payee to creditors, where he holds as collateral in trust for the payment of said debts, is the limit of recovery.¹⁰⁰ Recovery is also limited to the extent of the advances made, coupled with interest, also with costs of suit where there is a judgment in case of a pledge by the payee of accommodation paper as collateral. And as against an assignee purchaser, of a judgment recovered by the pledgee defenses and equities are available to limit a recovery to an amount not greater than as above stated.¹⁰¹ It is further determined that a pledgee in good faith and

Wisconsin.—Union Nat. Bank v. Wis. 615; Watson v. Russell, 3 Best Roberts, 45 Wis. 373; Stevens v. & S. 34; Wiffen v. Roberts, 1 Esp. Campbell, 13 Wis. 375; Bond v. 261.
Wiltse, 12 Wis. 611.

Examine Steere v. Benson, 2 Ill. App. 560.

Iowa.—Mahaska County State Bk. v. Crist, 87 Iowa 415, 420, 54 N. W. 450.

Kansas.—Claffin v. Rowlinson, 2 Kan. App. 82, 43 Pac. 304.

Louisiana.—Mechanics' Building Assn. v. Ferguson, 29 La. Ann. 548; Citizens' Bank v. Payne, 18 La. Ann. 222, 89 Am. Dec. 650.

Nebraska.—Holmer v. Commercial Bank, 28 Neb. 474, 44 N. W. 482.

New Jersey.—Allaire v. Hartshorne, 21 N. J. Law 665, 47 Am. Dec. 175.

New York.—Fourth Nat. Bank v. Snow, 3 Daly (N. Y.) 167; Pearce & Miller Eng. Co. v. Broner, 10 Misc. (N. Y.) 502, 31 N. Y. Supp. 195.

Wisconsin.—Curtis v. Mohr, 18

⁹⁷ Hayden v. Nicoletti, 18 Neb. 290, 295, per Leonard, J.

⁹⁸ Kinney v. Kruse, 28 Wis. 183 (note here was put into circulation by fraud).

⁹⁹ Williams v. Smith, 2 Hill (N. Y.) 301.

¹⁰⁰ *California*.—Bell v. Bean, 75 Cal. 86; Vaulieu v. Mason, 1 Cart. (Ind.) 288; Valette v. Mason, 1 Smith (Ind.) 89.

Massachusetts.—Williams v. Cheney, 3 Gray (Mass.) 215.

Minnesota.—St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 48 N. W. 526.

Missouri.—Crawford v. Spencer, 92 Mo. 498, 4 S. W. 713.

Texas.—Wright v. Hardie, 88 Tex. 653, 32 S. W. 885.

¹⁰¹ Blydenburgh v. Thayer, 3 Keyes (N. Y.) 293, 1 Abb. Dec. (N. Y.) 156, 1 Transcr. App. (N. Y.)

for value of promissory notes transferred to him before maturity can prove them for their full amount against the assets in bankruptcy of the promisors, whatever may have been the equities between the promisors and the pledgor, but if there are such equities which would prevent the pledgor from proving, then the pledgee can receive in dividends only the amount for which he holds the notes in pledge, and where such a pledgee, after the bankruptcy of the promisors, settled with the pledgor who was insolvent, and in the arrangement took the notes as payment for a certain sum and the arrangement appeared to have been made in good faith, it was held that he might still prove for the face of the notes and receive dividends to the extent of the sum paid for them.¹⁰² A *bona fide* holder for value may, however, recover at least the amount actually paid or credited on the faith of the paper, although bad faith existed in obtaining the paper.¹⁰³ So the entire amount is recoverable when the note is pledged as security on an advance of money equal thereto.^{103*} Money overdrawn upon the pledge should, however, be excluded.¹⁰⁴ Notwithstanding the first stated rule it is also decided that as between the maker and the transferee from the payee the amount due when the note was given cannot be inquired into.¹⁰⁵ And if a negotiable note has been indorsed and transferred, *bona fide* before its maturity, as collateral security for a demand short of its nominal value, payment afterward by the maker to the payee cannot be given in evidence in an action thereon against the maker by the indorsee to reduce the amount of the judgment to the sum then actually due to him.¹⁰⁶ Under other decisions the whole sum due on the note, even though it is in excess of the demand or face

221, 34 How. Pr. (N. Y.) 88. See *Mechanics' & Traders' Bank v. Barnett*, 27 La. Ann. 177; *Mechanics' & Traders' Bank v. Livingston*, 4 Misc. Rep. 257, 23 N. Y. Supp. 813; *Holeman v. Hobson*, 8 Humph. (Tenn.) 127; *Wiffen v. Roberts*, 1 Esp. 261.

But see *Fowler v. Strickland*, 107 Mass. 552.

¹⁰² *Ex parte Kelly*, 1 Low (U. S. Dist. Mass.) 394, Fed. Cas. No. 7,681.

¹⁰³ *Beckhaus v. Commercial Nat. Bank*, — Pa. —, 12 Atl. 72.

^{103*} *Crooke & Fowkes v. Mali*, 11 Barb. (N. Y.) 205.

¹⁰⁴ *Mechanics' & Traders' Bank v. Barnett*, 27 La. Ann. 177.

¹⁰⁵ *McCrary v. Jones*, 36 S. C. 136, 15 S. E. 430 (the syllabus in this case is: "Where A holds the legal title to land which is a security for all indebtedness of B to him, and B gives his note for an amount due, and this note is transferred by A to C, in action which involves a specific performance between A and B, no inquiry should be allowed as between B and C of the real amount due when such note was given").

¹⁰⁶ *Gowen v. Wentworth*, 5 Shep. (17 Me.) 66.

of the note, may be recovered.¹⁰⁷ If, however, such recovery is had of the whole amount the surplus over and above the claim or amount due is, it is decided, held in trust for the parties entitled.¹⁰⁸ In Nebraska it is determined that if notes, accompanied by real estate mortgages by which the payments of the notes are secured, are pledged as collateral security for the payment of a debt and the mortgages are foreclosed by the pledgee, in actions to which the pledgor is not made a party, and the pledgee at the foreclosure sales purchases the properties, if it appear that such action was with the intent to acquire complete titles thereto, the pledgor may affirm the sales and demand credit on the principal debt for the amounts bid and expenses of the foreclosures, and if said sums in the aggregate exceed the debt may recover the excess.¹⁰⁹ Again, if a person holding a note as collateral to a debt due him transfers it so that in legal presumption he receives a benefit therefrom, then, unless he regains it and has it ready to deliver to the defendant, his recovery will be limited or defeated according as the paper transferred may be for a less or greater sum than the debt intended to be secured; as the creditor who receives a note as collateral security and transfers it to another must be understood to have elected that mode of payment and have made the security a substitute for the debt.¹¹⁰ So a note which is taken when overdue as collateral security for a smaller debt may be reduced by the amount of any payment specially proven to have been made to the assignor or by the amount of a payment where the assignor had declared that the note

¹⁰⁷ *Tooke v. Newman*, 75 Ill. 215; *Smith v. Isaacs*, 23 La. Ann. 454 (may recover the whole amount, notwithstanding equities between maker and payee collateral security holder stands the same as any innocent third party holding negotiable paper); *Gowen v. Wentworth*, 5 Shep. (17 Me. 66, 69) (notwithstanding the note pledged as collateral security was of greater value than the amount of the liability first assumed the plaintiff has a right to recover and receive in his own name the amount of the note (Story on Bailments, § 321) and he is not limited to the sum for which it was pledged"); *Berenbroick v. Stephens*, 8 Daly (N. Y.) 249; *Bank v. Cham-*

bers, 11 Rich. Law (S. C.) 657 (may recover amount of note against parties liable when note taken, even though he has not yet sustained actual loss nor given credit to his immediate debtor).

¹⁰⁸ *Exchange Bank v. Butner & Edgeworth*, 60 Ga. 654; *Tarbell v. Sturtevant*, 26 Vt. 513 (may recover whole amount, but holds the surplus after payment of his claim as trustee of the payee or his assignee). *Sawyer v. Cutting*, 23 Vt. 486 (may recover full amount, although note was collateral security for payment of less sum).

¹⁰⁹ *Ross v. Barker*, 58 Neb. 402, 78 N. W. 730.

¹¹⁰ *Cocke v. Chaney*, 14 Ala. 65, 67.

was paid.¹¹¹ Under a Vermont decision if the payee himself paid the debt secured and received the note he cannot recover thereon, for his own benefit, no consideration having passed between said payee and the defendant, where they had consented to its transfer to a third person as collateral security.¹¹² And a second assignee, to whom the note and mortgage are assigned by the mortgagee with notice of the guaranty has the right to pay the balance due the first assignees, and, on receiving an assignment from them and their securities, will be subrogated to their rights as a *bona fide* holder to the amount paid, but no further.¹¹³

§ 377. Same subject—Collateral security for pre-existing debt.—

The extent to which a recovery may be had upon a note taken as collateral security for a pre-existing debt must necessarily rest largely upon the validity of such contract as against defenses and equities.¹¹⁴ It is held, however, that paper so taken is valid in the *bona fide* indorsee's hands to the extent of his claim.¹¹⁵

¹¹¹ *Bound v. Fitzpatrick*, 8 Gray (74 Mass.) 536. See *First National Bank v. Werst*, 52 Iowa 684, 3 N. W. 711 (purchaser can recover only so much of the debt as was unpaid).

¹¹² *Sargeant v. Sargeant*, 18 Vt. 371.

¹¹³ *Anderson v. Bank*, 98 Mich. 543, 57 N. W. 808.

¹¹⁴ See §§ 246-249, 353-355 herein.

¹¹⁵ *Yellowstone Bank v. Gagnon*, 19 Mont. 402, 405-407, 48 Pac. 762, 61 Am. St. Rep. 520, 44 L. R. A. 243. In this case the court, per Hunt, J., quotes from and considers certain text-books as follows: "Daniel on Negotiable Instruments (§ 832a) expresses the rule in this language: 'When it appears that the bill or note was acquired by the holder as collateral security for a debt, and he is deemed entitled to recover upon it, he is still limited to the amount of the debt which it secures, if there be a valid defense against his transferor being regarded as, at all events, a *bona fide* holder, and en-

titled to stand upon a better footing only *pro tanto*. Thus, such a holder could recover against an accommodation party no more than the consideration actually advanced, but, in the absence of proof, he will be deemed to have advanced the full amount of the paper.' * * * *Colebrooke on Collateral Securities* (section 92) cites several * * * cases * * * and deduces the following text from them: 'Where negotiable promissory notes, without consideration or subject to an equitable set-off, or, in cases of misappropriation, as between the makers and payees and indorsers thereof, and the collateral securities are of greater amount than the loan represented by the principal evidence of indebtedness, the recovery of the pledgee against the makers upon an action thereon is limited to the amount of his advances. The pledgee in such cases of fraud is a holder for value of the collateral notes as against the makers of such paper, to the ex-

§ 378. **Same subject—Accommodation paper.**—In case a promissory note is executed without any consideration actually passing from the maker to the payee, and as an accommodation to the payee for the express purpose of enabling the latter to pledge the same as collateral security for an anticipated indebtedness to a third person in pursuance of an agreement to that effect, the same in the hands of the latter can be realized upon against the maker to the extent of the secured indebtedness of the payee and pledgor and no further.¹¹⁶ So an ac-

tent only of his interest at the time he acquires the title or has notice of the defenses to it.' This doctrine is also followed in *Bank v. Barnett*, 27 La. Ann. 177. * * * Tiedeman on Commercial Paper (section 304) states that where a pledge of a negotiable note is made for the purpose of securing the payment of a debt, the better rule is that the pledgee can recover the whole of the face value of the note, and hold the balance over and above the amount of his own claim as a trustee for the pledgor. It would seem, therefore, as if he took a different view of the law from that taken by Daniel, although he expressly states in a subsequent part of his text that the pledgee in such a case is a *bona fide* holder only in respect to the amount of his claim against the pledgor; and, if there be a good defense to an action on the collateral by the pledgor, the recovery of the pledgee is limited to the amount of his claim against the pledgor. But we think that if the pledgee is to be regarded in such a case (as he undoubtedly should be) as a *bona fide* holder only to the amount of his claim against the pledgor, and if he be limited in his recovery to the amount of his claim, it is most reasonable that the controversy over the balance be litigated by those directly interested, and that ordinarily the pledgee is not to be held as a trustee for the

pledgor. We are aware that there is a contradiction of opinion as to the attitude of the pledgee who seeks to recover the full amount of the collateral where such amount is in excess of the debt secured to him; but we are content to adopt the rule sustained by the decisions already cited, which limit his recovery to the amount due to him. In addition to the cases above cited, we may include *Steere v. Benson*, 2 Ill. App. 560, and *Second Nat. Bank of Cincinnati v. Hemingway*, 34 Ohio St. 381." The court also cites *Valette v. Mason*, 1 Smith (Ind.) 89 (which limits the recovery to the debt actually due, if payment had been previously made to the payee); *Farmers' State Bank v. Blevins*, 46 Kan. 536, 26 Pac. 1044 (holding that recovery is limited to the amount of the pre-existing debt where there are equitable defenses against the transferor); *Mechanics' & Traders' Bank v. Barnett*, 27 La. Ann. 177 (which was an accommodation note); *Maitland v. Citizens' National Bank of Baltimore*, 40 Md. 540 (recovery is amount due on debts); *Fisher v. Fisher*, 98 Mass. 303; *Stoddard v. Kimball*, 6 Cush. (60 Mass.) 469; *Duncan v. Gilbert*, 29 N. J. L. 521; *Huff v. Wagner*, 63 Barb. (N. Y.) 215; *Williams v. Smith*, 2 Hill (N. Y.) 301.

¹¹⁶ *Forstall v. Fussell*, 50 La. Ann. 249, 23 So. 273.

accommodation party is held liable to an accommodation holder to the same extent as if that value were personally advanced to himself, and he cannot resist payment to a pledgee where the holder had been authorized to sell.¹¹⁷ Again, where an accommodation note, held as collateral, is sold for the amount of the debt secured by it, the purchaser is limited to a recovery from the maker to the amount paid.¹¹⁸

¹¹⁷ *Matthews v. Rutherford*, 7 La. Ann. 225.

¹¹⁸ *First Nat. Bank v. Werst*, 52 Iowa 684, 3 N. W. 711.

CHAPTER XVI.

DIVERSION AND FRAUDULENT TRANSFER.

Sec.	Sec.
379. As a defense generally.	387. Negotiation of accommodation paper to party not contemplated.
380. Where paper is taken in ordinary course of business— <i>Bona fide</i> holders.	388. Same subject—Paper to be discounted at a particular bank.
381. Same subject—Evidence—Burden of proof.	389. Paper to be discounted at particular bank continued—Rule illustrated.
382. Same subject—Transfer in violation of statute.	390. Where transferred or applied as security for an antecedent debt.
383. Accommodation paper — <i>Bona fide</i> holders.	391. Same subject continued.
384. Same subject continued.	392. Diversion of proceeds of paper.
385. Accommodation paper — Other holders.	393. Effect of waiver.
386. Accommodation paper—Where purpose substantially effected or no restrictions imposed.	

§ 379. As a defense generally.—A fraudulent transfer or diversion of negotiable paper will, as a general rule, be a good defense to an action thereon between the parties or by a holder with notice.¹ So where one with whom a bill or note is deposited, to be kept for the depositor, fraudulently transfers the same, such fact may be shown as a defense to an action by one with notice thereof.² And a fraudulent diversion of negotiable paper by the principal will operate as a discharge of a surety where done without his knowledge or consent.³ Such a defense may also be available against an assignee of non-negotiable paper.⁴ So where a note not negotiable but designed for procuring a loan of money of the payee was signed by one as surety under an

¹ See subsequent sections in this chapter. And compare *Smith v. First National Bank*, 21 Ky. Law Rep. 953,

² *Marston v. Allen*, 8 Mees. & W. 53 S. W. 648.

³ *Johnston v. May*, 76 Ind. 293. *Weyman v. Perry*, 42 S. C. 415, 20 S.

See Hidden v. Bishop, 5 R. I. 29. E. 287.

agreement that a certain sum of the amount raised on the note should be applied by the maker in payment of a debt he owed the surety and the payee refused to discount the note, and the maker then let a third party have it under an agreement that he should indorse it and get it discounted, and apply the money so obtained upon a debt due him from the maker, and such third party, who took the note in ignorance of the agreement between the surety and maker, paid the note when protested against him, it was decided that he could not maintain an action against the surety in the name of the payee.⁵ An intention merely on the part of the payee to convert to his own use a note given to him for the benefit of another will, however, be no defense to an action against the maker, it appearing that the note was, in fact, not diverted, but used in accordance with the maker's intentions.⁶ Again, where a fraudulent diversion of an instrument is relied on as a defense the facts constituting the alleged fraud should be pleaded, and an allegation that the instrument was wrongfully converted by a third person, with whom it was deposited, and fraudulently delivered to the plaintiff without the knowledge or assent of the defendants, states a mere conclusion of law and is demurrable.⁷

§ 380. Where paper is taken in ordinary course of business—Bona fide holders.—Where the maker or owner of negotiable paper entrusts it to another and puts it in the power of the latter to deceive a third

⁵ *Farmers' & Mechanics' Bank v. Hathaway*, 36 Vt. 539. The court said: "It is impossible for us to see upon what principle, either of law of equity, Adams can be held to have immunity by virtue of receiving that note in that manner, against the real transaction and agreement between the defendant and Osgood in and in pursuance of which the defendant signed the note as surety. Certainly no principle of commercial or mercantile law can be invoked for such a purpose, for the transaction did not place Adams in the character and position, under that law, which would protect him against equitable defenses by the surety. He was not payee, nor indorser, nor was he holder for a con-

sideration advanced in good faith at the time he took the note, nor in our apprehension should he be regarded as a holder unaffected with notice, —for, as before said, the note imported that it was designed to be used for obtaining a loan of money. When therefore he took it of the principal maker to apply on an old debt, we think he should be regarded as assuming the peril of the perversion of the note from the purpose of it as shown by the instrument itself." Per Barrett, J.

⁶ *Elias v. Finnegan*, 37 Minn. 144, 33 N. W. 330.

⁷ *Rogers v. Morton* (N. Y. Sup. Ct., Special Term, 1905), 95 N. Y. Supp. 49.

person he must bear the loss of any deception resulting from the power so conferred. This rule is based upon the principle that where one of two innocent persons must bear a loss he must bear it who has by his own act rendered such loss possible. Therefore, where negotiable paper comes into the hands of a person in the ordinary course of business, for a valuable consideration and without notice, he will be regarded as a *bona fide* holder, and an action by him on the paper will not be subject to the defense that it was fraudulently transferred or diverted by the one to whom it was entrusted or delivered.⁸ Thus such a defense is not available in the case of an instrument indorsed in blank which comes into the possession of one in the ordinary course

⁸ *Indiana*.—*Stoner v. Brown*, 18 Ind. 464. 573; *Woodhull v. Holmes*, 10 Johns. (N. Y.) 231.

Iowa.—*Laub v. Rudd*, 37 Iowa 617.

Kansas.—*National Bank v. Dakin*, 54 Kan. 656, 39 Pac. 180, 45 Am. St. R. 299.

Kentucky.—*Barry v. Holderman*, 6 J. J. Marsh. (Ky.) 471.

Louisiana.—*Cochrane v. Dicken-*
son, 40 La. Ann. 127, 3 So. 841.

Maine.—*Nutter v. Stover*, 48 Me. 163.

Massachusetts.—*Scollans v. Rob-*
bins, 179 Mass. 346, 60 N. E. 983;
White v. Duggan, 140 Mass. 18, 20,
2 N. E. 110; *Sweetser v. French*, 2
Cush. (Mass.) 309, 48 Am. Dec. 666.

Michigan.—*Birch v. Fisher*, 51
Mich. 36, 16 N. W. 220.

Minnesota.—*Pence v. Arbuckle*, 22
Minn. 417.

Missouri.—*American National Bk.*
v. Harrison Wire Co., 11 Mo. App.
446.

New Hampshire.—*Clement v.*
Leverett, 12 N. H. 317.

New Jersey.—*Halsted v. Colvin*, 51
N. J. Eq. 387, 26 Atl. 928.

New York.—*Benjamin v. Rogers*,
126 N. Y. 60; *Wilson v. Roche*, 58 N.
Y. 642; *McNeil v. Bank*, 46 N. Y.
325, 7 Am. Rep. 341; *Park Bank v.*
Watson, 42 N. Y. 490, 1 Am. Rep.

573; *Woodhull v. Holmes*, 10 Johns.
(N. Y.) 231.

Pennsylvania.—*Burton's Appeal*,
93 Pa. St. 214; *Bardsley v. Delp*, 88
Pa. St. 420; *Long v. Rawn*, 75 Pa.
St. 128.

Tennessee.—*Merritt v. Duncan*, 7
Heisk. (Tenn.) 156, 19 Am. Rep. 612.

Texas.—*Whittle v. Hide &*
Leather Bank, 7 Tex. Civ. App. 616,
26 S. W. 1011.

Washington.—*Peters v. Gay*, 9
Wash. 383, 37 Pac. 325.

Wisconsin.—*Kinney v. Kruse*, 28
Wis. 183.

Federal.—*Swift v. Smith*, 102 U.
S. 442, 26 L. Ed. 193.

The words of the court in an English case are pertinent in this connection: "Whilst courts of justice ought to repress all such dealings with bills as amount to mere swindling, the importance to a commercial country of a free circulation of bills ought not to be forgotten. A man who takes a bill cannot ascertain the intention of previous parties whose names appear on the bill." Per Pollock, C. B., in *Barker v. Richards*, 20 Law J. Exch. 135, 136.

In case of stock certificates, see *Trust Co. v. Gray*, 12 App. D. C. 276, 287.

of business with no notice or knowledge of any fact to put him upon inquiry or excite his suspicion. As is said in a case where this question arose: "All know that bank bills, treasury warrants, notes payable to bearer, and bills and notes indorsed in blank, pass by mere delivery. Nor, when such paper is offered for payment or for sale, is the person receiving or purchasing it required to inquire as to the title of the holder unless he has notice or is put on inquiry. If he purchases in good faith the law will protect him. With all such paper possession is evidence of ownership, and the commercial value of such paper would be greatly impaired and its negotiability would be destroyed if the taker was required to investigate the title and to seek for latent equities before receiving it. But the law has imposed no such burden upon him until he has notice, or knowledge of facts which on inquiry would lead to notice."⁹ So where a note is indorsed with recourse by an agent of the payee and with the knowledge of the latter is left in the possession of the indorsee, who transfers it to a *bona fide* purchaser, the right of the purchaser to recover in an action against the payee cannot be defeated by such a defense.¹⁰ And this has also been declared to be the rule in the case of a non-negotiable note, upon the ground that, though the assignee of a chose in action can take no better title than that of his assignor, yet such doctrine is to be taken in connection with another, which is that the original owner

⁹ Per Mr. Chief Justice Walker in *Morris v. Preston*, 93 Ill. 215, 221. See also *National Bank v. Dakin*, 54 Kan. 656, 39 Pac. 180, 45 Am. St. R. 299.

¹⁰ *Andrews v. Butler*, 46 Ill. App. 183, wherein it was said by the court: "It appears the indorsement was actually written by one Hicks, who was the agent of Andrews for collecting notes and claims due him. It may be admitted that Hicks had no specific authority to make this indorsement, yet we are inclined to think that Andrews, by his conduct after learning of the indorsement, has estopped himself from making the defense. He insisted that the indorsement should have been without recourse, and after hearing that it had been indorsed with recourse he

went to the holder of the paper and had some conversation with him, in which it appears it was admitted a mistake had been made and there was something said about correcting it, but it was not done, and the note in this condition was permitted to remain in the hands of the purchaser, who soon after traded it to another, and he in turn traded it to Butler. Butler bought on the strength of Andrew's indorsement, knowing the maker was not good, and gave value for it in trade. Andrews, by his own act, after he knew the character of the indorsement, suffered the note to remain in that condition until it passed to a *bona fide* holder. He should not be allowed to deny the indorsement." Per Wall, J.

may so act as to estop himself from asserting his rights.¹¹ Where, however, it appears that, though a person may be a *bona fide* holder, he has not paid full value therefor, it has been decided that the recovery will be limited to the amount which he has actually paid with interest.¹² And if a transferee, at the time of taking such paper, had knowledge or reasonable ground of suspicion to believe that the persons from whom he received the instrument had limited authority and had acted in fraud of the actual owner or diverted the paper from the purpose for which it was given, he will not be regarded as a *bona fide* holder.¹³ Nor will one be regarded as such a holder where he takes the paper without valuable consideration.¹⁴

§ 381. Same subject—Evidence—Burden of proof.—Where in an action upon a bill or note against the maker or indorser it is shown that the paper has been diverted from the purpose for which it was given the burden is then cast upon the plaintiff of showing that he is a *bona fide* holder or has succeeded to the rights of such a holder.¹⁵ Thus in a case in West Virginia it is declared that: "It is the settled rule of commercial law that where a negotiable note is given for a specific purpose, is indorsed and used by the payee for an entirely different purpose, without the knowledge or consent of the maker, the burden of proof is on the holder of such note to show that he received it in the ordinary course of business before maturity for a valuable consideration, and without notice of its misuse by the payee, before he can recover from the maker."¹⁶ So in an action upon a promissory note it has been held error to sustain an objection to the admission of evidence showing that the note was executed by the defendants as makers without any consideration and for the purpose of taking up another note given as collateral security for the benefit of the payee,

¹¹ *Combes v. Chandler*, 33 Ohio St. 178. But see preceding section.

¹² *Faulkner v. White*, 33 Neb. 199, 49 N. W. 1122; *First National Bank v. Haulenbeck*, 65 Hun (N. Y.) 54, 19 N. Y. Supp. 567.

¹³ *Haynes v. Foster*, 2 Crompt. & M. 237.

¹⁴ *Theurer v. Schmidt*, 10 La. Ann. 293; *Lincoln v. Fitch*, 42 Me. 456; *Victor v. Bauer*, 11 N. Y. St. R. 531; *Carpenter v. National Bank of the Republic*, 106 Pa. St. 170.

¹⁵ *Farmers' & Citizens' Bank v. Noxon*, 45 N. Y. 762, 765; *American Exchange Nat. Bank v. New York Belting & P. Co.*, 74 Hun (N. Y.) 446, 6 N. Y. Supp. 822, *aff'd*, 148 N. Y. 698; *Davis v. Bartlett*, 12 Ohio St. 584, 80 Am. Dec. 375; *Smith v. Popular Loan & Bldg. Ass'n*, 93 Pa. St. 19.

¹⁶ *Union Trust Co. v. McClellan*, 40 W. Va. 405, 411, 21 S. E. 1025. *Per Dent, J.*

and that he did not take up such note, the ground of the objection being that it had not been shown that plaintiffs were not innocent holders for value, it being declared that if the offered proof had been made the burden would then rest on the plaintiffs to show that they were *bona fide* holders for value.¹⁷

§ 382. Same subject—Transfer in violation of statute.—Where a note, deposited as collateral security with a person, has been transferred by him to an innocent holder, an action by the latter against the maker or indorser cannot be defeated by the fact that such transfer was in violation of a statute making it a criminal offense to dispose of collateral security before the maturity of the debt secured, where there is nothing in the statute providing that the title of an innocent holder in such a case shall be affected by the fraudulent transfer.¹⁸

§ 383. Accommodation paper—Bona fide holder.—It is no defense to an action by a *bona fide* holder that there has been a misappropriation or fraudulent diversion or transfer of accommodation paper.¹⁹

¹⁷ *Nickerson v. Ruger*, 76 N. Y. Ins. Co., 30 Iowa 172; *Iowa College Trustees v. Hill*, 12 Iowa 462.

¹⁸ *Gardner v. Gager*, 1 Allen (Mass.) 502. The statute in this case provided that if any person who shall hold, any collateral security, deposited with him for the payment of any debt which may be due to him, shall, before such debt shall have become due and payable, and without the authority of the party who shall have deposited with him such collateral security, sell, pledge, loan, or in any way dispose of the same, he shall be deemed to be guilty of a criminal offense and shall be punished by fine or imprisonment. Mass. St. 1855, c. 213.

¹⁹ *Alabama*.—*Bunzel v. Maas*, 116 Ala. 68, 22 So. 568.

Connecticut.—*Brush v. Scribner*, 11 Conn. 388, 29 Am. Dec. 303.

Illinois.—*Miller v. Larned*, 103 Ill. 570.

Iowa.—*Tomblin v. Callen*, 69 Iowa 229, 28 N. W. 573; *Winters v. Home*

Kentucky.—*Frank v. Quast*, 8 Ky. Law Rep. 780.

Louisiana.—*Hutchinson v. Mitchell*, 15 La. Ann. 326.

Maine.—*Breckenridge v. Lewis*, 84 Me. 349, 24 Atl. 864; *Nutter v. Stover*, 48 Me. 163.

Maryland.—*Maitland v. Citizens' National Bank*, 40 Md. 540, 17 Am. Rep. 620.

Massachusetts.—*Woodruff v. Hill*, 116 Mass. 310; *Clark v. Thayer*, 105 Mass. 216, 7 Am. Rep. 511; *Sweetser v. French*, 14 Metc. (Mass.) 262; *Wareham Bank v. Lincoln*, 3 Allen (Mass.) 192.

Nebraska.—*Faulkner v. White*, 33 Neb. 199, 49 N. W. 1122.

New York.—*Merchants' National Bank v. Comstock*, 55 N. Y. 24; *Bank of New York v. Vanderhorst*, 32 N. Y. 553; *Blair v. Hagemeyer*, 26 App. Div. (N. Y.) 219, 49 N. Y. Supp. 965; *Brooks v. Hey*, 23 Hun (N. Y.)

Thus in an early case it is said: "When negotiable paper is made for a particular object, as when it is indorsed for a specific purpose, the indorser lending his name to accommodate the maker, as to renew another note, and the maker applies it to a different purpose, to the prejudice of the indorser, and this is known to the person receiving it, he shall stand upon no better ground than the fraudulent assignor. But if the assignment of such note or bill is a fraud upon the indorser, yet a *bona fide* holder for a valuable consideration, without notice, to whom such note or bill has been transferred, will be protected in receiving such paper in the usual course of business."²⁰ And in a case in New York, where the defendant sought to avail himself of such a defense, the court declared that: "The fact that the note in suit, of which the defendant was an accommodation indorser as the surety for the makers, was diverted from the purpose for which it was made and indorsed, to the prejudice of the indorser, is fully met and overcome as a defense by the fact, also proved, that the plaintiff became the holder and owner of the note before its maturity for value actually paid, and without notice of any defense to the note, or defect in the title of its immediate indorser."²¹

§ 384. **Same subject continued.**—In an action by an indorsee against the indorsers of negotiable promissory notes, where the defense relied on by the defendants was that they were accommodation indorsers and that the indorsements were made upon the promise of the maker of said notes that, by the use of said indorsements, he would pay off an indebtedness for which collaterals were pledged, and deliver such collaterals to the defendants together with a written guaranty of a certain firm as further security, and that the maker had fraudulently diverted the indorsements and failed to keep said promises, it was decided that the jury should be instructed that the plaintiff was entitled

372; *Tinsdale v. Murray*, 9 Daly (N. Y.) 446.

North Carolina.—*Ray v. Banks*, 6 Jones L. (N. C.) 118.

South Carolina.—*Witte v. Williams*, 8 S. C. 290.

Texas.—*Brown v. Thompson*, 79 Tex. 58, 15 S. W. 168.

Vermont.—*Quinn v. Hard*, 43 Vt. 375; *Farmers' & Mechanics' Bank v. Humphrey*, 36 Vt. 554.

Virginia.—*Etheridge v. Parker*, 76 Va. 247.

Washington.—*Peters v. Gay*, 9 Wash. 383, 37 Pac. 325.

Federal.—*Gillespie v. Campbell*, 39 Fed. 724.

²⁰ *Brush v. Scribner*, 11 Conn. 388, 390, 29 Am. Dec. 303, per Williams, C. J.

²¹ *Merchants' National Bank v. Comstock*, 55 N. Y. 24, 26, per Allen, J.

to recover if the jury believe from the evidence that he purchased the notes before maturity in good faith, without notice that the indorsements were without consideration or had been procured by fraud, or that the notes or the proceeds thereof had been misapplied or dealt with in any manner which would impeach their validity.²² It is, however, decided that, under some circumstances, a *bona fide* holder in good faith will be limited in his recovery to the amount which he has actually paid for the same.²³ In such a case, however, upon proof of the fact that there has been a diversion of negotiable paper the burden is then held to rest upon the holder to show that he is a *bona fide* holder.²⁴

§ 385. **Accommodation paper—Other holders.**—The maker of, or surety on, an accommodation note has the right to determine what use shall be made of the same and may impose material or immaterial conditions or terms in regard to its use, and one who takes the paper with knowledge of the terms and conditions imposed will be subject to the defense that there has been a diversion of the instrument from the use contemplated.²⁵ Thus it is said that: "If accommodation paper is given for a particular purpose, and that purpose is known to the holder at the time it is taken, a diversion of the paper from that purpose or misappropriation of it will release the party giving the accommodation from all responsibility."²⁶ And such a defense is, as a general rule, available against all parties except one who occupies the position of a *bona fide* holder.²⁷ So where defendant signed a note and

²² *Bunzel v. Maas*, 116 Ala. 68, 22 So. 568.

²³ *Chicopee Bank v. Chapin*, 8 Metc. (Mass.) 40; *Stoddard v. Kimball*, 6 Cush. (Mass.) 469; *Faulkner v. White*, 33 Neb. 199, 49 N. W. 1122; *Brown v. Mott*, 7 Johns. (N. Y.) 361; *First National Bank v. Fowler*, 36 Ohio St. 524, 38 Am. Rep. 610.

²⁴ *Ives v. Jacobs*, 21 Abb. N. C. (N. Y.) 151.

²⁵ *Brush v. Scribner*, 11 Conn. 388, 390, 29 Am. Dec. 303; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620; *Benjamin v. Rogers*, 126 N. Y. 60; *McAdam v. Cooke*, 6 Daly (N. Y.) 101; *Rochester v. Tay-*

lor, 23 Barb. (N. Y.) 18. Compare *Ransom v. Turley*, 50 Ind. 273.

²⁶ *Per Barbour, J.*, in *Olds Wagon Works v. Bank of Louisville*, 10 Ky. Law Rep. 235.

²⁷ *Indiana*.—*Johnston v. May*, 76 Ind. 293.

Kentucky.—*Thompson v. Poston*, 1 Duv. (Ky.) 389.

New York.—*Brown v. Taber*, 5 Wend. (N. Y.) 566; *Tinsdale v. Murray*, 9 Daly (N. Y.) 446; *Garfield National Bank v. Colwell*, 57 Hun (N. Y.) 169, 10 N. Y. Supp. 864.

Pennsylvania.—*Cozen v. Middleton*, 118 Pa. St. 622, 12 Atl. 566.

put it into the hands of the plaintiff for the purpose of having it indorsed by the promisee and then paying with it a debt due from the promisee to a stranger, on the condition, however, that the plaintiff should procure a certain chattel of the promisee and hold it for the defendant's use, but the plaintiff paid the debt with his own funds and took the note himself as indorsee and procured the chattel of the promisee, but afterwards restored it to him, it was held that such facts constituted a good defense.²⁸ In this class of cases the question whether the plaintiff had such knowledge or not is one of fact for the jury.²⁹

§ 386. **Accommodation paper—Where purpose substantially effected or no restrictions imposed.**—Where a person affixes his name to accommodation paper either as maker or indorser, and has no interest in the way in which such paper or the proceeds therefrom are to be used, it will be no defense to an action against such party that it has been diverted from the precise use contemplated where the purpose for which the accommodation was given has been substantially effected.³⁰ So where one accepted a bill of exchange under an agreement that it should be used to raise money and to pay an indebtedness to the plaintiff, and instead of using it in the manner designated it was transferred to the plaintiff in payment of such indebtedness and in consideration of further advances and of forbearance, it was decided

Tennessee.—*Jordan v. Jordan*, 10 Lea (Tenn.) 124.

Wisconsin.—*Bowman v. Van Kuren*, 29 Wis. 209.

Federal.—*Quebec Bank v. Hellman*, 110 U. S. 178, 4 Sup. Ct. 76.

²⁸ *Boutelle v. Wheaton*, 13 Pick. (Mass.) 499.

²⁹ *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620.

³⁰ *District of Columbia.*—*Leach v. Lewis*, 1 MacArthur (D. C.) 112.

Indiana.—*Fetters v. Bank*, 34 Ind. 251, 7 Am. Rep. 225.

Maryland.—*Maitland v. Citizens' National Bank*, 40 Md. 540, 17 Am. Rep. 620.

Nebraska.—*Morris v. Morton*, 14 Neb. 358, 15 N. W. 725.

New Hampshire.—*Trask v. Wingate*, 63 N. H. 474, 3 Atl. 926; *Perry*

v. Armstrong, 39 N. H. 583; *Cross v. Rowe*, 22 N. H. 77.

New Jersey.—*Jackson v. Bank*, 42 N. J. L. 177; *Rogers v. Sipley*, 35 N. J. L. 86; *Duncan, Sherman & Co. v. Gilbert*, 29 N. J. L. 521.

New York.—*Hay v. Jaeckle*, 90 Hun (N. Y.) 114, 35 N. Y. Supp. 650; *New Central Coal Co. v. Cummings*, 66 Hun (N. Y.) 626, 21 N. Y. Supp. 17; *Wheeler v. Allen*, 59 How. Prac. (N. Y.) 118; *Corbitt v. Miller*, 43 Barb. (N. Y.) 305; *Wardell v. Howell*, 9 Wend. (N. Y.) 170; *Bank of Rutland v. Buck*, 5 Wend. (N. Y.) 66.

Texas.—*First National Bank v. Wood*, 8 Tex. Civ. App. 554, 28 S. W. 384.

Compare Wisconsin.—*Thomas v. Watkins*, 16 Wis. 549.

that the plaintiff might recover thereon.³¹ And where a note was indorsed to be "used" only at a certain bank, and it was deposited with such bank as collateral security for advances, it was held that the bank might recover on the instrument.³² And where an accommodation note was given upon the understanding that it was to be deposited temporarily as collateral for a loan, to be made to the payee, and the latter instead of obtaining a new loan and depositing the note with the lender as collateral, deposited it with a bank as security for money which he already owed that institution, it was decided that such use did not constitute a misappropriation, though it was not the precise use contemplated, since the substantial purpose for which the note was given was effected.³³ The court said: "In the present case it is difficult to see how the defendant has been injured by the particular use that has been made of this note. It was given for the general purpose of accommodating the payee, and the particular mode in which it was to subserve that end was of no account to the maker; whether such payee raised the money upon it, which was the use indicated at the time, and with that money paid off an old debt, or, without the security of a new loan applied the note directly to the satisfaction or security of such old debt, could be of no consequence to the defendant. He lost no right by such a diversion of the paper, nor was he subjected to any additional risk."³⁴

§ 387. **Negotiation of accommodation paper to party not contemplated.**—Though a party affixes his name to accommodation paper with an understanding that it is to be negotiated to a particular party, it will be no defense to an action thereon by a *bona fide* holder that it was negotiated to another party than the one contemplated.³⁵

³¹ *Leach v. Lewis*, 1 MacArthur (D. Ky.) 13; *Whitaker v. Crutcher*, 5 C.) 112; *Corbitt v. Miller*, 43 Barb. Bush (Ky.) 621.
(N. Y.) 305.

³² *Proctor v. Whitcomb*, 137 Mass. Claiborne, 5 How. (Miss.) 301.
303. *New Hampshire*.—*Hunt v. Al-*

³³ *Jackson v. First National Bank*, drich, 27 N. H. 31.
42 N. J. L. 177. *New Jersey*.—*Duncan v. Gilbert*,

³⁴ *Per Beasley, C. J.* 29 N. J. L. 521.

³⁵ *Indiana*.—*Reed v. Trentman*, 53 *New York*.—*Mitchell v. Oakley*, 7
Ind. 438. Paige (N. Y.) 68; *Wardell v. Hughes*,

Kentucky.—*Ward v. Northern* 3 Wend. (N. Y.) 418.
Bank of Kentucky, 14 B. Mon. (Ky.) *North Carolina*.—*Parker v. Sut-*
351; *Browning v. Fountain*, 1 Duv. ton, 103 N. C. 191, 9 S. E. 283, 14

§ 388. Same subject—Paper to be discounted at a particular bank.

The fact that a bill or note was to be discounted at a particular bank, but was negotiated in a manner other than was intended, will be no defense to an action thereon by one who is a *bona fide* holder.³⁶ So recovery on a note cannot be defeated by the fact that it was discounted by another bank or party than the one contemplated,³⁷ nor by the fact that such bank did not discount the note where it appears that money was drawn at different times from the bank on the credit of the paper which was retained as collateral.³⁸ And this has been held to be true in the case of one who purchases such a note, though he had knowledge of the restriction upon its negotiation at the time of purchase. So it was declared in a case where this question was raised: "The note sued upon was plainly a negotiable instrument, and might, by indorsement of the payee thereof, be put upon the market and bought and sold indefinitely. The original parties to it treated it as 'accommodation paper,' and the facts show that the chief and material part of their purpose was to enable the maker thereof to borrow money upon it. It was expected that he would get the money from one of the banks in Fayetteville, but not necessarily from a bank or in that town. If it had been so intended some particular restriction in this respect would have been set forth in or about the note, but it was left at large—en-

Am. St. R. 795; *Parker v. McDowell*, 95 N. C. 219, 59 Am. Rep. 235.

Vermont.—*Bank of Newberry v. Richards*, 35 Vt. 281.

Virginia.—*Robertson v. Williams*, 5 Munf. (Va.) 381.

³⁶ *Thompson v. Armstrong*, 5 Ala. 383; *First National Bank v. Wood*, 8 Tex. Civ. App. 554, 28 S. W. 384.

³⁷ *Kentucky*.—*Frank v. Quast*, 86 Ky. 649, 6 S. W. 909; *Browning v. Fountain*, 1 Duv. (Ky.) 13.

Maine.—*Dunn v. Weston*, 71 Me. 270, 36 Am. Rep. 310; *Chase v. Hathorn*, 61 Me. 505; *Granite Bank v. Ellis*, 43 Me. 367.

Missouri.—*Mastin Bank v. Hamerslough*, 72 Mo. 274.

Nebraska.—*Morris v. Morton*, 14 Neb. 358, 15 N. W. 725.

New Hampshire.—*Elliott v. Abbot*, 12 N. H. 549.

New Jersey.—*Duncan, Sherman & Co. v. Gilbert*, 29 N. J. L. 521.

New York.—*Hay v. Jaekle*, 90 Hun (N. Y.) 114, 35 N. Y. Supp. 650.

North Carolina.—*Parker v. McDowell*, 95 N. C. 219, 59 Am. Rep. 235; *Sutherland v. Whitaker*, 50 N. C. 5; *Dewey v. Cochran*, 49 N. C. 184.

Ohio.—*Knox County Bank v. Lloyd*, 18 Ohio St. 353.

Vermont.—*Briggs v. Boyd*, 37 Vt. 534; *Bank of Middlebury v. Bingham*, 33 Vt. 621.

Compare Rogge v. Cassidy, 10 Ky. Law Rep. 396.

³⁸ *Proctor v. Whitcomb*, 137 Mass. 303. See *Platt v. Beebe*, 57 N. Y. 339 holding that where money is so drawn it is in effect a discount of the note for such amount.

tirely without such restriction—to be sold to any person who might buy it. If a bank had purchased it it could at once have sold it to the intestate of the plaintiff or any other person in the course of business. There was nothing in its nature, or in the purpose of the parties in connection with it, that rendered the sale of it to a bank necessary or at all material to its sufficiency or efficiency as a negotiable instrument; nor would the sale of it to a bank have given the payee, who indorsed it, any material legal advantage. There was no reason—certainly none appears—why the intestate of the plaintiff should not have bought it on the same footing as a bank or any other person might have done. The simple fact that he had knowledge of the ‘understanding,’ that the money was to be obtained from a bank in the town mentioned, did not render it in any sense fraudulent on his part to buy it.”³⁹

§ 389. Paper to be discounted at particular bank, continued—Rule illustrated.—Where a note which was payable to the plaintiff bank was handed to the president, who received it individually, and advanced money thereon for the amount of the note, paying therewith certain claims which he held as a lawyer against the principal, and he intended to discount it immediately, but forgot to do so until about two years later, when he discounted it with the bank, it was decided that the bank was a *bona fide* holder and that the delay did not vitiate the note.⁴⁰ So if a note be made and signed by sureties to enable the principal to raise money of a bank, and made payable to a bank or order, and not discounted, yet if an individual advance money upon the note the sureties will be bound to the holder of the note for its payment.⁴¹ Where, however, it is agreed that the paper shall be

³⁹ *Parker v. Sutton*, 103 N. C. 191, 193, 9 S. E. 283, 14 Am. St. R. 795, per Merrimon, J.

⁴⁰ *Farmers' Bank v. Couch*, 118 N. C. 436, 24 S. E. 737.

⁴¹ *Ward v. Northern Bank of Kentucky*, 14 B. Mon. (Ky.) 351. The court said: “The main purpose for which they signed the note was to give it credit, and to enable Johnson to realize the money by its sale, and, although the defendants doubtless expected that the money would be procured from the Northern Bank

of Kentucky, to whom the note was made payable, this expectation was founded upon the idea that it was the proper business and interest of the bank to discount notes and thus employ its capital; but it does not follow that because it was expected or designed to have the paper discounted by the bank, that the authority to the principal was necessarily so restricted and limited as that it might not be purchased, and the money paid upon it by any individual who should give credit to

returned in case a certain bank refuses to discount the same, it may be shown, in an action thereon, that such bank refused to discount the note and that it was not returned, but was transferred to the plaintiff, who took it with notice of the condition imposed.⁴² And where a depositor took a note executed by himself and another as

the paper on account of the signatures to it. * * * To raise money was the most important object, and the bank was named as the payee because it was supposed the money could be most readily and speedily procured from that quarter, and not because it could be considered a matter of controlling importance that the bank only should become the creditor in the transaction. * * * The defendants cannot escape responsibility upon such unsubstantial and flimsy pretext; they gave it credit by signing their names to the paper, and put it in Johnson's possession to raise money upon it. It was intended for circulation, as is manifest from its face, being negotiable and payable to the bank or order. It was within the knowledge of the defendants that the note was transferable by law, and that it was liable, by successive assignment, to pass through hundreds of hands. They knew that by making the note payable to the bank that they had not and could not have been secured thereby against subsequent transfers of the paper, or have prevented other persons, as assignees, from becoming their creditors." Per Hise, C. J.

⁴² *Hickerson v. Raignel*, 2 Heisk. (Tenn.) 329. This case was an action to enjoin the execution of a judgment which had been recovered by default against the indorser who alleged that he signed it on the condition stated. The court said: "The proof shows that when complainant indorsed the bill, he did so upon the

express condition that if the Planters' Bank did not discount the bill on that day, his liability as indorser was to cease, and the bill was either to be returned or destroyed. It is wholly immaterial whether complainant knew the use which Sheid proposed to make of the money, or not. He was indorsing without consideration, and for the accommodation of Sheid, and had the right to annex such terms and conditions to his liability as he saw proper. *Perkins v. Anent*, 2 Head 110; *Bank of Tennessee v. Johnson*, 1 Swan 217. It is clear that when the Planters' Bank refused to discount the bill, and the day had expired, during which it was to be presented, the liability of the complainant was terminated. The only liability which could then be created must have arisen, from the transfer of the bill, in the due course of trade, to some innocent purchaser, for value. But the proof shows that when Sheid offered to transfer the bill to Clements, * * * he informed him of the terms and conditions which complainant had annexed to his indorsement. It follows that Clements took the bill with full notice that Sheid had no authority to use it for any purpose and in any way. As Clements was acting as the agent of Raignel & Co., they would be affected with the notice which their agent had." Per Nicholson, C. J. See *Adams Bank v. Jones*, 16 Pick. (Mass.) 574; *Williams v. Bosson*, 11 Ohio 62.

surety to a bank to be discounted and the bank refused, whereupon the maker left it in his private pocketbook in the bank vault, and, on his insolvency, the cashier, without the former's knowledge, took it out and discounted it and credited the proceeds to his account against an overdraft at the bank by him, it was held that the surety was released.⁴³ Again, where a note was to be discounted at a particular bank to take up a matured note by the same maker to the same payee, and the latter instead of using it in the manner agreed retained possession of it, there was held to be a diversion of the paper which would defeat an action by him.⁴⁴

§ 390. Where transferred or applied as security for an antecedent debt.—The question as to the rights and liabilities of the parties where paper has been transferred as security for an antecedent debt has been the subject of much discussion.⁴⁵ The question has frequently arisen where a note is made or indorsed merely for accommodation without any restriction as to its use and is so transferred. In such cases it is a general rule that the one to whom it is transferred may recover thereon.⁴⁶ And where paper is entrusted or delivered to one for a

⁴³ *St. Louis National Bank v. Flanagan*, 129 Mo. 178, 31 S. W. 773.

⁴⁴ *Armstrong v. Cook*, 30 Ind. 22.

⁴⁵ See §§ 246-249, 353-355 herein, where this question is considered.

"Upon the question of the rights of holders of negotiable paper taken in due course before maturity as collateral security for a pre-existing debt, there is a radical conflict of authority. The courts sustaining the right of the holders to recover in such cases as against equities or defenses in favor of the holders, do so, generally, upon the ground that, by becoming holders of such negotiable paper through indorsement, they become parties to it, and as such assume obligations in reference to the enforcement of the same. * * * Those courts denying the rights of such holders to recover as against defenses in favor of the makers do so upon the ground that the holders parted with nothing in the nature

of a new consideration when they acquired such note or other negotiable paper; that merely accepting the note as collateral security for a pre-existing debt, without any agreement for extension of time or forbearance of some kind, and without making any new promise, so far as the original debt is concerned, or any new obligation, is not receiving the collateral for anything of value, within the meaning of that term as laid down in the statute or the law merchant." *Porter v. Andrus*, 10 N. D. 558, 562, 88 N. W. 567, per Morgan, J.

⁴⁶ *Georgia*.—*Davis v. Bank*, 66 Ga. 651.

Indiana.—*Fetters v. Bank*, 34 Ind. 251, 7 Am. Rep. 225.

Maryland.—*Maitland v. Citizens' National Bank*, 40 Md. 540, 17 Am. Rep. 620.

New York.—*Farmers' & Citizens'*

specified purpose or use and is not used in the manner designated, but is, instead, transferred to a creditor of the holder as security for an antecedent debt, the weight of authority supports the rule that one who takes the paper under such circumstances, before maturity and without notice of the particular use contemplated will be regarded

Bank v. Nixon, 45 N. Y. 762; *Grandin v. Le Roy*, 2 Paige (N. Y.) 509.

Tennessee.—*Kimbro v. Little*, 10 Yerg. (Tenn.) 417, 31 Am. Dec. 585.

Vermont.—*Bank of Montpelier v. Joyner*, 33 Vt. 481.

England.—*Collins v. Martin*, 1 Bos. & P. 648.

In a recent case where it appeared that notes were given by the defendant to a company for its accommodation and were indorsed by the latter as collateral security for its indebtedness to the plaintiff under a contract between them the court said: "We do not doubt that if the jury believed the testimony put in at the trial they would have been required to find a verdict for the plaintiff. The fact that the plaintiff held other security from the Quimby Company would not prevent it from enforcing this security for its protection. Creditors have a right to hold and enforce all their security until they shall have been paid in full. *New Bedford Savings Bank v. Union Mill Co.*, 128 Mass. 27; *Lincoln v. Bassett*, 23 Pick. (Mass.) 154; *Lee v. Butler*, 167 Mass. 427, 46 N. E. 52, 57 Am. St. R. 466; *Allen v. Woodard*, 125 Mass. 400, 28 Am. Rep. 250; *Crocker v. Gilbert*, 9 Cush. (Mass.) 131; *Commercial Bank v. Clarke*, 180 Mass. 249, 62 N. E. 670. But while this is so, it yet remains true that this is a question of consideration and must be passed upon by the jury. The burden was on the plaintiff to show that it was a holder for value." *Mercantile Guaranty Co. v. Hilton*

(Mass. 1906), 77 N. E. 312, per Sheldon, J.

There are, however, several decisions which sustain the proposition that where a restriction is imposed upon the use to be made of a bill or note the one who takes such paper as security for a pre-existing debt is not a *bona fide* holder. *United States Nat. Bank v. Ewing*, 131 N. Y. 506, 30 N. E. 501, 27 Am. St. R. 615; *Grocers' Bank v. Penfield*, 69 N. Y. 502, 25 Am. R. 231; *New York National Bank v. Coydendall*, 58 Hun (N. Y.) 205, 12 N. Y. Supp. 334; *Ayers v. Doying*, 42 Hun (N. Y.) 630; *Duncan v. Gosche*, 8 Bosw. (N. Y.) 243, 21 How. Prac. 344; *Tinsdale v. Murray*, 9 Daly (N. Y.) 449; *Union Trust Co. v. McClellan*, 40 W. Va. 405, 21 S. E. 1025.

In North Dakota it has been decided that one who takes a note with a written guaranty of payment indorsed thereon by the payee as collateral security for the payment of a pre-existing debt is not a holder in due course within the meaning of the § 4884, of the Rev. Codes, which defines an indorsee in due course as "one who in good faith, in the ordinary course of business and for value before its apparent maturity or presumptive dishonor and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him or indorsed generally, or payable to the bearer or one other than the payee who acquires such an instrument of such indorsee thereof." *Porter v. Andrus*, 10 N. D. 558, 88 N. W. 567.

as a holder for value, and the fact that it has been so used will be no defense to an action thereon by him.⁴⁷

§ 391. **Same subject continued.**—This question as to the right of a holder of negotiable paper, indorsed to him as security for an antecedent debt, to recover thereon is considered at length by the United States Supreme Court,⁴⁸ which says: “Our conclusion, therefore, is, that the transfer, before maturity, of negotiable paper as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper and is as much in the usual course of such commercial business as its transfer in payment of such debt. In either case the *bona fide* holder is unaffected by equities or defenses between prior parties of which he had no notice. This conclusion is abundantly sustained by authority. A different determination by this court would, we apprehend, greatly surprise both the legal profession and the commercial world.” So where a note indorsed in blank was delivered to a person for discount such fact was held to be no defense to an action by one to whom it was transferred as payment for an antecedent debt, the latter having no knowledge of the restriction.⁴⁹ And thus it has been held no defense to an action by one who took paper as security for an antecedent debt that it was given for the purpose of having it discounted

⁴⁷ *Illinois*.—*Morris v. Preston*, 93 Ill. 215.

Iowa.—*Tomblin v. Callen*, 69 Iowa 229, 28 N. W. 573.

Kansas.—*National Bank of St. Joseph v. Dakin*, 54 Kans. 656, 39 Pac. 180, 45 Am. St. R. 299.

New Hampshire.—*Clement v. Leverett*, 12 N. H. 317.

Ohio.—*First National Bank v. Fowler*, 36 Ohio St. 524, 38 Am. Rep. 610.

Pennsylvania.—*Bardsley v. Delp*, 88 Pa. St. 420.

⁴⁸ *Brooklyn City & Newtown R. R. Co. v. National Bank of the Republic*, 102 U. S. 14, 26 L. Ed. 61, per Mr. Justice Harlan.

⁴⁹ *Burch v. Scribner*, 11 Conn. 388, 29 Am. Dec. 303.

See *Mechanics' Bank v. Chardavoyne*, 69 N. J. L. 256, where it is said that “one who indorses a promissory note in blank and entrusts it to another to fill it up and have it discounted for his (the indorser's) benefit, is liable upon it to a *bona fide* holder for value, who receives it before maturity, in the usual course of business, from the person to whom it was entrusted, notwithstanding that the latter has filled it up for and fraudulently converted it to a purpose entirely different from that for which he was authorized to use it.” Per Gummere, C. J.

at a particular bank and that it was transferred to the holder in violation of such purpose, where the holder took it in good faith and without knowledge of the restriction.⁵⁰ And in a recent case in New York it was decided that one who takes an accommodation note as security for an antecedent debt is, under the Negotiable Instruments Law, to be regarded as a holder for value.⁵¹ So where the maker of a note delivers it to the payee, to be used by the latter as collateral for a particular indebtedness, and instead of using it as designated the payee

⁵⁰ *Evans v. Hardware Co.*, 65 Ark. 204, 45 S. W. 370; *Dawson v. Good-year*, 43 Conn. 548; *Duncan v. Gilbert*, 29 N. J. L. 521; *Wheeler v. Allen*, 59 How. Pr. (N. Y.) 118; *McGuire v. Sinclair*, 47 How. Pr. (N. Y.) 360.

But see *Smith v. Willing* (Wis. 1904), 101 N. W. 692, wherein it is held that, where a note was given by a father to a son, who was president of a corporation, to be discounted at a particular bank for a specified purpose, namely to buy out the interest of his partner with whom he was associated as a corporation, such fact might be shown as a defense to an action to enforce the note as security for antecedent debts of such corporation after it became insolvent. (Two judges dissenting.)

⁵¹ *Milius v. Kauffman*, 104 App. Div. (N. Y.) 442, 93 N. Y. Supp. 669; see *Neg. Inst. Law*, § 51, *Laws of 1897*, chap. 612. In this case it appeared that one Manheim had given his notes to Kauffman as an accommodation for both parties. There was a written agreement which recited the giving of the notes and stated that they were given under the condition that the said Kauffman should discount them and pay to Manheim forty per cent. of the proceeds, the balance of sixty per cent. to be retained by Kauffman, who was to give his own therefor to

Manheim. The agreement also provided that each party was then to take prompt care of his own notes at maturity. In an action by one to whom one of the notes had been indorsed, against Kauffman, the latter contended that the note could not have been enforced by Manheim as he had defaulted in the payment of his note given in pursuance of the agreement, and that as the plaintiff had taken the note as security for an antecedent debt he was not a *bona fide* holder and that the note in his hands was subject to any defense that existed against its collection by Manheim. The court said: "The note not having been diverted, but being unrestricted as to its use, would not be subject in plaintiff's hands to the defense of want or failure of consideration, or that Manheim had subsequently failed to perform his obligation of paying his own note, and the plaintiff having taken it as security for an antecedent debt is regarded as a holder for value." Per Laughlin, J., citing *Neg. Inst. Law* [*Laws 1897*, ch. 612], § 51; *First Nat. Bank v. Wood*, 128 N. Y. 35; *McSpedon v. Troy City Bank*, 2 Keyes (N. Y.) 35; *Grandin v. Le Roy*, 2 Paige (N. Y.) 509; *Tinsdale v. Murray*, 9 Daly (N. Y.) 446; *Furniss v. Gilchrist*, 1 Sandf. (N. Y.) 53; *Grocers' Bank v. Penfield*, 69 N. Y. 502; *Continental Nat. Bank v. Townsend*, 87 N. Y. 8.

transfers it as collateral for another indebtedness, it has been decided that the indorsee, if he takes it without notice or knowledge of such restrictions, may recover thereon.⁵² But where a bill is indorsed for discount it has been decided that the indorsee cannot misappropriate it as collateral for a debt due to him and recover thereon against the acceptor.⁵³

§ 392. Diversion of proceeds of paper.—In an action by a *bona fide* purchaser of commercial paper against a maker, drawer or indorser thereof, it will be no defense that the proceeds therefrom were to be applied to a particular purpose by the one negotiating it and that they have not been applied in the manner contemplated, but have been diverted to another and different purpose.⁵⁴ So in an action against the maker of a note it is no defense that the agent of the maker, who negotiated the note, was to use the proceeds in purchasing United States bonds to be used in organizing a bank in which the defendant was interested and that they were not so applied.⁵⁵ And an accommodation maker cannot defeat recovery by a *bona fide* holder by showing that the proceeds were diverted by his co-maker from the purpose intended.⁵⁶ And where a bank advanced money in good faith on corporate notes without any knowledge or reason to believe that the proceeds would be used by an officer of the corporation for other than the legitimate purposes of the maker, it was decided that in an action by the bank on such notes the corporation could not defeat a recovery on the ground that the proceeds had in fact been used in an improper manner.⁵⁷ Again, where a bank discounted an accommodation bill of ex-

⁵² *Maitland v. Citizens' Bank*, 40 Md. 540, 17 Am. Rep. 620.

⁵³ *Delauney v. Mitchell*, 1 Starkie 439.

⁵⁴ *Alabama*.—*Clapp v. Mock*, 8 Ala. 122.

Illinois.—*McIntire v. Yates*, 104 Ill. 491.

Kentucky.—*Moreland v. Citizens' Savings Bank*, 97 Ky. 211, 30 S. W. 637; *Olds Wagon Works v. Bank of Louisville*, 10 Ky. Law Rep. 235.

Massachusetts.—*Wood v. Boylston National Bank*, 129 Mass. 358, 37 Am. Rep. 366.

New York.—*Parker v. McLean*, 134 N. Y. 255, 32 N. E. 73; *Brooks v.*

Hey, 23 Hun (N. Y.) 372; *Mohawk Bank v. Corey*, 1 Hill (N. Y.) 513.

Pennsylvania.—*Garden City National Bank v. Fitler*, 155 Pa. St. 210, 26 Atl. 372; *Lingg v. Blummer*, 88 Pa. St. 518.

Virginia.—*Clifton Forge v. Bank*, 92 Va. 283, 23 S. E. 284.

Federal.—*Germania Bank v. La Follette*, 72 Fed. 145.

⁵⁵ *Arman v. First National Bank*, 36 Fla. 398, 18 So. 786.

⁵⁶ *Evans v. Speer Hardware Co.*, 65 Ark. 204, 45 S. W. 370.

⁵⁷ *Reagan v. First National Bank*, 157 Ind. 623, 62 N. E. 701.

change and the payee was induced by its cashier, who knew of the use contemplated by the accommodation maker, to apply the proceeds in payment of an insurance premium to a company in which the cashier was interested as agent, it was held that the bank might recover thereon, as it was a *bona fide* holder, not being affected by the act of its officer, whose agency for the bank ceased when the bill of exchange was purchased by it.⁵⁸ But where several notes are executed to a bank by the same party, and there is an agreement that upon the sale of collateral held by the payee, the proceeds are to be applied to a certain note upon which a person's name appears as surety, such person has the right to have the proceeds applied according to the agreement, and in an action against him it may be shown that they were not so applied.⁵⁹

§ 393. **Effect of waiver.**—Where a note is given for the accommodation of another, to be used in a particular manner, the defense that it was not used in the manner contemplated may be expressly waived by the maker or indorser, or such a party may be estopped by his acts and conduct, after knowledge of the use of the paper, from insisting upon such defense.⁶⁰

⁵⁸ *Moreland v. Citizens' Savings Bank*, 97 Ky. 211, 30 S. W. 637.

⁵⁹ *Brown v. First National Bank*, 112 Fed. 901, 50 C. C. A. 602. The court said: "The proceeds of the judgment should have been applied according to the agreement of the parties, and not otherwise. It is true it was applied upon another note of Brown which the bank held, and so far as he was concerned it

makes no great difference. Still we think he had the right to have it applied according to the agreement. But especially as to the other defendants who signed as surety to Brown, they had the right beyond all question to have the money applied upon the note in suit, if that was the agreement." Per Bunn, D. J.

⁶⁰ *Mastin Bank v. Hammerslough*, 72 Mo. 274.

CHAPTER XVII.

LOST OR STOLEN INSTRUMENTS.

<p>Sec.</p> <p>394. Lost or stolen instruments— General rules and principles.</p> <p>395. Same subject—Application of rule.</p> <p>396. Statutory provision as to holder in due course construed.</p> <p>397. Non-negotiable paper.</p>	<p>Sec.</p> <p>398. Bank and treasury notes.</p> <p>399. City or county certificates— Stolen after cancellation.</p> <p>400. Action under statute by owner of lost instruments.</p> <p>401. Evidence—Burden of proof.</p>
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§ 394. Lost or stolen instruments—General rules and principles.
—Though it was a rule established by the early common law that one could not, except by a sale in market overt, give a better title to personal property than he had himself, an exception has generally been recognized in the case of securities transferrable by delivery.¹ In the case

¹ *Murray v. Lardner*, 2 Wall. (U. S.) 110, 118, wherein it is said: "The general rule of the common law is, that, except by a sale in market overt, no one can give a better title to personal property than he has himself. The exemption from this principle of securities, transferable by delivery, was established at an early period. It is founded upon principles of commercial policy, and is now as firmly fixed as the rule to which it is an exception. It was applied by Lord Holt to a bank bill in *Anon*, 1st Salkeld, 126. This is the earliest reported case upon the subject. He held that the action must fail 'by reason of the course of trade, which creates a property in the assignee or bearer.' The leading case upon the subject is *Miller v. Race*, 1 Burrow 452, decided by Lord

Mansfield. The question in that case also related to a bank note. The right of a *bona fide* holder for a valuable consideration was held to be paramount against the loser. He put the decision upon the grounds of the course of business, the interests of trade, and especially that bank notes pass from hand to hand, in all respects, like coin. The same principle was applied by that distinguished judge in *Grant v. Vaughan*, 3 Burrow 1516, to a merchant's draft upon his banker. He there said: In '*Miller v. Race*, 31st Geo. II, B. R., the holder of a bank note recovered against the cashier of a bank, though the mail had been robbed of it, and payment had been stopped, it appearing that he came by it fairly and *bona fide*, and upon a valuable consideration, and there

of negotiable paper of such a character, as where it is indorsed in blank or payable to bearer, one who has taken it in the usual course of business and occupies the position of a *bona fide* holder, is not subject to the defense that it has been lost or stolen, nor, where he has collected the amount due thereon, can the owner recover such amount from him.² "The law in regard to bills of exchange and promissory notes is so framed as to give confidence and security to those who receive them, for valuable consideration, in the ordinary course of business, when payable to bearer or indorsed in blank so as to be transferable by delivery; and in general a party taking such a bill under such circumstances has only to look to the credit of the parties to it, and the regularity and genuineness of the signatures and indorsements. So

is no distinction between a bank note and such a note as this.' In *Peacock v. Rhodes*, 2 Douglas 633, he said: 'The law is settled that a holder coming fairly by a bill or note has nothing to do with the transaction between the original parties, unless, perhaps, in the single case, which is a hard one, but has been determined, of a note for money won at play.' The question has since been considered no longer an open one in the English law, as to any class of securities within the category mentioned." Per Mr. Justice Swayne.

² *Illinois*.—*Mann v. Merchants' Loan & T. Co.*, 100 Ill. App. 224.

Louisiana.—*Consolidated Association of Planters v. Avegno*, 23 La. Ann. 552.

Massachusetts.—*Wheeler v. Guild*, 20 Pick. (Mass.) 545, 32 Am. Dec. 231.

New York.—*Seybel v. National Currency Bank*, 54 N. Y. 288, 13 Am. Rep. 283; *Nolan v. Bank of New York*, 67 Barb. (N. Y.) 24.

Pennsylvania.—*Kuhns v. Gettysburg National Bank*, 68 Pa. St. 445.

Tennessee.—*Whiteside v. First National Bank* (Tenn. Ch. App. 1898), 47 S. W. 1108.

Texas.—*Greneaux v. Wheeler*, 6 Tex. 515; *First National Bank v. Beck*, 2 Tex. App. Civ. Cas., § 832.

English.—*Peacock v. Rhodes*, 2 Doug. 611. See *Garvin v. Wiswell*, 83 Ill. 215; *Merriam v. Granite Bank*, 8 Gray (Mass.) 254; *Franklin Sav. Inst. v. Heinsman*, 1 Mo. App. 336; *Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. 667; *Miller v. Race*, 1 Burrows 452.

Effect of blank indorsement. One of the consequences resulting from the power to pass a bill or note with a blank indorsement by mere delivery is "that if such a bill or note be lost or stolen or fraudulently misapplied any person who may become the holder of it in good faith for value and without notice, is entitled to recover the amount thereof and hold the same against the rights of the true owner at the time of the loss or theft," per Stites, J., in *Caruth v. Thompson*, 16 B. Mon. (Ky.) 572, 63 Am. Dec. 559.

In the case of an assigned note whether it is indorsed by the owner or not it has been held that he may recover it even of a purchaser in good faith. *Prather v. Weissiger*, 10 Bush (Ky.) 117.

that if such a bill or note be made without consideration, or be lost or stolen, and afterwards be negotiated to one having no knowledge of these facts for a valuable consideration and in the usual course of business, his title is good and he shall be entitled to receive the amount."³ And in this connection it was said in a case in the United States Supreme Court, in which this question arose in an action on bonds payable to bearer: "We are well aware of the principle involved in this inquiry. These securities are found in the channels of commerce everywhere, and their volume is constantly increasing. They represent a large part of the wealth of the commercial world. The interest of the community at large in the subject is deep rooted and wide branching. It ramifies in every direction, and its fruits enter daily into the affairs of persons in all conditions of life. While courts should be careful not so to shape or apply the rule as to invite aggression or give an easy triumph to fraud, they should not forget the considerations of equal importance which lie in the other direction."⁴ And where bonds payable to bearer are offered to one for purchase he is held to be under no obligation to make any inquiry of the persons offering them as to their right or title thereto or to take any special precautionary measures in the purchase of such securities by which the interest of other parties would be protected.⁵ And it has also been decided that one is not deprived of his character as a *bona fide* holder of such bonds by an omission on his part to examine and regard notices of their theft which have been left at his place of business, in the absence of actual knowledge or notice of the fact that they have been lost or stolen.⁶ A *bona fide* holder does not, however, acquire such an absolute property in negotiable paper which has been stolen that he can transmit it to a purchaser, who takes it with knowledge of the fact that it has been stolen.⁷ And where such paper has never taken effect as a binding obligation on account of a want of delivery, the fact that it was stolen may be a good defense to an action thereon.⁸

§ 395. **Same subject—Application of rule.**—In the application of the general rule it is decided that recovery by a *bona fide* holder of a

³ Wheeler v. Guild, 20 Pick. (Mass.) 545, 551, 32 Am. Dec. 231.

⁴ Murray v. Lardner, 2 Wall. (U. S.) 110, 122. Per Mr. Justice Swaine.

⁵ Seybel v. National Currency Bk., 54 N. Y. 288, 13 Am. Rep. 583, per Lott, Ch. C.

⁶ Seybel v. National Currency Bk., 54 N. Y. 288, 13 Am. Rep. 583.

⁷ Olmstead v. Winsted Bank, 32 Conn. 278, 85 Am. Dec. 260.

⁸ Salley v. Terrill, 95 Me. 553, 50 Atl. 896, 55 L. R. A. 730, 85 Am. St. R. 433; Hall v. Wilson, 16 Barb. (N. Y.) 548.

note indorsed in blank cannot be defeated by the fact that it was stolen.⁹ And where a person drew a check to his own order, indorsed it in blank and had it certified, and it was subsequently stolen from him and came into the possession of one who was a *bona fide* holder, it was held that the fact that the check had been stolen was no defense to an action by such holder.¹⁰ So where a check payable to bearer was received during banking hours of the day on which it was drawn, in the usual course of business, under circumstances not calculated to excite suspicion, and no negligence was shown from which bad faith could be inferred, it was decided that the holder could recover the amount thereof against the drawer, though it was lost or stolen from the real owner.¹¹ And where a bill was indorsed in blank, the fact that it was lost and its loss advertised in a newspaper, was no defense to an action thereon against the maker by one who discounted it for the finder in good faith and without notice.¹² So coupon bonds payable to bearer pass by delivery, and where such bonds were stolen from the safe of the owner and negotiated to a *bona fide* holder it was decided that the latter obtained a good title thereto and could maintain an action on the same.^{12*}

§ 396. Statutory provision as to holder in due course construed.—

Under a provision of statute that "where the instrument is in the hands of a holder in due course, a valid delivery thereof by all the parties prior to him, so as to make them liable to him, is conclusively presumed," it is decided that such presumption exists as well when a note is taken from a thief as in any other case, where it is a complete negotiable promissory note, payable to bearer.¹³

§ 397. Non-negotiable paper.—The rule as to the rights of a *bona fide* holder in respect to paper which has been lost or stolen does not extend to cases where the paper is non-negotiable. So it has been decided that a certificate of stock is not negotiable and that a purchaser of such a certificate acquires no rights thereto where it was stolen without

⁹ Mann v. Merchants' Loan & T. Co., 100 Ill. App. 224.

¹⁰ Nolan v. Bank of New York, 67 Barb. (N. Y.) 24.

¹¹ Marsh v. Small, 3 La. Ann. 402, 48 Am. Dec. 452.

¹² Lawson v. Weston, 4 Esp. 56.

^{12*} Murray v. Lardner, 2 Wall. (U.

S.) 110. See Consolidated Association of Planters v. Avegno, 28 La. Ann. 552.

¹³ Massachusetts National Bank v. Snow (Mass. 1905), 72 N. E. 959, decided under § 33 of Negotiable Instruments Act, embodied in Rev. Laws, c. 73, §§ 18-212, inclusive.

the fault or negligence of the owner though it was regularly indorsed.¹⁴ And where tax bills indorsed in blank were stolen and transferred to another it has been decided that the latter acquires no better title than the thief.¹⁵

§ 398. Bank and treasury notes.—Bank notes, though stolen or otherwise fraudulently put into circulation, become the property of one who gives a valuable consideration therefor, having no notice or knowledge of the robbery.¹⁶ So in the case of a stolen bank bill a *bona fide* holder may recover thereon against the bank from which it was stolen.¹⁷ But where the holder of a United States treasury note exercises an option given to him of having it converted into government bonds and indorses it in blank for that purpose and forwards it by an express company, from which it is stolen, the indorsement erased and the note negotiated, it has been decided in an action for the conversion of the note that its negotiability was destroyed by the acts of the owner and that a purchaser acquired no title thereto.¹⁸

¹⁴ *Barstow v. Mining Co.*, 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705. See *Sherwood v. Meadow Valley Mining Co.*, 50 Cal. 412.

The words of the court in *Bangor Electric Light & Power Co. v. Robinson*, 52 Fed. 520, 523, are pertinent in this connection. It is there said: "Certificates of stock indorsed in blank are so far of a negotiable character that they ordinarily pass from hand to hand, that they are subject to *lis pendens*, and that in order to effectuate the ends of justice and the intention of the parties, the courts ordinarily decree a better title to the transferee than actually existed in the transferor. Nevertheless we do not find that any court of authority has ever gone so far as to hold that the holder of them may lose the title to such as may be stolen from him, as he may of negotiable promissory notes, bills, scrip, or bonds, payable to bearer or indorsed in blank. * * * At first

it occurred to the court that, inasmuch as Robinson had seen fit to leave this certificate in such condition as to indicate that somebody was authorized to acquire it and fill in the indorsement, he was barred; but the court is unable to find any authorities sustaining this suggestion, and is compelled to treat this certificate, indorsed in blank and stolen, as it would any other stolen property, aside from strictly negotiable securities." Per Putnam, C. J.

¹⁵ *Young v. Brewster*, 62 Mo. App. 628, 1 Mo. App. Repr. 577.

¹⁶ *Robinson v. Bank of Darien*, 18 Ga. 65; *Sinclair v. Piercy*, 5 J. J. Marsh. (Ky.) 63; *United States v. Read*, Fed. Cas. No. 16125, 2 Cranch C. C. 159; *Miller v. Race*, 1 Burr. 452.

¹⁷ *Olmstead v. Winsted Bank*, 32 Conn. 278, 85 Am. Dec. 260.

¹⁸ *Dinsmore v. Ducan*, 57 N. Y. 573, 15 Am. Rep. 534.

§ 399. City or county certificates—Stolen after cancellation.—

Where certificates which are issued by a city or county for the payment of legitimate obligations and which acquire no validity unless issued for the purpose authorized by law, and which do not possess the character of commercial paper so as to render them good in the hands of a purchaser for value and without notice, without regard to fraud in their issuance, are lawfully cancelled, it may be shown in defense to an action by such a purchaser that they were subsequently stolen, the marks of cancellation erased, and that they were then put into circulation. Thus it was so held in an action against the District of Columbia on certificates of indebtedness called sewer certificates which had been redeemed according to law and cancelled by stamping across their face the words "cancelled by the Board of Audit." These certificates were then inclosed in bundles, filed away and the fact of redemption entered in the proper books. Subsequently they were stolen, the marks of cancellation erased, and were sold to a purchaser for value, in good faith without notice, who brought an action thereon. The court said in this case: "When the maker of a negotiable instrument lawfully cancels it before maturity, his liability upon it is extinguished, and cannot be revived without his consent. It is immaterial whether the cancellation is by destroying the instrument, or by writing or stamping words or lines in ink upon its face, provided the instrument, in the condition in which he puts it, unequivocally shows that it has been cancelled. * * * These certificates having been lawfully extinguished by stamping across their face marks of cancellation as clear and permanent as the original signatures, the liability of the District upon them as negotiable paper could not be revived by its omission to take additional precautions against their being stolen and fraudulently restored to their original condition by such means as ingenious wickedness might devise. * * * Considering the nature of these certificates, the method in which they had been cancelled, and the means by which they were afterwards put in circulation, we are of opinion that there is no ground for holding the District of Columbia liable to this claimant."¹⁹

§ 400. Action under statute by owner of lost instruments.—Where a statute permits an action on an instrument which has been lost by the owner,²⁰ the establishment of a lost note under such a statute is no

¹⁹ District of Columbia v. Cornell, 130 U. S. 655, 9 Sup. Ct. 694, 32 L. Ed. 1041. Per Mr. Justice Gray.

²⁰ A loss by theft is a loss by accident within the meaning of a statute authorizing a suit to be brought

bar to any defense that might be set up to the original note.²¹ So in an action upon a copy of a promissory note, regularly established in lieu of the lost original as provided by statute, a payment of the original note prior to the judgment establishing the copy may be pleaded.²² The rule that upon a plea of payment the burden of proof is upon the defendant is not altered by the fact that the note was lost after suit.²³

§ 401. **Evidence—Burden of proof.**—In an action on negotiable paper which is shown to have been lost or stolen the burden rests on the plaintiff to show that he is a *bona fide* holder.²⁴ And in such a

upon a bond, note, bill of exchange or other mercantile instrument which has been lost or destroyed by accident. *Mobile County v. Sand*, 127 Ala. 493, 29 So. 26, construing Ala. Code, § 31.

Pleading in action on lost instrument. In an action by the payee on a note which has been lost it is only necessary to allege the execution of the note to the plaintiff. It need not be alleged that he is the owner, as such fact will be presumed until the contrary is shown. *Embree v. Emmerston* (Ind. App. 1905), 74 N. E. 44.

Where a note is sued on as a lost instrument and is accurately described in the declaration, and the execution is not specially denied, and it appears from the evidence that the note was payable to bearer, had been acquired by plaintiff before maturity and lost after maturity, it is held that a case is made out entitling the plaintiff to have the merits of the controversy submitted to the jury. *Champenois v. Collins* (Miss. 1904), 36 S. E. 72.

Injunction to restrain maintenance of action. A provision of a negotiable instruments law that an action at law may be brought upon any negotiable instrument which is lost, "but any court of law shall

give judgment in the same manner as if such note was not lost," has been held to leave it questionable whether it was the intention of the legislature to have the act apply to any negotiable instrument other than a note. Where, however, the act contains a further provision that any court of law may make the same order as a court of equity would to indemnify the party charged against the repayment thereof, a court of equity is not thereby deprived of its original jurisdiction in such matters and may enjoin the maintenance of an action at law by the payee upon certain cashier's checks which have been lost where there has been an offer to pay the same upon the giving of the indemnity which would be required in any court of law or equity. *Clinton National Bank v. Stiger*, 67 N. J. Eq. 522, 58 Atl. 1055, construing N. J. Gen. St., p. 2605, § 7.

²¹ *Prescott v. Johnson*, 8 Fla. 391; *Jenkins v. Forbes* (Ga. 1904), 49 S. E. 284.

²² *Jenkins v. Forbes* (Ga. 1904), 49 S. E. 284.

²³ *Walston v. Davis* (Ala. 1906), 40 So. 1017.

²⁴ *Nolan v. Bank of New York*, 67 Barb. (N. Y.) 24; *Kuhns v. Gettysburg National Bank*, 68 Pa. St. 445.

case, unless the one who has obtained the money on the paper can show that he was a holder for value, he will be liable to the real owner in an action for money had and received.²⁵ But under a code provision authorizing the bringing of a suit on lost commercial paper and providing that where an affidavit is made by the plaintiff of such loss and of the contents and that the same has not been paid or discharged and such affidavit accompanies the complaint it must be received as presumptive evidence of the facts stated unless the defendant by plea accompanied by affidavit denies the execution of the paper, or the indorsement, acceptance or contents, in which case proof of the fact denied must be made by the plaintiff, a suit may be brought without affidavit in which case the plaintiff has the burden of proving the loss and contents but if accompanied by affidavit this burden is then held to shift onto the defendant who may, by denying the execution by verified plea, again shift such burden onto the plaintiff.²⁶ Upon proof, however, of the fact that a note has been lost a plaintiff cannot be required to prove in whose possession it is.²⁷ Again where the evidence fairly warrants the conclusion that a note is lost and there is no evidence to show that it was payable in a bank of the state it will not be presumed that it was so payable.²⁸

But see *Murray v. Lardner*, 2 Wall. 493, 29 So. 26, construing Ala. Code, (U. S.) 110. § 31.

²⁵ *Kuhns v. Gettysburg National Bank*, 68 Pa. St. 445.

²⁶ *Mobile County v. Sands*, 127 Ala.

²⁷ *Champenois v. Collins* (Miss. 1904), 36 So. 72.

²⁸ *Embree v. Emmerson* (Ind. App.), 74 N. E. 44.

CHAPTER XVIII.

WANT OF TITLE OR INTEREST.

Sec.	Sec.
402. Possession as evidence of title.	410. Transfer of title or interest after suit commenced.
403. Right of holder or owner to sue—Real party in interest.	411. Character of title or interest.
404. Right to recover generally—Legal and equitable title.	412. Void or voidable title or transfer.
405. Payees.	413. Checks.
406. Indorsee against indorser.	414. Bill of lading.
407. Assignee.	415. To protect maker or let in his defense.
408. Agency.	416. Same subject.
409. Recovery for benefit of holder—Beneficial interest.	417. Denial of ownership or title.
	418. Same subject.

§ 402. Possession as evidence of title.—Possession of a note is *prima facie* evidence of title and ownership.¹ This rule has been ap-

¹ *California*.—Bank of California v. J. L. Mott Iron Works, 113 Cal. 409, 45 Pac. 674.

Colorado.—Gumaer v. Sowers, 31 Colo. 164, 71 Pac. 1103; Reed v. First Nat. Bank, 23 Colo. 380, 48 Pac. 507; Perot v. Cooper, 17 Colo. 80, 28 Pac. 391.

Connecticut.—New Haven Mfg. Co. v. New Haven Pulp & Board Co., 76 Conn. 126, 55 Atl. 604.

Georgia.—Bomar v. Equitable Mort. Co., 111 Ga. 143, 36 S. E. 601.

Illinois.—Henderson v. Davisson, 157 Ill. 379, 41 N. E. 560; Wellman v. Highland, 87 Ill. App. 405.

Indiana.—Taylor v. Hearn, 131 Ind. 537, 31 N. E. 201.

Kansas.—O'Keeffe v. Frankfort First Nat. Bank, 49 Kan. 347, 30 Pac. 473.

Massachusetts.—Massachusetts Na-

tional Bank v. Snow, 187 Mass. 159, 72 N. E. 959.

Minnesota.—Kells v. Northwestern Live Stock Ins. Co., 64 Minn. 390, 67 N. W. 215, 25 Ins. L. J. 627, 64 Minn. 393, 71 N. W. 5; Robinson v. Smith, 62 Minn. 62, 64 N. W. 90.

Nebraska.—Ryan v. West, 63 Neb. 894, 89 N. W. 416; First National Bank v. McKibbin, 50 Neb. 513, 70 N. W. 38; City National Bank v. Thomas, 46 Neb. 861, 65 N. W. 895.

New York.—Poess v. Twelfth Ward Bank, 86 N. Y. Supp. 857, 43 Misc. 45; Neg. Inst. Law, Laws 1897, p. 719, c. 612.

North Dakota.—Brynjolfson v. Osthus (N. D.), 96 N. W. 261.

Virginia.—Dashiell v. Merchants' & P. Savings Bank (Va.), 22 S. E. 169.

Washington.—Citizens' Nat. Bk. v.

plied to a non-indorsed note,² payable to a third person's order;³ a note indorsed in blank;⁴ a bill of exchange payable to drawer and indorsed in blank;⁵ in favor of the bearer of a note payable to bearer;⁶ a note indorsed to another when coupled with evidence of payment of value;⁷ a duly indorsed note in possession at time of death;⁸ and to a note in possession of heirs of the holder.⁹ So production of notes is held sufficient without proof of who are the holders,¹⁰ and also that

Wintler, 14 Wash. 558, 45 Pac. 38, 4 Am. & Eng. Corp. Cas. N. S. 146; Yakima Nat. Bank v. Knipe, 6 Wash. 348, 33 Pac. 834.

Examine the following cases:

United States.—Pana v. Bowler, 107 U. S. 529, 27 L. Ed. 424; New Orleans Canal & Bkg. Co. v. Montgomery, 95 U. S. 16, 24 L. Ed. 346.

Alabama.—Paige v. Broadfoot, 100 Ala. 613, 13 So. 426.

Kansas.—Cobleskill First Nat. Bk. v. Emmitt, 52 Kan. 603, 35 Pac. 213.

Kentucky.—Holton v. Alley, 15 Ky. L. Rep. 529, 24 S. W. 113.

Minnesota.—Huntley v. Hutchinson, 91 Minn. 244, 97 N. W. 971, Gen. Stat. 1894, § 5751; Estes v. Lovering Shoe Co., 59 Minn. 504, 61 N. W. 674, 12 Bkg. L. J. 148; Bahmsen v. Gilbert, 55 Minn. 334, 56 N. W. 1117.

Missouri.—Hair v. Edwards, 104 Mo. App. 213, 77 S. W. 1089.

Nebraska.—Gandy v. Bissell (Neb.), 100 N. W. 803, rev'g 5 Neb. (unofficial) 184, 97 N. W. 632.

New Jersey.—Halstead v. Colvin, 51 N. J. Eq. 387, 26 Atl. 928.

New York.—People v. Bradner, 108 N. Y. 659, 15 N. E. 445, 15 Cent. Rep. 474; Goetting v. Day, 87 N. Y. Supp. 510; Manawaring v. Keenan, 86 N. Y. Supp. 262; Frankenstein v. Levini, 65 N. Y. Supp. 562.

North Dakota.—Shepard v. Hansor, 9 N. D. 249, 83 N. W. 20.

Oklahoma.—Price v. Winnebago Nat. Bank, 14 Okla. 268, 79 Pac. 105.

Rhode Island.—Third National Bank v. Angell, 18 R. I. 1, 29 Atl. 500.

South Dakota.—Heffleman v. Pennington County, 3 S. D. 162, 52 N. W. 851.

Tennessee.—Memphis v. Bethel (Tenn.), 17 S. W. 191.

Utah.—Voorhees v. Fisher, 9 Utah 303, 34 Pac. 64.

² Dickerson v. Cass County Bank (Iowa), 89 N. W. 15.

³ Martin v. Martin, 174 Ill. 371, 51 N. E. 691, aff'g 74 Ill. App. 215.

⁴ Battersbee v. Calkins (Mich.), 87 N. W. 760, 8 Det. Leg. N. 778; Ames & F. Co. v. Smith, 65 Minn. 304, 67 N. W. 999; Bank of Spencer v. Simmons, 43 W. Va. 79, 27 S. E. 299.

⁵ Gillespie v. Planters' Oil Mill Mfg. Co., 76 Miss. 406, 24 So. 900.

⁶ Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959.

⁷ Menzie v. Smith, 63 Neb. 666, 88 N. W. 855.

⁸ Eyermann v. Piron, 151 Mo. 107, 52 S. W. 229.

⁹ Magel v. Milligan, 150 Ind. 582, 50 N. E. 564.

¹⁰ Williams v. Holt, 170 Mass. 351, 49 N. E. 654.

Ownership of the notes sued on may be prima facie established in the indorsee's favor by putting in evidence the note with its indorsements thereon. Murto v. Lemon (Colo. App.), 75 Pac. 160.

a non-avermment of ownership by the payee as plaintiff does not render the complaint defective;¹¹ although it is decided that the title to a note must be sufficiently shown by the pleadings.¹² But the rule as to possession is inapplicable as to paper indorsed in blank and non-negotiable.¹³ And it is held that a party not the payee will not be presumed to be the owner of an undorsed note not payable to bearer, merely because it was found amongst his papers after his decease.¹⁴

§ 403. Right of holder or owner to sue—Real party in interest.—

A statutory right to have an action brought by the real person in interest is an important factor in the determination of the question of the right to dispute plaintiff's title or ownership and of the right of the defendant to protection against other claimants.¹⁵ But the holder of commercial paper may sue in his own name.¹⁶ And an indorsee in possession can cancel an indorsement by him to a bank for collection.¹⁷ So the indorsee of a note for collection may sue thereon in his own name, under a statute so permitting in case of a transferee under a restrictive indorsement.¹⁸ And the owner of the equitable title by reason of payment made after dishonor, may maintain an action in his own name without formal indorsement back.¹⁹ Nor will the surrender of a note preclude the holder from recovering against the maker, where the surrender was a mere formality under an agreement that the holder might sue.²⁰ And an indorsement of paper payable to bearer is unnecessary, where the statute so permits, to enable the holder to sue thereon as he has a *prima facie* right to recover.²¹ But the holder of a note indorsed in blank, who has not title or interest cannot maintain an action thereon.²²

¹¹ *Ullery v. Brohm*, 20 Colo. App. 389, 79 Pac. 180.

¹² *National Life & Trust Co. v. Gifford*, 90 Minn. 358, 96 N. W. 919.

¹³ *Mitchell v. St. Mary*, 148 Ind. 111, 47 N. E. 224.

¹⁴ *Hair v. Edwards*, 104 Mo. App. 213, 77 S. W. 1089.

¹⁵ *Giselman v. Starr*, 106 Cal. 651, 657, 40 Pac. 8. See §§ 415-418 herein.

¹⁶ *Bomar v. Equitable Mort. Co.*, 111 Ga. 143, 36 S. E. 601; *McDaniel v. Chinski*, 23 Tex. Civ. App. 504, 57 S. W. 922.

¹⁷ *New Haven Mfg. Co. v. New Haven Pulp & Board Co.*, 76 Conn. 126, 55 Atl. 604; Gen. Stat. 1902, § 4218.

¹⁸ *Smith v. Bayer (Oreg.)*, 79 Pac. 497.

¹⁹ *Hartzell v. McClurg*, 54 Neb. 316, 74 N. W. 626.

²⁰ *Clark v. Butts*, 73 Minn. 361, 76 N. W. 199.

²¹ *Buck v. Troy Aqueduct Co.*, 76 Vt. 75, 56 Atl. 285.

²² *Hart v. West*, 16 Tex. Civ. App. 395, 41 S. W. 383, aff'd 91 Tex. 184, 42 S. W. 544.

§ 404. **Right to recover generally—Legal and equitable title.**—Indorsement or transfer are not necessary to enable a purchaser for value to recover,²³ and the holder by delivery of a note payable to a certain person or order and indorsed in blank has the title thereto.²⁴ Nor is it necessary in order to recover on a note, transferable by delivery only, to prove the transfer.²⁵ But title cannot rest upon proof of indorsement alone where the note is returned by the indorser without delivery to the claimant and he denies delivery.²⁶ If, however, the payee indorses a note, and the indorsee recovers judgment against the maker, and upon a return upon execution of "no property found" a subsequent judgment against the indorser is satisfied by him, he can transfer the claim against defendant, and an averment by the transferee as plaintiff of these facts states a good cause of action and the indorsement or transfer can only be denied by a sworn plea.²⁷ So the legal title of a note being in the plaintiff, the fact that the payee may have been the equitable owner constitutes no defense.²⁸ Nor is it a defense that the note is held as trustee for a third party.²⁹ Again, in an action by an administrator on a note given him for land bought at an administrator's sale, a plea that heirs at law are alone interested in the note and that after the sale they had sued defendant to recover the land for the purchase of which the note was given, and so put him to great expense, is not good as a defense.³⁰ But a transferee, before maturity of commercial paper not indorsed at the date of its transfer, acquires an equitable but not a legal title, and equities of which the transferee had notice are not excluded by a subsequent indorsement before maturity.³¹ If, however, it is intended by an indorsement to pass the title to a note, and it is designed that it shall circulate as negotiable paper transferable by delivery as a note payable to order and duly indorsed by the payee, the contract must take effect according to the intent of the parties, and the indorsee before maturity without notice takes the legal title for value free from all equities on the part of the payee, even though the latter did not assume the liability of an indorser or guarantor, and even though the indorsement is

²³ Lyman v. Warner, 113 Fed. 87.
See § 413 herein.

²⁴ Heard v. De Loach, 105 Ga. 500, 161.
30 S. E. 940.

²⁵ Gumaer v. Sowers, 31 Colo. 164,
71 Pac. 1103.

²⁶ Moehn v. Moehn, 105 Iowa 710, 353, 12 So. 512, 19 L. R. A. 716.
75 N. W. 521.

²⁷ Smith v. Harrison, 33 Ala. 706.

²⁸ Caldwell v. Lawrence, 84 Ill.

²⁹ Nicolay v. Fritschle, 40 Mo. 67.

³⁰ Story v. Kemp, 51 Ga. 399.

³¹ Pavey v. Stauffer, 45 La. Ann.

on another paper attached to and made part of the note, called an allonge.³² It is also determined that the indorsee is not affected by his indorser's want of title.³³

§ 405. **Payees.**—The party to whom a note is made payable being *prima facie* the owner, it is held that his right to maintain an action cannot be questioned, except the defendant pleads payment or offset against the party who he alleges is the true owner of the note. So it is no defense to an action on a note that it was given to the payee, in lieu of three other notes, given to the husband of the payee. The widow might be acting as executrix in her own wrong, or might be the heir; in either case the notes surrendered would be satisfied.³⁴ And in an action upon a promissory note made by the defendant, payable to order, it is no defense that the payee and nominal plaintiff pledged the note without indorsement to another as collateral security for a debt due to the latter, and that before the debt became due the payment of the debt was tendered by such payee but that the pledgee refused to receive it or to give up the note, and that after its maturity the pledgee commenced the action without the authority or consent of

³² Crosby v. Roub, 16 Wis. 616, 84 Am. Dec. 720.

³³ Grant v. Vaughan, 3 Burrows 1516 (an action where the bearer of a bill of exchange, who had come by it honestly and for value, was held entitled to recover against the drawer, even though the note had been lost and the person who found it, or who at least was in possession of it, had transferred it to the holder, the latter having taken it after inquiry as to the standing of the transferor); Miller v. Race, 1 Burrows 452 (holding that a bank note payable to a person named, or bearer, on demand, becomes the property of him who gives value therefor without notice of defenses); Peacock v. Rhodes, Dougl. 633 (holding that an innocent indorsee of an inland bill of exchange with a blank indorsement may recover upon it against the drawer. Lord Mansfield said: "The

holder of a bill of exchange is not to be considered in the light of an assignee or payee. * * * The law is well settled that a holder, coming fairly by a bill or note, has nothing to do with the transactions between the original parties. * * * I see no difference between a note indorsed in blank and one payable to bearer; they both go by delivery, and possession proves property in both cases. The question of *mala fides* was for the consideration of the jury. The circumstances that the buyer and also the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion very fit for their consideration. But they have considered them and have found that it was received in the course of trade, and therefore the case is clear").

³⁴ Riley v. Loughrey, 22 Ill. (12 Peck) 98.

the payee; although if the promisees came in and disclaimed it would be different.³⁵ So a plea that the note has been assigned should be supported by proof that the right to the note is in the assignee.³⁶ But where a joint and several promissory note was executed and left in the hands of one of the promisors, for delivery to the payee, when he should demand it, in exchange for a note of the same amount, but of a previous date, and signed alone by such promisor, with whom said note had been left in escrow, and no demand was made upon him, before said promisor's death, by the payee; it was held that the new note did not operate *de facto* as a payment of the old note, that the property of such new note had not vested in the payee, and that he could not recover possession of it from the administrator of the deceased promisor, it being presumed that the accrued interest upon the old note was to be paid upon making the exchange.³⁷ A note discounted in bank, however, assumes the dignity of a foreign bill, and if the note was made by the payor and loaned for the accommodation of the payee and it has been negotiated, the bank alone can maintain an action against the payor, who cannot question the consideration; but upon a plea that the note is the property of another than the plaintiff the latter will be precluded from maintaining an action in his own name, and although the holder who is *prima facie* the owner may strike

³⁵ Wolcott v. Boston Faucet Co., 9 Gray (75 Mass.) 376.

³⁶ Conant v. Wills, 1 McLean (U. S. C. C.) 427, Fed. Cas. No. 3,087.

³⁷ Canfield v. Ives, 18 Pick. (35 Mass.) 253, the court, per Shaw, C. J., said: "The single question in this case is, whether the property in the note, which is the subject of the action (trover), had vested in the plaintiff at the time of the demand and refusal. The court are all of the opinion that it had not. The transaction was inchoate and incomplete, and until the exchange was made pursuant to the agreement the old note was not discharged, nor did the plaintiff become entitled to the right of property in the new one. It was a proposition, an executory agreement, never in fact executed. It is impos-

sible to consider Miles Bartholomew as the agent of the plaintiff; he was himself a promisor and a party. * * * It could not have been understood by the parties: that the new note was to enure and operate *de facto*, as payment of the old one; or that the new note was to be left with Miles Bartholomew for any other purpose than to be exchanged for the old one; that is, to be delivered when the old one should be given up. The further consideration, that the interest was to be paid on the old note, on such exchange, renders it quite clear that the transaction was not to be understood as closed, so as to vest the property in the new note in the plaintiff, until such exchange, which was never made."

out the indorsements the payor may, nevertheless, show that the note is the property of one of the indorsers.³⁸

§ 406. **Indorsee against indorser.**—In an action by the indorsee against the indorser of a note the relation between such parties may be shown, and the presence of the defendant's name in blank upon the back of the note is *prima facie* evidence of a contract of indorsement, which is not wholly overcome by showing that the name was previously written for another purpose. The apparent indorser should not be concluded contrary to the true meaning and intent of the parties, and the question is issuable and provable whether such blank indorsement was made in the usual course of trade to transfer title.³⁹ So, in an action by an indorsee against his immediate indorser, a plea that, before the commencement of the suit, the plaintiff transferred the note to a third person, who since then had been and continued to be the true and lawful owner and possessor of the note is a bar to the recovery.⁴⁰ If the action is by the third indorsee against the second indorser, an affidavit of defense is sufficient to carry the cause to the jury, where it sets forth the ability to prove that the suit is brought for the use and benefit of the payee and first indorser, and that he is the real owner and holder of the note and that the plaintiff is merely the nominal holder; as the payee and first indorser, being responsible to every subsequent indorser, the second indorser, upon recovery against him, would have his remedy against the preceding indorser.⁴¹ But in an action by an indorsee against an indorser, a plea setting up that defendant assigned the note, after maturity, "for the purpose of transferring" the same, "and for no other purpose" is bad on demurrer since it is only equivalent to an averment that he assigned the note not intending that he should be liable as an assignor, such a plea being a simple denial of the legal import of the assignment.⁴²

§ 407. **Assignee.**—Suit may be brought by the legal assignee;⁴³ by an assignee without indorsement when he is the real party in inter-

³⁸ Tuggle v. Adams, 3 A. K. Marsh. 10 Ky.) 429.

³⁹ Hudson v. Wolcott, 39 Ohio St. 618.

⁴⁰ Waggoner v. Colvin, 11 Wend. (N. Y.) 27. See §§ 415-418 herein.

⁴¹ Oberle v. Schmidt, 86 Pa. St. 221.

⁴² Dunn v. Ghost, 5 Colo. 134.

⁴³ Gladstone Baptist Church v. Scott, 25 Ky. L. Rep. 237, 74 S. W. 1075.

est;⁴⁴ and by an assignee of a non-negotiable note.⁴⁵ So an assignee may sue in his own name and is subject to defenses against the payee.⁴⁶ A wife as assignee may also maintain suit in her own name, though the assignor has an interest in the note.⁴⁷ And where a surety has paid a note and received the assignment thereof his successor in interest may recover thereon from the maker.⁴⁸ So the maker may be sued by a surety who was paid the note and it is assigned to him.⁴⁹ And so where a single bill is indorsed in blank and delivered, the transferee is entitled to fill out the assignment to himself and bring an action against the maker in his own name.⁵⁰ Again, the written assignment of a note payable to the testator, made and executed by the executors, confers upon the assignee the title to the note and the right to sue thereon, and constitutes ample protection to the defendant as maker and debtor of the estate, and whatever equities may exist in such case between the assignors and assignee of the note cannot interest the defendant nor defeat a recovery, so long as he is protected from any subsequent action by such recovery.⁵¹ So an indorsement or transfer of a negotiable note does not constitute an agency. It is an assignment, and if the assignment is made by its owner and holder, with a limitation not appearing upon the note itself it can in no way affect the maker who has paid it while he is ignorant thereof as such maker is not bound to understand an assignment limited by some act of the parties instead of by virtue of some law which he might be presumed to understand.⁵² And in a suit on a promissory note, by the assignee of the payee against the maker, the defendant's plea that the note was assigned for collection only, the proceeds to be credited on certain notes given by the assignor, is insufficient as a defense.⁵³ But the assignee

⁴⁴ *Vinson v. Palmer*, 45 Fla. 630, 34 So. 276.

⁴⁵ *Barry v. Wachosky*, 57 Neb. 534, 77 N. W. 1080.

⁴⁶ *Power v. Hambrick*, 25 Ky. L. Rep. 30, 74 S. W. 660.

⁴⁷ *Lodge v. Lewis*, 32 Wash. 191, 72 Pac. 1009.

⁴⁸ *Bay View Brew. Co. v. Tecklenberg*, 19 Wash. 469, 53 Pac. 724.

⁴⁹ *Stratton v. Heuser*, 19 Ky. L. Rep. 1019, 42 S. W. 1133, Ky. Stat., §§ 4665-4667.

⁵⁰ *Dickey v. Pocomoke City Nat. Bk.*, 89 Md. 280, 43 Atl. 33.

⁵¹ *Huck v. Kraus*, 99 N. Y. Supp. 490. See §§ 415, 416 herein.

⁵² *Lamb v. Matthews*, 41 Vt. 42. In this case a note payable to bearer was delivered by the owner and holder to collect and to use the avails thereof as needed, and there was an express understanding at the time of its delivery that if uncollected it should, upon decease of the person giving the note, be surrendered to his executor.

⁵³ *Butler v. Sturges*, 6 Blackf.

of a sealed note is held to be a holder subject to the infirmities against the original obligee.⁵⁴

§ 408. **Agency.**—An agent, in case of a note indorsed to himself, may sue thereon in his own name, even though said note was purchased with his principal's money.⁵⁵ But in a suit between the original parties to a due bill it is held that the maker may show that the apparent payee was the agent of the real payee, or that the person, in favor of whom the bill was indirectly given was his debtor and that the plaintiff's name was a borrowed one, only where such facts tend to prove that there was really no consideration.⁵⁶ And where an agent, having such power, accepts a bill in the name of his principal the latter is liable as acceptor, and cannot escape liability on the ground that he had no interest in the transaction in which the bill was given and that he had received no consideration, unless he proves that his agent, to the knowledge of the holder of the bill, had abused his power or the confidence reposed, and had availed himself of the power for his own benefit or purposes.⁵⁷ But it is also decided that if the transferee is to be considered as the agent of a foreign merchant, he cannot recover upon his title only, where such title is bad.⁵⁸ And in an action by the second indorsee against his immediate indorser defendant may prove that the plaintiff had given no consideration for the note, but held it as the agent merely of the payees, or first indorsers, to collect the amount for them, and therefore had no right to bring the suit.⁵⁹ So in an action, brought since the code in New York, on a note payable to bearer or indorsed in blank it may be shown that the plaintiff is not the real owner of the note; so his want of interest, or that he holds the note merely as agent for the payee, against whom the maker has a good defense, may be proven.⁶⁰

§ 409. **Recovery for benefit of holder—Beneficial interest.**—The lawful possessor of a note may recover for the benefit of the holder of

⁵⁴ *J. C. Stevenson & Co. v. Bethea*, 68 S. C. 246, 47 S. E. 71.

⁵⁵ *Cochran v. Siegfried* (Tex. Civ. App.), 75 S. W. 542.

⁵⁶ *Lauve v. Bell*, 1 La. (1 La. O. S. 191) 73.

⁵⁷ *Broadway Sav. Bank of St. Louis v. Vorster*, 30 La. Ann. 587.

⁵⁸ *De la Chaumette v. Bank of England*, 9 Barn. & C. 208, but there was a new trial granted, one of the

grounds being to enable the plaintiff to show that his transferer had paid value for the note, it being a foreign one.

⁵⁹ *Herrick v. Carman*, 10 Johns. (N. Y.) 224. But see: *Case v. Mechanics' Banking Assoc.*, 4 N. Y. 166.

⁶⁰ *Eaton v. Alger*, 57 Barb. (N. Y.) 179.

the legal title.⁶¹ And a want of beneficial interest in the proceeds of a note will not preclude the holder of the legal title from suing on the note, where the assignment is made in order that he may realize on the paper in the original payee's interest.⁶² Nor will the beneficial interest of the indorsee preclude recovery by the payee of a note, indorsed as collateral security, where the payee has possession, without fraud.⁶³ Nor is it a valid objection to a suit that it is brought for the benefit of the principal in a note, which is sued as against a surety only and two other persons as executors of an estate.⁶⁴ Nor is it a defense that the purchaser took only the nominal title to a note and that another was to benefit by the purchase.⁶⁵ But it is held that an answer that the note had been delivered to another party with authority to collect the same and apply the proceeds on a debt due to him, shows the beneficial interest to be in such party and constitutes a good defense.⁶⁶

§ 410. Transfer of title or interest after suit commenced.—It is held that in a suit on a bill or note, a plea *puis darrein* continuance, that since suit commenced plaintiff has transferred to another the legal interest in the bill or note, is a good bar.⁶⁷ But, under an Iowa decision, after an action has been commenced the plaintiff may sell and dispose of the judgment he may recover without investing the person purchasing it with the legal interest to the chose in action, and under such an assignment it would be improper for the court to substitute the holder of it as plaintiff in the action with power to prosecute in his own name. And where, in an action on a promissory note, the answer denies that plaintiff holds against him any such notes as are described in his petition, such a denial, without more, relates to the time of commencing the action, and means only that it

⁶¹ *Hyde v. Lawrence*, 49 Vt. 361.

Plaintiff was the beneficial owner when the suit was brought. The assignee, who was the mere legal title holder, subsequently appeared and admitted plaintiff's ownership and disclaimed title in himself, and it was decided that the defense that plaintiff was not the owner of the paper was unsustainable. *Simon v. Wildt*, 84 Ky. 157.

⁶² *Manley v. Park*, 68 Kan. 400, 75 Pac. 557, 76 Pac. 1130.

⁶³ *Hutchings v. Reinhalter*, 23 R. I. 518, 51 Atl. 429.

⁶⁴ *Hampton v. Shehan*, 7 Ala. 295.

⁶⁵ *Anderson v. Johnson*, 106 Wis. 218, 82 N. W. 177, aff'g *Anderson v. Chicago Title & Trust Co.*, 101 Wis. 385, 77 N. W. 710.

⁶⁶ *Gillispie v. Ft. Wayne & Southern R. Co.*, 12 Ind. 398.

⁶⁷ *Beebe v. Real Estate Bank*, 5 Pike (Ark.) 183; following *Gray v. Real Estate Bank*, 5 Pike (Ark.) 93.

is denied that plaintiff holds such notes as are described. If in such case the notes offered in evidence are not indorsed, and it is claimed that the assignment shows that the action was not prosecuted in the name of the real party in interest; it is held error to instruct the jury to find for the defendant, and that the assignment did not invest the assignee with the legal interest in the notes, being only a transfer of the judgment the assignor expected to recover.⁶⁸

§ 411. **Character of title or interest.**—It is decided that the holder of the legal title is not obligated, in order to recover, to show in what capacity he holds the note.⁶⁹ And, ordinarily, the character and extent or nature of the interest of the legal holder of negotiable paper cannot constitute a defense as to the amount recoverable from the maker, provided he is entitled to any recovery whatever.⁷⁰ Nor, it is decided, can the maker, when sued on a note by an indorsee from the payee, defend as to the character in which the plaintiff sues, and which is alleged to arise from a guaranty made by the indorsee to a bank where he had discounted the note.⁷¹

§ 412. **Void or voidable title or transfer.**—Any illegality in the transfer will vitiate the title of one who derives it through a violation of law to which he was a party, although one not a party to such violation and holding it *bona fide* might recover.⁷² And while it is generally true as a rule that if a promisor induces a person to take an assignment of a note, by admitting the justice of the debt, or by declaring that he has no defense, he cannot afterward deny it to the prejudice of the assignee, yet such a rule has no application to a case of usury where the assignee has knowledge of the same, and especially where such declarations are obtained the more effectually to cover and hide the same.⁷³ If a note has been actually and regularly indorsed and delivered by the payee to the indorsee the legal title be-

⁶⁸ Allen v. Newberry, 8 Clarke (Iowa) 65.

⁶⁹ Graham v. Troth, 69 Kan. 861, 77 Pac. 92.

⁷⁰ Ellis v. Watkins, 73 Vt. 371, 50 Atl. 1105.

⁷¹ Finney v. Pennsylvania Iron Works Co., 22 App. D. C. 476.

⁷² Sproule v. Merrill, 16 Shep. (29 Me.) 260. See Solomons v. Bank of

England, 13 East 135. Lord Kenyon, C. J., said: "There is no doubt that the holder of a bank note is entitled *prima facie* to prompt payment; but if the other party has been plundered of it before," and there is some suspicion of priority in the fraud, it is a proper question for the jury. See §§ 288, *et seq.*, herein.

⁷³ Nichols v. Levins, 15 Iowa 362.

comes thereby transferred to such indorsee with the right to enforce payment without regard to the relations between him and his immediate indorser, and such right to recover cannot be successfully challenged by either the maker or his creditors upon the grounds that the indorsement was made *causa mortis* and that there had been a subsequent revocation by the recovery by the donor. The gift is not void, but voidable, and that only by the donor or his legal representative. The note is the property of the indorsee, except possibly as to some offset by the maker against the payee or except as to creditors hindered, delayed or defrauded by such assignment made and accepted.⁷⁴ The character of the paper, however, as in case of certificates of indebtedness issued by a municipality, may be such that its ultimate payment depends upon contingencies which must happen before any right of action can accrue, these conditions precedent being imposed under ordinance. In such case the paper, not being a negotiable or transferable instrument, the holder thereof acquires no enforceable title where there has been no compliance by him with the prerequisites upon which title must rest.⁷⁵ But if an assignment is voidable only at the instance of other parties than the maker, the latter cannot set up such assignment to destroy the title of the indorsee in a suit by him.⁷⁶ And although a cashier of a bank can indorse negotiable paper and convey the legal title to any person but himself, yet an indorsement to himself would be voidable merely at the instance of the bank, and until avoided by the bank would pass legal title to the cashier.⁷⁷

§ 413. **Checks.**—An assignee in due course of a check may sue thereon.⁷⁸ And in a recent case in New York the rule is affirmed as settled that title to a check, like title to any other chose in action, can be transferred by indorsement, and by delivery and parol; but by such transfer its negotiability is destroyed and the transferee takes simply the title which the transferor had which is subject to equities existing between the drawer of the check and the payee; and under the Negotiable Instruments Law, where the holder of an instrument payable to his order transfers it for value without indorsing it, the

⁷⁴ *Hulley v. Chedic*, 22 Nev. 127, 36 Pac. 783.

⁷⁵ *Newgrass v. City of New Orleans*, 42 La. Ann. 163, 7 So. 565.

⁷⁶ *Tyson v. Bray*, 117 Ga. 639, 45 S. E. 74.

⁷⁷ *Dyer v. Sebrell*, 135 Cal. 597, 67

Pac. 1036, per Henshaw, J.; *Preston v. Cutter*, 64 N. H. 461, 463; *Haugan v. Sunwall*, 60 Minn. 367, 62 N. W. 398.

⁷⁸ *Kemp v. Northern Trust Co.*, 108 Ill. App. 242.

transfer vests in the transferee such title as the transferor had therein, and the transferee acquires in addition the right to have the indorsement of the transferor; and a bank certifying a check so delivered without indorsement is liable, though it had no knowledge as to who was owner of the check.⁷⁹

§ 414. **Bill of lading.**—It is decided that the fact that goods were taken from the possession of the carrier by one having title paramount to that of the consignor is a good defense to an action by the consignee or indorsee of the bill of lading for the non-delivery of the property.⁸⁰ The statute making bills of lading negotiable does not put them upon the footing of bills of exchange and charge the negotiation of them with the consequences which attend or follow the negotiating of bills or notes, but merely prescribes the mode of transferring or assigning them, and provides that such transfer and delivery by these symbols of property shall for certain purposes be equivalent to an actual transfer and delivery of the property itself.⁸¹

⁷⁹ *Mueur v. Phoenix Nat. Bk.*, 88 N. Y. Sup. 83, 94 App. Div. 331, aff'g 86 N. Y. Supp. 701, 42 Misc. 341, aff'd 183 N. Y. (Mem.) 511. See *Freund v. Importers' & Traders' Nat. Bank*, 76 N. Y. 352.

⁸⁰ See next following note.

⁸¹ *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 232-237. The court, per Mitchell, J., said: "There is an unbroken line of authorities in England that, even as against a *bona fide* consignee or indorsee for value, the carrier is not estopped by the statements of the bill of lading, issued by his agent, from showing that no goods were in fact received for transportation. *Grant v. Norway*, 10 C. B. 665; *Coleman v. Riches*, 16 C. B. 104; *Hubbersty v. Ward*, 8 Exch. 330; *Brown v. Powell Coal Co.*, L. R. 10 C. P. 562; *McLean v. Fleming*, L. R. 2 H. L. Sc. 128; *Cox v. Bruce*, 18 E. B. Div. 147; *Meyer v. Dresser*, 16 C. B. (U. S.) 646; *Jessel v. Bath*, L. R. 2 Exch. 267. And this has not

been at all changed by the 'bills of lading act' (18 and 19 Vict., c. 111, § 3). It is also the settled doctrine of the federal courts. *Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182; *The Lady Franklin*, 8 Wall. (U. S.) 325; *Pollard v. Vinton*, 105 U. S. 7; *St. Louis, etc., Ry. Co. v. Knight*, 122 U. S. 79 (7 Sup. Ct. Rep. 1132); *Friedlander v. Texas & Pac. Ry. Co.*, 130 U. S. 416 (8 Sup. Ct. Rep. 570). What was said on the subject in *Schooner Freeman v. Buckingham* was probably obiter, for in that case it was sought to hold the interest of the general owner in a ship liable on a bill of lading issued by the special owner, who was not the agent of the former. But what is there said is important both as being the utterance of so eminent a jurist as Curtis, J., and also because so often quoted with approval by the same court in subsequent cases. The case of the *Lady Franklin* did not involve the question of a *bona fide*

§ 415. To protect maker or let in his defense.—If the maker has a good defense, as between him and the payee, but is prevented from

purchaser, but is important as announcing that the principle is the same, whether the false bill of lading is issued fraudulently or by mistake. But, in view of the later cases cited above, there is no room to doubt that that court is firmly committed to the doctrine in its broadest scope. The same rule obtains in Massachusetts, Maryland, Louisiana, Missouri, North Carolina, and apparently Ohio. *Sears v. Wingate*, 3 Allen 103; *Baltimore & Ohio R. Co. v. Wilkins*, 44 Md. 11; *Fellows v. Steamer Powell*, 16 La. Ann. 316; *Hunt v. Miss. Cent. R. Co.*, 29 La. Ann. 446; *Louisiana Nat. Bank v. Laveille*, 52 Mo. 380; *Williams v. Wilmington & Weldon R. Co.*, 93 N. C. 42; *Dean v. King*, 22 Ohio St. 118. The text writers all agree that the overwhelming weight of authority is on this side. See 38 Am. Dec. 410 (note to *Chandler v. Sprague*). The reason by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that his real and apparent authority—i. e.,

the power with which his principal has clothed him in the character in which he is held out to the world—is the same, viz., to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that, if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency or the performance of a certain condition, the occurrence of an event, or the happening of a contingency, or the preponderance of the condition must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. An examination of the authorities also shows that they apply the same principle whether the bill of lading was issued fraudulently and collusively, or merely by mistake. The only States that we have found in which a contrary rule has been adopted are New York, Kansas, Nebraska, apparently Illinois, and perhaps Pennsylvania. *Armour v. Mich. Central R. Co.*, 65 N. Y. 111; *Bank of Batavia v. N. Y. L. E. & W. R. Co.*, 106 N. Y. 195 (12 N. E. 433); *Sioux City & Pac. R. Co. v. First Nat. Bank*, 10 Neb. 556 (7 N. W. 311); *St. Louis & Iron Mt. R. Co. v. Larned*, 103 Ill. 293; *Brook v. New York, etc., R. Co.*, 108 Pa. St. 529 (1 Atl. 206). The reasoning of these cases is in substance

making it in consequence of the note having passed into the hands of an indorsee, it may be proper to show the circumstances under which

that the question does not at all depend upon the negotiability of bills of lading, but upon the principle of estoppel *in pais*; that where a principal has clothed an agent with power to do an act in case of the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person who has dealt with the agent or acted on his representation in good faith in the ordinary course of business. This rule this court in effect adopted and applied in *McCord v. Western Union Telegraph Co.*, 39 Minn. 181 (39 N. W. 315, 318). It is urged that force is added to this reasoning in view of the fact that bills of lading are viewed and dealt with by the commercial world as *quasi* negotiable, and consequently it is desirable that they should be viewed with confidence and not distrust; and that for these considerations it is better to cast the risk of the goods not having been shipped upon the carrier, who has placed it in the power of agents of his own choosing to make these representations, rather than upon the innocent consignee or indorsee, who, as a rule, has no means of ascertaining the fact. If the question was *res integra*, we confess that it seems to us that this argument would be very cogent. But, on the other hand, it may be said that carriers are not in the business of issuing and dealing in bills of lading in the same sense in which bankers issue and deal in

bills of exchange; that their business is transporting property, and that if the statements in the receipt part of bills of lading issued by any of their numerous station or local agents are to be held conclusive upon them, although false, it would open so wide a door for fraud and collusion that the disastrous consequences to the carrier would far outweigh the inconvenience resulting to the commercial world from the opposite rule. It is also to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading. But on questions of commercial law it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted. Moreover, on questions of general commercial law the federal courts refuse to follow the decisions of the state courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the state courts should conform to the doctrine of the federal courts. The inconvenience and confusion that would follow from having two conflicting rules on the same question in the same state, one in the federal courts and another in the state courts, is of itself almost a sufficient reason why we

the indorsement was made, as that it was indorsed to him when past due, or that he is not for other reasons the *bona fide* holder of the note. Such evidence may be admissible in many cases in order to subject the note in the hands of the indorsee to a defense existing between the original parties. Aside from that consideration, in the absence of

should adopt the doctrine of the federal courts on this question. To do otherwise, so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens. In deference, therefore, to the overwhelming weight of authority, but without committing ourselves to all the reasoning of the decided cases on the subject of the law of agency, we deem it best to hold that a bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and that the rule is the same whether the act of the agent was fraudulent and collusive, or merely the result of mistake. Of course this presumption is predicated upon the assumption that the authority of the agent is limited to issuing bills of lading for freight receivable before, or concurrent with the issuing of the bills, which would be the presumption in the absence of evidence to the contrary. No doubt a carrier might adopt a different mode of doing business by giving his agents authority to issue bills of lading for goods not received, so as to render him liable in such cases to third parties."

As to negotiability of bills of lading and rights on transfer thereof see further:—

United States.—Farmers' Loan & Trust Co. v. Northern P. R. Co., 120 Fed. 873, 57 C. C. A. 533, rev'g 112 Fed. 829.

Connecticut.—Mather v. Gordon Bros., 77 Conn. 341, 59 Atl. 424.

Georgia.—Commercial Bank v. J. K. Armsby Co., 120 Ga. 74, 65 L. R. A. 443, 47 S. E. 589; Raleigh & G. R. Co. v. Lowe, 101 Ga. 320, 28 S. E. 867, 10 Am. & Eng. R. Cas. N. S. 398.

Kentucky.—Temple Nat. Bank v. Louisville Cotton Oil Co., 26 Ky. L. Rep. 518, 82 S. W. 253.

Maryland.—National Bank of Bristol v. Baltimore & O. R. Co., 99 Md. 661, 59 Atl. 134.

Minnesota.—Ryan v. Great Northern R. Co., 90 Minn. 12, 95 N. W. 758.

Missouri.—American Zinc L. & S. Co. v. Marble Leadworks, 102 Mo. App. 158, 76 S. W. 668; Smith v. Missouri P. R. Co., 74 Mo. App. 48.

New Hampshire.—Hart v. Boston & M. R., 72 N. H. 410, 56 Atl. 920.

New Jersey.—National Newark Bkg. Co. v. Delaware L. & W. R. Co., 70 N. J. L. 774, 58 Atl. 311.

North Carolina.—Willard Mfg. Co. v. G. H. Tierney & Co., 133 N. C. 630, 45 S. E. 1026.

Texas.—Grayson County National Bank v. Nashville C. & St. L. R. (Tex. Civ. App.), 79 S. W. 1094; First Nat. Bank v. San Antonio & A. P. R. Co., 97 Tex. 201, 77 S. W. 410, 72 S. E. 1033.

Washington.—Seattle Nat. Bank v. Powles, 33 Wash. 21, 73 Pac. 887.

illegality in the transaction, such testimony would probably be inadmissible. But if the maker justly owes the debt and has no defense legal or equitable which should shield him from payment of the note to some one, it is immaterial to him to whom he pays it or who recovers upon it, provided that when the payment is made, or a recovery had, it will bar any further claim on the note by others.⁸² So where the holder has legal title to a demand, and the defendants would be protected in payment to, or recovery by him, it is enough to entitle him to maintain an action on the note and to preclude defendant from questioning the conditions or considerations on which the transfer was based.⁸³ And the maker of a negotiable note has no interest in raising the question of the right of the payee to indorse it, as a payment to the indorsee and holder will protect him.⁸⁴ But the defendant maker has a right to have the judgment rendered against him in favor of the legal holder, so as to become a bar to a future recovery on the same instrument.⁸⁵

§ 416. **Same subject.**—It is held that the general rule is that, in the absence of *mala fides*, plaintiff's *prima facie* title from possession may not be rebutted by the debtor by evidence that the title is in some other party so long as he is protected against the claim of such party by the payment of the judgment which may be rendered against him.⁸⁶ It is also determined that unless the title of the plaintiff is necessary for a defense against the one asserted to be the owner, it cannot be disputed, in the absence of a showing of a fictitious or fraudulent transfer, made to deprive the maker of his defense against the true owner; that it is not a good plea to allege that the note sued on is the property of another and not of the plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, and which could not be set up against the plaintiff.⁸⁷ It is de-

⁸² Tarbell v. Sturtevant, 26 Vt. 513, 517, per Isham, J.

⁸³ Hunter v. Allen, 94 N. Y. Supp. 880, 106 N. Y. App. Div. 557.

⁸⁴ Taylor v. Littell, 21 La. Ann. 665.

⁸⁵ Burnap v. Cook, 32 Ill. 168.

⁸⁶ Dyer v. Sebrell, 135 Cal. 597, 67 Pac. 1036, per Henshaw, J.

Where it appeared that the person who was claimed by the defendant to be the real owner of the

note had full knowledge of all the proceedings in the suit, and had not in any manner asserted any right to interfere, it was held that a payment of the judgment to the plaintiff, if permitted by the real owner of the note, would be a sufficient protection to the defendant. Hackett v. Kendall, 23 Vt. 275.

⁸⁷ Gushee v. Leavitt, 5 Cal. 160, 63 Am. Dec. 116, approved in Giselman v. Starr, 106 Cal. 651, 657, 658,

where the court, per Henshaw, J., said: "The defendant has a statutory right to have a cause of action against him prosecuted by the real person in interest (Code Civ. Proc., § 307), and it was in the exercise of that right that he pleaded lack of title in plaintiffs and asked to have determined the conflicting claims of those whom he asserted to be the owners. But the purpose of the statute is readily discernible, and the right is limited to its purpose. It is to save a defendant, against whom a judgment may be obtained, from further harassment or vexation at the hands of other claimants to the same demand. It is to prevent a claimant from making a simulated transfer, and thus defeating any just counter-claim or set-off which defendant would have to the demand if pressed by the real owner. But where the plaintiff shows such a title as that a judgment upon it satisfied by defendant will protect him from future annoyance or loss, and where, as against the party suing, defendant can urge any defenses he could make against the real owner, then there is an end of the defendant's concern and with it of his right to object; for, so far as he is interested, the action is being prosecuted in the name of the real party in interest. The cases which seemingly lay down the broad rule that it is not a good plea to allege that the note sued upon is the property of another and not of plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, are to be read in the light of their facts, and so read they will be found to be in strict accord with what is here said. These are cases where *prima facie* legal title is shown in plaintiff,

such a title as would protect defendant if judgment were obtained upon it. If, under such circumstances, the defendant claims another to be the real owner, he must support his right to make that claim by showing that he has some equity or defense against the real owner which he cannot maintain against the *prima facie* legal owner. Such is the meaning of *Price v. Dunlap*, 5 Cal. 483, and *Gushee v. Leavitt*, 5 Cal. 160, 63 Am. Dec. 116." The *Giselman* case is cited in *Philbrook v. Superior Court*, 111 Cal. 31, 35, a case of mandamus to compel substitution of assignee and the right of a disbarred attorney at law to prosecute cause of action, and availability of defenses against him; also cited in *Herman v. Hecht*, 116 Cal. 553, 560, 561, where it was declared that the assignment vested the legal title to the note in plaintiff and carried with it the original debt, and that it was immaterial whether the money consideration mentioned in the assignment was received by plaintiff's assignors or whether they expected to obtain a benefit from a recovery by the plaintiff. That the writing imported a consideration sufficient to sustain the assignment, "and as the defendants do not show that they have some equity or defense against plaintiff's assignors which they do not have against the plaintiff, or show that a judgment against them in favor of the plaintiff would not protect them, they are not concerned with what the plaintiff may do with the fruits of such judgment." The *Giselman* case, *ante*, is also cited in *Seybold v. Bank*, 5 N. D. 460, 465, to the point that an assignee having naked legal title may sue, though whole beneficial interest be in assignor.

cided in Georgia that the holder's title cannot be made the subject of inquiry unless necessary for the maker's protection and to let in his defense,⁸⁸ or the defense which he seeks to make.⁸⁹

§ 417. **Denial of ownership or title.**—Upon this point the decisions are not in harmony. In the federal courts it is held that one who has not a meritorious defense cannot be permitted to show that the nominal plaintiff, in whose name the suit is brought, is no longer the real party in interest.⁹⁰ But it is also decided that a denial that plaintiff is the lawful owner of the note in suit is a good defense.⁹¹ Under an Alabama decision if the consideration on which the note is based moves entirely from a third person to one assuming to act for him, any defense of the maker against the party in interest is admissible where no interest in the note is disclosed in the person to whom it is made.⁹² In California it is held that it may be shown in an action by the transferee that one is not the legal owner of a note for value.⁹³ In Indiana it is determined that the maker of a note cannot show, as a defense to an action thereon, that the payee was not the real party in interest at the time the note was executed.⁹⁴ And under another decision the executor can maintain an action on notes and mortgages given to the testator and it is no defense that they were specifically bequeathed to another and that the suit should have been brought in his name.⁹⁵ But it is also held in that state that a defense is good which shows that no administration was taken out on the estate

⁸⁸ Ray v. Anderson, 119 Ga. 926, 47 S. E. 205; Civ. Code 1895, § 3698.

⁸⁹ Bomar v. Equitable Mort. Co., 111 Ga. 143, 36 S. E. 1101; Varner v. Lamar, 9 Ga. 589 (there was in this case no evidence that defendant had any defense to the note by way of set-off or otherwise and rule was affirmed as settled); Hall v. Carey, 5 Ga. 239 (the defendants were indebted for money advanced, for which notes were given, and it was not necessary for their defense that they should inquire into the validity of plaintiff's title); Nisbet v. Lawson, 1 Kelly (Ga.) 275.

⁹⁰ Lum v. Robertson, 6 Wall. (73 U. S.) 277, 18 L. Ed. 743.

⁹¹ Boggs v. Wann, 58 Fed. 681. In

citing this, amongst other cases, the court, in *City of Cleveland v. Cleveland C. C. & St. L. Ry. Co.*, 93 Fed. 113, 123, says, in discussing the point of estoppel in that case: "The Supreme Court of the United States, seemingly, loosened its ancient moorings upon the subject of admitting equitable defenses in actions at law."

⁹² McClure v. Litchfield, 11 Ala. 337.

⁹³ Woodsum v. Cole, 69 Cal. 142, 10 Pac. 331. Examine § 416 herein.

⁹⁴ Johnson v. Conklin, 119 Ind. 109, 21 N. E. 462, 12 Am. St. Rep. 371.

⁹⁵ Crist v. Crist, 1 Ind. 570, 50 Am. Dec. 461.

of an assignee of the note, that it came by assignment and indorsement into plaintiff's hands through the widow and another and that defendant was a creditor of the estate; the note being first indorsed in blank.⁹⁶ In Iowa it is decided that the maker must show that he had a defense against the payee where he seeks to avail himself of a defense of the payee's breach of agreement not to transfer the note.⁹⁷ Under a Kansas decision it must be shown, where it is averred as a defense that the holder is not the real party in interest and who is the unconditional assignee, that the defendants would be unprotected against other liability in case of a payment to such transferee.⁹⁸ Under a Louisiana decision the maker or indorser, in the absence of an equity existing against the payee, cannot question the holder's title; and the equities which the defendant is entitled to plead are such as operate in his own favor and not those which belong to a party to whom he is himself liable.⁹⁹ So in another case in that state it is held that the maker of a note cannot set up, in defense to its payment, that the holder is not the true owner unless he shows that the assignment or transfer is fictitious and fraudulent and made to deprive him of a substantial defense against the true owner.¹⁰⁰ It is also decided that, in case of notes indorsed in blank, it is immaterial to inquire whether plaintiff is the absolute owner or not, where defendant denies that plaintiff is the owner without suggesting that he has any defense, which could be set up against such notes in the hands of any person whomsoever which would not be available against the plaintiff.¹⁰¹ In Maine it is decided that a person may retain title to a negotiable note and order its contents paid to another who may sue upon it, and the maker cannot dispute the title, because he had promised to pay, not necessarily the owner but to the order of the payee in a note payable on demand to such order. This rule was applied where the payee ordered the contents of the note undue to be paid to a third

⁹⁶ *Stebbins v. Goldthwait*, 31 Ind. 159.

⁹⁷ *State Bank of Indiana v. Mentzer* (Iowa), 100 N. W. 69.

⁹⁸ *Greene v. McAuley* (Kan.), 79 Pac. 133.

⁹⁹ *Ran v. Latham*, 11 La. Ann. 276.

¹⁰⁰ *Case v. Watson*, 21 La. Ann. 731.

¹⁰¹ *Scionneaux v. Wahuespack*, 32

La. Ann. 283, 288. See *Taylor v. Littell*, 21 La. Ann. 665.

The simple denial of plaintiff's right to sue as the holder of a negotiable instrument cannot authorize the maker to contest his title to it when he holds by a blank indorsement, unless the note was lost or stolen. *McKinney v. Beeson*, 7 La. (14 La. O. S. 254) 530.

person by the maker after the death of the payee.¹⁰² Under another case in that state if one brings a suit in the name of another person, the same defense may be made as if he were a party to the record.¹⁰³

§ 418. **Same subject.**—Under a Massachusetts decision, the mere isolated fact that a bank for whose benefit the suit is brought has no interest in or legal title to the note is wholly immaterial to the defendant, in a suit brought in the name of the person who has the legal title to its use, unless a foundation is laid for the introduction of such evidence, as in the case of an offer to prove an offset against the nominal plaintiff or payment to him.¹⁰⁴ In Missouri it is held that an averment is good which positively and specifically denies that the note was assigned by indorsement and that the legal ownership of the paper is not in the plaintiff.¹⁰⁵ Under a Nebraska decision the denial of indorsement and ownership is a good defense.¹⁰⁶ It is held in New York, in an action against the maker by an indorsee, an answer is frivolous which denies that plaintiff lawfully holds or owns the note or that the lawful owner transferred or delivered it to him.¹⁰⁷ But it is also decided in that state that it may, under certain circumstances, be shown or alleged in defense that plaintiff is not the real party in interest.¹⁰⁸

¹⁰² *Downing v. Wheeler*, 93 Me. 570, 45 Atl. 836.

¹⁰³ *Sproule v. Merrill*, 16 Shep. (29 Me.) 260.

¹⁰⁴ *Brigham v. Marean*, 7 Pick. (24 Mass.) 40.

¹⁰⁵ *Mechanics' Bank v. Fowler*, 36 Mo. 33, 35. See *Cocker v. Cocker*, 2 Mo. App. 451.

¹⁰⁶ *Central City Bank v. Rice*, 44 Neb. 594, 63 N. W. 60.

¹⁰⁷ *First National Bank v. Jennings*, 89 N. Y. Supp. 995, 44 Misc. 374. See *Howland v. Bates*, 48 N. Y. St. Rep. 642, 1 Misc. (N. Y.) 91, 20 N. Y. Supp. 373, aff'd in 3 Misc. 609, 22 N. Y. Supp. 557, 51 N. Y. St. Rep. 857 (holding that it is immaterial where holder obtained note indorsed by defendants in blank).

¹⁰⁸ *Wood v. Wellington*, 30 N. Y. 218. See *Aspinwall v. Meyer*, 2 Sandf. (4 N. Y. Super. Ct.) 180

(holding that the maker cannot in suit by holder allege that latter did not pay value or that it was not lawfully transferred unless he can show that he was defrauded or has lost some defense he might have had against the payees had they retained it; nor is it any defense that the property of the note is in a third person unless plaintiff's possession is *mala fide* or defendant's defense prejudiced); *Guernsey v. Burns*, 25 Wend. (N. Y.) 411 (substantially same ruling as in last case); *Andrews v. Bond*, 16 Barb. (N. Y.) 633 (holding that the lawful possession of a negotiable note operates as a full authority to the holder so far as innocent third parties are concerned, to negotiate and transfer all right, title and interest).

So in another case it is held that the defendant may, since the code, prove that plaintiff is not the real owner of the note sued on,¹⁰⁹ where such defense goes entirely to disprove any ownership or interest whatever or even right to possession.¹¹⁰ Under a North Carolina decision, if the drawer has come into possession, without indorsement, of a bill which has been accepted by the drawee in favor of another, he cannot recover without showing that the bill had been indorsed to him or in blank, or that he had been obliged to pay the money as such drawer, or that the acceptor on account had, was indebted to him to the amount of the bill.¹¹¹ In an Oklahoma case it is decided that a denial of ownership is no defense, where the facts on which a presumption of ownership exists are alleged in a suit on a note payable to a certain person or his orders.¹¹² In Pennsylvania it is held that an affidavit of defense may be set up by the maker, in a suit by the indorsee, where it alleges ownership of the note in suit by a bank against whom a set-off exists on the note under a collateral contract.¹¹³ So in that state it is held to be a sufficient affidavit of defense that the note is actually the payee's property, and that the indorser's name was used by the plaintiffs to avoid the defense of usury.¹¹⁴ So an indorser of a negotiated note may prove that he has paid it, and that the plaintiff is but a trustee for him, and that ownership is in another to let in creditors' claims may also be shown.¹¹⁵ And in an action for debt on a single bill, evidence may be given tending to show that another is really the owner, and that it was held in trust for him by the plaintiff,

¹⁰⁹ *Eaton v. Alger*, 57 Barb. (N. Y.) 179.

¹¹⁰ *Hays v. Hathorn*, 74 N. Y. 486, dist'g *Sheridan v. Mayor, etc.*, New York, 68 N. Y. 30; *Eaton v. Alger*, 47 N. Y. 345; *Allen v. Brown*, 44 N. Y. 228; *Brown v. Penfield*, 36 N. Y. 473; *City Bank of New Haven v. Perkins*, 29 N. Y. 554; *Cummings v. Morris*, 25 N. Y. 625, holding that code has changed rule in *Gage v. Kendall*, 14 Wend. (N. Y.) 640, and reversing *Hays v. Southgate*, 10 Hun (N. Y.) 511. See, further, *Gerding v. Welch*, 51 N. Y. Supp. 1064, 30 N. Y. App. Div. 623; *Hughes v. Wilcox*, 17 Misc. 32, 39 N. Y. Supp. 210; *Clark v. Tryon*, 23 N. Y. Supp. 780, 786, 4 Misc. 63.

¹¹¹ *Smith v. Bryan*, 33 N. C. (11 Ired. L.) 416.

¹¹² *Berry v. Barton*, 12 Okla. 221, 71 Pac. 1074.

¹¹³ *Long v. Long*, 208 Pa. 368, 57 Atl. 759. See *Graphic Co. v. Marcy*, 12 Phila. (Pa.) 218, holding that an affidavit of defense is good which sets up that the party in whose favor the note is drawn is still the owner and real holder thereof, to whose use the plaintiff holds it, and that suit is brought in plaintiff's name to prevent the defense of set-off.

¹¹⁴ *Eyre v. Yohe*, 67 Pa. St. 477.

¹¹⁵ *Maynard v. Nekervis*, 9 Pa. St. 81.

and that said owner was indebted to the defendant in a greater amount, thereby enabling the defendant to set off a debt due from the equitable owner.¹¹⁶ So under another decision in the same state it may be shown that the note was only delivered to be held until return was demanded, which demand had been made and refused on the ground that the note was lost.¹¹⁷ But it is also determined in another case that in a suit against the drawers on a negotiable note indorsed in blank, the defendants have no concern with the question of the actual ownership of the note, except where the defense turns upon points involving the personal conduct of the true owner or of those who preceded him, inasmuch as the owner of such note may fill it up with what name he pleases, and the person whose name is inserted is deemed the legal owner, for the purposes of the action.¹¹⁸ Under a South Carolina decision, in an action by the bearer on a note payable to a certain person or bearer, the defendant, that he may be let into his defense against the payee, may show that the plaintiff is not the owner of the note, or has no interest, or that he gave no consideration for it.¹¹⁹ In a South Dakota case it is held that the want of authority of a national bank to purchase a note cannot be availed of by the maker in a suit against him.¹²⁰ In Texas it is decided that the fact alone that plaintiff is not the real owner of the note constitutes no defense either in bar or in abatement, and that the plea that plaintiff was a bankrupt, and that the note belonged to his creditors, who had not been paid, was bad on demurrer, where it was not alleged that the assignee in bankruptcy had reduced the note to possession or that defendant was a creditor.¹²¹ Under a Vermont decision the defendant cannot contest plaintiff's

¹¹⁶ Childerston v. Hammond, 9 Serg. & R. (Pa.) 68.

¹¹⁷ Carskaddon v. Miller, 25 Pa. Super. Ct. 47.

¹¹⁸ Brown v. Clark, 14 Pa. St. 469, a case of a partnership note and dissolution of the firm. See Rice v. Abbeles (Pa.), 1 Wkly. Notes Cas. 38, holding that an affidavit of defense is insufficient which sets forth that the defendant was an accommodation maker and that payee was still the true owner and that the indorsement was made to prevent a defense which defendant had against the payee.

¹¹⁹ Lee v. Ware, 3 Rich. L. (S. C.) 193.

¹²⁰ First National Bank v. Smith, 8 S. D. 7, 65 N. W. 437, aff'd 8 S. D. 101, 65 N. W. 439.

¹²¹ Brown v. Chenoworth, 51 Tex. 469. See Sanders v. Atkinson, 1 Tex. Ct. App. Civ. Cas. (White & W.), § 1326, holding that "it has been frequently held by this court that a debtor cannot resist a suit on a note by a party in possession of it with the apparent legal right, on the ground that he is not in fact the owner, but that in equity it belongs to some one else."

title to sue except for the purpose of protecting himself from a subsequent suit, in the name of some one having a better title and who has not acquiesced in the suit commenced.¹²² But it is also decided in that state that the *prima facie* evidence of legal interest of a holder in a note may be rebutted by showing that he is wrongfully in possession and has no real right or title to the note.¹²³

¹²² Hackett v. Kendall, 23 Vt. 275. though the wife of the payee is the

In an action against members of owner. Ormsbee v. Kidder, 48 Vt. 361.
firm on a note executed to one of
them by all for value, an indorser
for collection can recover, even

¹²³ Fletcher v. Fletcher, 29 Vt. 98.

CHAPTER XIX.

PURCHASERS AFTER MATURITY.

Sec.	Sec.
419. General rule.	430. Effect of statute providing that suit by assignee shall be without prejudice.
420. Same subject—Continued.	431. Limitations of rule—In general.
421. Application of rule—Generally.	432. <i>Pro tanto</i> recovery.
422. Application of rule, continued—Set-off and recoupment.	433. Purchaser from <i>bona fide</i> holder—General rule.
423. Where series of notes mature on failure to pay any one.	434. Same subject—Application of rule.
424. Where payable on default in payment of interest.	435. Demand paper.
425. Application to particular paper.	436. Defenses and equities between maker and indorsee or intermediate holder.
426. Same subject—Coupon bonds.	437. Secret equity in favor of entire stranger.
427. Certificate of deposit.	
428. Where transferred before but not indorsed until after maturity.	
429. Non-negotiable note.	

§ 419. **General rule.**—It is a general rule that one to whom commercial paper is indorsed after its maturity takes it subject to such defenses as existed against it in the hands of his indorser.¹ The dis-

¹ *Alabama.*—Battle v. Weems, 44 Ala. 105; Glasscock v. Smith, 25 Ala. 474; Robertson v. Breedlove, 7 Port. (Ala.) 541. *Ga.* 615; Howard v. Gresham, 27 Ga. 347; Smith v. Lloyd, Charit. T. U. P. (Ga.) 253.

Illinois.—Melendy v. Keen, 89 Ill. 395; Eagle v. Kohn, 84 Ill. 292; First National Bank v. Strang, 72 Ill. 559; Bissell v. Curran, 69 Ill. 20; Stricklin v. Cunningham, 58 Ill. 293; Lock v. Fulford, 52 Ill. 166; Stafford v. Fargo, 35 Ill. 481; Lord v. Favorite, 29 Ill. 149; Bryan v. Primm, 1 Ill. 59; McCaffrey v. Dustin, 43 Ill. App. 34; Bradley v. Linn, 19 Ill. App. 322; Cooper v. Nock, 17 Peck (Ill.) 301; Griffin v. Ketchum, 8 Peck (Ill.) 392; Bryan v. Primm, 539

California.—Templeton v. Poole, 59 Cal. 286; Hayward v. Stearns, 39 Cal. 58; Coghlin v. May, 17 Cal. 515; Sherman v. Rollberg, 11 Cal. 38; Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746; Vinton v. Crowe, 4 Cal. 309; Folsom v. Bartlett, 2 Cal. 163.

Connecticut.—Bissell v. Gowdy, 31 Conn. 47.

Georgia.—Harrell v. Braxton, 78 Ga. 129, 3 S. E. 5; Burton v. Wynne,

55 Ga. 615; Howard v. Gresham, 27 Ga. 347; Smith v. Lloyd, Charit. T. U. P. (Ga.) 253.

Illinois.—Melendy v. Keen, 89 Ill. 395; Eagle v. Kohn, 84 Ill. 292; First National Bank v. Strang, 72 Ill. 559; Bissell v. Curran, 69 Ill. 20; Stricklin v. Cunningham, 58 Ill. 293; Lock v. Fulford, 52 Ill. 166; Stafford v. Fargo, 35 Ill. 481; Lord v. Favorite, 29 Ill. 149; Bryan v. Primm, 1 Ill. 59; McCaffrey v. Dustin, 43 Ill. App. 34; Bradley v. Linn, 19 Ill. App. 322; Cooper v. Nock, 17 Peck (Ill.) 301; Griffin v. Ketchum, 8 Peck (Ill.) 392; Bryan v. Primm,

tion to be observed between a bill indorsed before and after maturity is that in the former case it comes to the indorsee with no sus-

Breese (Ill.) 59; Reichert v. Koerner, 54 Ill. 306; Morgan v. Bean, 100 Ill. App. 114.

Indiana.—Cross v. Herr, 96 Ind. 96.

Iowa.—Leach v. Funk, 97 Iowa 576, 66 N. W. 768; Hedge v. Gibson, 58 Iowa 656, 12 N. W. 713; Clute v. Frazier, 58 Iowa 268, 12 N. W. 327; McCormick v. Williams, 54 Iowa 50, 6 N. W. 138; Schuster v. Marsden, 34 Iowa 181; McNitt v. Helm, 33 Iowa 342; Stannus v. Stannus, 30 Iowa 448; Hayward v. Minger, 14 Iowa 516; Kurz v. Holbrook, 13 Iowa 562; Bates v. Kemp, 12 Iowa 99; Barlow v. Scott's Adm'rs, 12 Iowa 63.

Kansas.—Eggar v. Briggs, 23 Kan. 710; Hadden v. Rodkey, 17 Kan. 429.

Kentucky.—Greenwell v. Haydon, 78 Ky. 332.

Louisiana.—State v. Sutherland, 111 La. 381, 35 So. 608; Lanata v. Bayhi, 31 La. Ann. 229; Henderson v. Case, 31 La. Ann. 215; Davis v. Bradley, 26 La. Ann. 555; Walton v. Young, 26 La. Ann. 164; Marcal v. Melliet, 18 La. Ann. 223; Williams v. Benton, 10 La. Ann. 158; Sawyer v. Hoovey, 5 La. Ann. 153; Ford v. Dossan, 1 Rob. (La.) 39; McKown v. Mathes, 19 La. 542; Shipmans v. Archinard, 19 La. 471; Stetson v. Stackhouse, 18 La. 119; Lapice v. Clifton, 17 La. 152; Burroughs v. Nettles, 7 La. 113; Turcas v. Rogers, 3 Mart. N. S. (La.) 699; Herriman v. Mulhellan, 1 Mart. N. S. (La.) 605.

Maine.—Cummings v. Little, 45 Me. 183; Davis v. Briggs, 39 Me. 304; Tucker v. Smith, 4 Me. 415; Sprague v. Graham, 16 Shep. (Me.)

160; Burnham v. Tucker, 6 Shep. (Me.) 179.

Maryland.—Herrick v. Swomley, 56 Md. 439, 465; Clark v. Dederick, 31 Md. 148.

Massachusetts.—Holland v. Makepeace, 8 Mass. 418; Ayer v. Hutchins, 4 Mass. 370, 3 Am. Dec. 232; Gold v. Eddy, 1 Mass. 1; American Bank v. Jenness, 2 Metc. (Mass.) 288; Kellogg v. Barton, 12 Allen (Mass.) 527; Thompson v. Hale, 6 Pick. (Mass.) 259.

Michigan.—City Bank of Dowagiac v. Dill, 102 Mich. 305, 60 N. W. 767; Simons v. Morris, 53 Mich. 155, 18 N. W. 625; Church v. Clapp, 47 Mich. 257, 10 N. W. 362; Comstock v. Draper, 1 Man. (Mich.) 481, 53 Am. Dec. 78.

Mississippi.—Money v. Ricketts, 62 Miss. 209; Ainsworth v. Ainsworth, 24 Miss. 145.

Missouri.—Kellogg v. Schnaake, 56 Mo. 136; Mattoon v. McDaniel, 34 Mo. 138; Farris v. Catlett, 32 Mo. 469; Wheller v. Barret, 20 Mo. 573; Shipp v. Stacker, 8 Mo. 145; Williams v. Baker, 100 Mo. App. 284, 73 S. W. 339.

Nebraska.—May v. First National Bank (Neb. 1905), 104 N. W. 184; Davis v. Neligh, 7 Nebr. 78, 84; Kittie v. De Lamater, 3 Nebr. 325.

New Hampshire.—Southard v. Porter, 43 N. H. 379; McDuffie v. Dame, 11 N. H. 244; Odiorne v. Howard, 10 N. H. 343.

New Jersey.—Cumberland Bank v. Hann, 18 N. J. L. 222; Youngs v. Little, 15 N. J. L. 1.

New York.—Northampton Nat. Bank v. Kidder, 106 N. Y. 221, 12 N. E. 577; Cowing v. Altman, 79 N. Y. 167; Chester v. Dorr, 41 N. Y.

picion on the face of it and he receives it on its own intrinsic credit, while in the latter case it is transferred out of the common course of dealing, which gives rise to suspicion.² The principle upon which this general rule is founded does not have reference to the title to the paper. Whether a person acquires such paper before or after maturity is not material, so far as his title is concerned. "These rules relate to the right of the holder growing out of his ownership of the paper, and not to his title to the paper itself. In either case he acquires

279; *Cummings v. Morris*, 25 N. Y. 625; *Merrick v. Butler*, 2 Lans. (N. Y.) 103; *Newell v. Gregg*, 51 Barb. (N. Y.) 263; *Farrington v. Bank*, 39 Barb. (N. Y.) 645; *Havens v. Hintington*, 1 Cow. (N. Y.) 387; *Lansing v. Lansing*, 8 Johns. (N. Y.) 354; *O'Callaghan v. Sawyer*, 5 Johns. (N. Y.) 118; *Lansing v. Gaine*, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422; *Johnson v. Bloodgood*, 2 Cai. Cas. (N. Y.) 302; *Sehring v. Rathbun*, 1 Johns. Cas. (N. Y.) 331; *De Mott v. Starkey*, 3 Barb. Ch. (N. Y.) 403; *Reed v. Warner*, 5 Paige (N. Y.) 650.

North Carolina.—*Griffin v. Hasty*, 94 N. C. 438; *Pugh v. Grant*, 86 N. C. 39; *Capell v. Long*, 84 N. C. 17; *Baucom v. Smith*, 66 N. C. 537; *Haywood v. McNair*, 2 Dev. & Bat. (N. C.) 283; *Turner v. Beggarly*, 11 Ired. (N. C.) 331; *Mosteller v. Bost*, 7 Ired. Eq. (N. C.) 39.

Pennsylvania.—*March v. Marshall*, 53 Pa. St. 396; *Maples v. Browne*, 48 Pa. St. 458; *Hoffman v. Foster*, 43 Pa. St. 137; *Bower v. Hastings*, 36 Pa. St. 285; *Clay v. Cottrell*, 18 Pa. St. 408; *Snyder v. Riley*, 6 Pa. St. 164; *Rakert v. Sanford*, 5 Watts & S. (Pa.) 164; *Cromwell v. Arrott*, 1 Serg. & R. (Pa.) 180; *McCullough v. Houston*, 1 Dall. (Pa.) 441.

South Carolina.—*British American Mortg. Co. v. Smith*, 45 S. C. 83, 22 S. E. 747; *Gibson v. Hutchins*, 43

S. C. 287, 21 S. E. 250; *McNeill v. McDonald*, 1 Hill (S. C.) 1; *Cain v. Apann*, 1 McMull. (S. C.) 258.

Tennessee.—*Smith v. Lurry*, *Cooke* (Tenn.) 325.

Texas.—*Walker v. Wilson*, 79 Tex. 188, 14 S. W. 798, 15 S. W. 402; *Mayfield Grocer Co. v. Price & Co.* (Tex. Civ. App. 1906), 95 S. W. 31; *Goodson v. Johnson*, 35 Tex. 622; *Diamond v. Harris*, 33 Tex. 634; *Huddleston v. Kempner*, 3 Tex. Civ. App. 252, 22 S. W. 871; *Bennett v. Carsner*, 1 Tex. App. Civ. Cas. Sec. 618.

Vermont.—*Bowen v. Thrall*, 28 Vt. 382.

Virginia.—*Arents v. Com*, 18 Gratt. (Va.) 750; *Davis v. Miller*, 14 Gratt. (Va.) 1.

West Virginia.—*Smith v. Lawson*, 18 W. Va. 212.

Federal.—*Central Trust Co. v. First Nat. Bank*, 101 U. S. 68, 25 L. Ed. 876; *Smyth v. Strader*, 4 How. (U. S.) 404, 11 L. Ed. 1031; *Fossitt v. Bell*, 4 McLean (U. S.) 427; *Gwathney v. McLane*, 3 McLean (U. S.) 371; *Lipsmeier v. Vehslage*, 29 Fed. 175.

English.—*Crossley v. Ham*, 13 East 498; *Easley v. Crockford*, 3 Moore & S. 700, 10 Bing. 243; *Brown v. Davies*, 3 Term. R. 80; *Taylor v. Mather*, 3 Term. R. 83, note; *Cripps v. Davis*, 12 Mees. & W. 159; *Lee v. Zagury*, 8 Taunt. 114.

² *Brown v. Davies*, 3 Term. R. 80.

a valid title to the obligation and is entitled to recover on it in the one case whatever is justly due from the parties to the paper, and in the other case whatever the paper calls for, whether it is justly due from the parties or not. In cases belonging to either of these classes no question arises as to the title of the holder. He is conceded to be the owner of the obligation. The question is, what is the extent of his right of recovery? If he took it overdue, he cannot recover unless the person from whom he received it could have recovered, and if that person could only have recovered a part, he can recover no more; if that person could have recovered all, he may recover all, for he stands in that person's place."³

§ 420. **Same subject continued.**—A note overdue or a bill dishonored is a circumstance of suspicion to put those dealing for it on their guard.⁴ It suggests inquiry, which the intending purchaser is bound to make, and, not making it, he buys at his peril,⁵ and he is held to have notice of what by proper effort he could have learned.⁶ So it is said by Lord Ellenborough in an early English case that: "After a bill or note is due, it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the indorser and subject to all the equities with which it may be incumbered."⁷ And in an early case in Massachusetts it was said: "He who takes it with notice of grounds of defense, or after it is due, which the law charges as notice, is holden to take it altogether on the credit of the indorser, knowing, or being presumed to know, that if the promisor had any dealings with the payee which would justify a defense, the note is chargeable with that defense in his hands."⁸ So again, in a recent case in Texas, it is declared: "The transferee of overdue commercial paper gets no better title than that of the transferor. The holder of such paper for value before maturity takes it discharged of every defense against it, but when dishonored it is in respect to the title acquired by a subsequent holder, degraded to the rank of a personal chattel, the

³ *Greenwell v. Haydon*, 78 Ky. 332, 336, per Cofer, J. *son v. Bloodgood*, 1 Johns. Cas. (N. Y.) 51, 1 Am. Dec. 93.

⁴ *Fowler v. Brantly*, 14 Pet. (U. S.) 318, 10 L. Ed. 473.

⁵ *Zeis v. Potter*, 105 Fed. 671.

⁷ *Tinson v. Francis*, 1 Campb. 19.

⁶ *Phillips v. Runnels*, 1 Morris (Iowa) 391, 43 Am. Dec. 109; *John-*

⁸ *Sargent v. Southgate*, 5 Pick. (Mass.) 312, 16 Am. Dec. 409.

purchaser of which acquires only such title as the seller had.”⁹ And the general rule has been affirmed in similar language by other courts.¹⁰

§ 421. Application of rule—Generally.—In the application of the general rule as to purchasers after maturity it has been decided that as against such a purchaser evidence is admissible to show usury in connection with the note,¹¹ and it may be shown that a transfer from the payee to such purchaser was in fraudulent violation of an agreement between the maker and the payee.¹² So where a note was executed for a particular purpose, which was accomplished, and the note was taken up by the payee in accordance with the agreement between him and the maker, but was not returned to the latter on demand, the payee stating to him that the note had been destroyed, when in fact it had not, it was decided that such facts could be shown in defense to an action by one to whom the payee had transferred the note after maturity.¹³ And where the owner of a note, which was secured by a deed of trust to a third person, agreed, before its maturity, with the maker that a certain sum should be paid and the time for the payment

⁹ *Mayfield Grocer Co. v. Andrew Price & Co.* (Tex. Civ. App., 1906), 95 S. W. 31, per James, C. J., quoting from *Walker v. Wilson*, 70 Tex. 188, 14 S. W. 798, 15 S. W. 402. The court also said: “This case was approved in *Kempner v. Huddleston*, 90 Tex. 185, 37 S. W. 1066, where a different rule was held to be applicable when the indorsement is in such language and terms as evidence ownership of the notes in the person to whom they are transferred, in which case the transferor would not be allowed to dispute this as against a subsequent purchaser who had acted upon such theory.”

¹⁰ “A note in circulation after it is due carries suspicion upon its face. It suggests inquiry, and places the purchaser in privity with his indorser and subject to any defense available against him. It is better to require one who would purchase a negotiable note after its maturity to ascertain whether it is a subsisting demand, than to subject the an-

tecedent parties to the necessity of tracing to him a knowledge that it is not.” *Atkins v. Knight*, 46 Ala. 539, per Saffold, J.

“The principle is certainly well established, and not to be denied, that the indorsee of a negotiable promissory note, indorsed after due, is considered as receiving dishonored paper, and takes it subject to all the infirmities and equities and, some cases say, defenses, to which it was liable in the hands of the payee.” *Robinson v. Lyman*, 10 Conn. 30, 25 Am. Dec. 52, per Church, J.

“The plaintiff took this bill after dishonor of it by the drawees; he therefore took it with all the existing infirmities belonging to it at the time.” *Crossley v. Ham*, 13 East 498, per Lord Ellenborough.

¹¹ *Tufts v. Shepherd*, 49 Me. 312.

¹² *Williamson v. Doby*, 36 Ark. 689.

¹³ *Frazer v. Edwards*, 5 Dana (Ky.) 538.

of the balance extended, and such an agreement was drawn up by a clerk of the trustee, who indorsed the payment on the note, and also a reference to the agreement for extension, but the agreement was only signed by the maker of the note and not by the owner, it was decided that one who took the note from the trustee, after maturity, as collateral security for his debt was not protected by such agreement, there being nothing in the papers showing who was the owner of the note and it not appearing that the legal title was in the trustee.¹⁴ But it has been decided that, where a note purports to be executed upon a secular day, it cannot be shown against a *bona fide* assignee after maturity that it was in fact executed on a Sunday, it being declared that it is only against a person in equal fault that a defendant can be allowed to allege his own turpitude.¹⁵ And where a note has been executed by a firm to one of its members it is held that an assignee after maturity does not take it subject to the disability of the payee to sue, this being declared not to be one of the equities which an indorsee assumes.¹⁶

§ 422. Application of rule, continued.—Set-off and recoupment.—A bill or note in the hands of a purchaser after maturity may be subject to a set-off which would have been available in favor of the maker against the one from whom the instrument was purchased.^{16*} So, where it was agreed between the original parties to a negotiable promissory note, while it was in the hands of the payee, that a sum then ascertained to be due from the payee to the maker, payable *in futuro*, should be applied on the note, and it was afterwards negotiated, when overdue, it was held in an action by the indorsee against the maker that such sum being an equity which attached to the note itself, before its transfer, ought to be set off or applied on the note.¹⁷ And where a note was given by a corporation to a stockholder, and it was agreed that assessments to be laid upon his stock in the corporation should, when payable, be considered as payments upon the note by the corporation to him, and the assessments made amounted to more than the face of the note, thus constituting a payment of it, one who took the note as indorsee after maturity took it subject to the defense

¹⁴ Merchants' Loan & Trust Co. v. Welter, 205 Ill. 647, 68 N. E. 1082.

^{16*} Baker v. Kinsey, 41 Ohio St. 403.

¹⁵ Leightman v. Kadetska, 58 Iowa 676, 12 N. W. 736, 43 Am. Rep. 129.

¹⁷ Robinson v. Lyman, 10 Conn. 30, 25 Am. Dec. 52.

¹⁶ Young v. Chew, 9 Mo. App. 387.

of payment.¹⁸ So where a note payable to an insolvent bank was long past due when assigned to plaintiff by the bank's assignee for creditors, the maker was held entitled to set off against the note the amount of his deposit account with the bank.¹⁹ Again, where notes secured by a mortgage were given for the unpaid purchase price of land, and one of the notes, the first to fall due, was assigned, after its maturity, it was decided that the assignee took it subject to the right of the vendee to recoup from the unpaid purchase money, as against his warrantor, whatever sum he had been compelled to pay to clear his title.²⁰ And where, by statute, a maker can avail himself of moneys paid, goods sold and delivered, or services rendered, in an action on a promissory note by the payee, this is held to be in fact a defense legal and equitable, which may be shown in defense to an action by a purchaser after maturity.²¹

§ 423. Where series of notes matures on failure to pay any one.

Where it is provided in each note of a series of notes that all the notes will be matured upon a failure to pay any one of the series, one who purchases the notes after such a failure is a purchaser after maturity, and in such a case it is decided that where the notes were secured together by a vendor's lien, the purchaser is chargeable with notice of homestead rights existing as a defense against them all.²² And where

¹⁸ *Paine v. Central Vermont R. R. Co.*, 118 U. S. 152, 6 Sup. Ct. 1019.

¹⁹ *Little v. Sturgis*, 127 Iowa 298, 103 N. W. 205.

²⁰ *Wolf v. Shelton*, 159 Ind. 531, 65 N. E. 531, in which the court said: "The note went to appellee discredited upon its face by non-payment at maturity. It was a broken contract when appellee purchased it, and he was bound to take notice of the defense, and to know that he would have no greater right to enforce payment than the payee had and that it would be open to the same defenses in his hands that it would have been subject to if it had remained the property of the payee. Suppose Foreman had not assigned the note at all, and himself had brought this suit as plaintiff. It

then becomes very clear that Wolf would have the right to recoup from the unpaid purchase money, as against his warrantor, whatever sum he had been compelled to pay to clear his title. *Watts v. Fletcher*, 107 Ind. 391; *Doss v. Ditmars*, 70 Ind. 451, 457; *Holman v. Creagmiles*, 14 Ind. 177. As we have seen appellant has this same right against the appellee who purchased the note charged with notice that the maker had a defense against it. *Green v. Louthain*, 49 Ind. 139; *First Nat. Bank v. Henry*, 156 Ind. 1, and cases cited." Per Hadley, C. J.

²¹ *Sargent v. Southgate*, 5 Pick. (Mass.) 312, 16 Am. Dec. 409.

²² *Lybrand v. Fuller*, 30 Tex. Civ. App. 116, 69 S. W. 1005. The court said: "In the case at bar the notes

five notes were given which showed upon their face that they were installment payments of one common consideration, and each purported to be for a part of the purchase money of a named and certain tract of land, and showed that they were not only parts of the same transaction, but that they in fact constituted but one contract, it was decided that a purchaser of the notes who purchased them after the first note had matured and was unpaid took them subject not only to any defenses which existed against the first note but to such defenses as might exist against them all.²³ The court said in this case: "The effect of notice by the dishonor of the note overdue was to call attention to the fact that the maker had some defense against the note arising out of the original transaction, which defense must apply equally to each of the other notes, which represent parts of a common consideration. What we decide upon this point is that, all of the notes being together, and acquired at the same time by the assignee, it appearing in each note that they were parts of one consideration and constitute one contract, the dishonor of the first note being overdue and unpaid charged Claflin & Co. with notice that the same defense existed in favor of the makers against the notes not due as against

were dated July 1, 1896, and the first note matured January 1, 1897, the second, January 1, 1898, and the third, January 1, 1899. They show upon their face that they were given as a part of the consideration for the conveyance from J. M. Lybrand and wife to R. N. Lybrand, and each stipulated that the failure to pay any one of the notes when due should mature the others. When appellee acquired the notes the first two were past due, and the third had matured by contract making failure to pay any one of the notes when due mature the others. Thus all of the notes, under their very terms, were past due when they were conveyed to appellee. *Association v. Stewart*, 27 Tex. Civ. App. 299, 61 S. W. Rep. 386. Again it is held in the case of *Harrington v. Claflin*, 91 Tex. 295, 42 S. W. 1055, that where several notes secured by a lien upon a homestead show upon

their face that they were given as parts of the same transaction and as installments of one common consideration, the first being overdue when transferred to plaintiffs, it was sufficient to charge them with notice of the defense as to all the other notes. We are of the opinion that the principle announced in that case is applicable to the case at bar, although the party resisting the enforcement of the lien in that case was the maker of the notes, while here it is the payee. We conclude that the appellee was not an innocent purchaser of the notes, he having acquired them after their maturity. Not being an innocent purchaser of the notes, the appellee was chargeable with such infirmities in their execution as resulted in a want of consideration."

²³ *Harrington v. Claflin*, 91 Tex. 295, 42 S. W. 1055.

the overdue note." So in the case of a mortgage which provides that upon the failure to pay any one of the notes secured by it all of the notes are to become due and collectible, an assignee of the notes and mortgages is chargeable with knowledge of such provision, and where one of the notes is past due and dishonored the others are due by the terms of the mortgage, and the same defense may be made against them as if the action was by the original payee and mortgagee.²⁴

§ 424. Note payable on default in payment of interest.—Where a note provides that it shall become due and collectible or payable upon default in the payment of any installment of interest due by the terms of such note it becomes a matured note upon failure to pay as provided, and one who takes it after that time is a holder after maturity, subject to such defenses as could be made against the transferer or indorser. Thus it has been so held in the case of a note which provided that "such delinquency shall cause the whole note to become immediately due and collectible." The court said: "The case presented is clearly distinguishable from those where the stipulation for accelerating the maturity of the note or notes on non-payment of interest or other default is contained in a mortgage or trust deed given to secure the same, and which mortgage or trust deed and notes are construed in some jurisdictions as one instrument in law. In such a case the note or notes may be transferred without the transferee having any knowledge of such stipulation in the mortgage or trust deed. Here the stipulation is in the notes themselves, and every transferee of the same necessarily took them with knowledge of such stipulation. So the case presented differs from those where one of a series of notes or an installment of interest has become due and unpaid, with no stipulation as here, that 'such delinquency shall cause the whole note to immediately become due and collectible.' * * * The case presented is distinguishable from those where the stipulation for accelerating the maturity of the note or notes contained therein is made optional with the payee or mortgagee, or his representatives or assigns. * * * On the contrary it is expressly and clearly declared therein that 'such delinquency shall cause the whole note to immediately become due and collectible.' To construe such language as merely optional or permissive would be to destroy the clearly expressed contract which the

²⁴ *Stoy v. Bledsoe*, 31 Ind. App. 643, 68 N. E. 907.

parties made for themselves and to force upon them a contract to which neither of them ever gave their consent. * * * We must hold that by the express terms of the stipulation and the default in paying the annual interest * * * the whole of each note 'immediately became due and collectible.' It follows from what has been said that the plaintiffs took the notes after they became due and payable and subject to the equities between the original parties."²⁵

§ 425. Application to particular paper.—The general rule as to one who purchases paper after maturity has been applied in the case of bank bills,²⁶ and to a due bill not negotiable.²⁷ It has, however, been decided in an English case that although this applies to bills and notes it is not applicable in the case of checks.²⁸

§ 426. Same subject—Coupon bonds.—The general rule also applies to coupon bonds which are negotiable.²⁹ So it has been decided that a party buying bonds of the United States with overdue and unpaid coupons is to be taken as affected with knowledge of prior equities when he purchases them after the date when they are redeemable and for which the coupons run.³⁰ So where coupon bonds which were issued by the United States, payable to the state of Texas, were alienated by the insurgent government during the rebellion, it was decided that purchasers of such bonds after the date at which they became redeemable were affected with notice of want or defect of title in the seller.³¹ And where bonds were stolen before the maturity of certain coupons thereon, which were detached and sold to a person after maturity, it was decided in an action of replevin by the owner that such person took them with notice of every defect which in fact existed and subject to all the defenses which the promisor might make to them. And the court held that though the coupons had passed through several hands there was no presumption that they were negotiated by the thief before maturity.³² Though, as stated above, this case was an action of replevin, yet the following quotation is of value as showing

²⁵ *Hodge v. Wallace* (Wis., 1906), (U. S.) 72; *Greenwall v. Haydon*, 108 N. W. 212, per Cassoday, C. J. 78 Ky. 332.

²⁶ *Burroughs v. Bank*, 70 N. C. 283.

³⁰ *Texas v. Hardenberg*, 10 Wall.

²⁷ *Thompson v. McClelland*, 29 Pa. (U. S.) 68. St. 475.

³¹ *Texas v. White*, 7 Wall. (U. S.)

²⁸ *Rothchild v. Corney*, 9 Barn. & 700.

C. 388.

³² *Hinckley v. Bank*, 131 Mass. 147,

²⁹ *National Bank v. Texas*, 20 Wall.

the application of the general rule to coupon bonds. The court here said: "The claim of the defendant is that, inasmuch as the coupon had not matured when the bonds were stolen, it is to be presumed that the thief negotiated them before maturity, so that they were in the market under the protection of the law merchant before maturity; and thus that the true owner had lost his right of property in them. No authority is cited which supports this proposition, and it is not sound in principle. * * * In the case at bar every known holder received the coupons after maturity, and it is not important to decide whether a previous holder took them before or after maturity, when there is no evidence that there ever was a previous holder after they were taken from the plaintiff except the thief. It is never to be assumed that facts exist which do not appear. * * * By the facts agreed the plaintiff was at one time the absolute owner of the coupons. He remains in law the owner until the contrary appears. Nothing appears in reference to a claim of title in any other person till a time when it was too late for such person to acquire title; and, in the absence of any evidence tending to show that any other person but the thief had any possession of them until they were purchased, as described in the agreed statement, the presumption, which is one of fact, is that they remained in the possession of the thief until thus sold. When they were purchased they were detached from the bonds, were overdue, and carried to the purchaser notice of every defect which in fact existed, and he took them subject to all the rights which any other than the vendor had to them, and to all the defenses which the promisor might make to them."^{32*}

§ 427. **Certificate of deposit.**—The general rule as to a purchaser after maturity being subject to defenses available against his indorser has been applied in the case of a certificate of deposit. So where on the face of a certificate of deposit in the usual form, payable to the order of the payee, on the return of the certificate properly indorsed, were stamped the words: "This certificate, payable three months after date with six per cent. interest per annum for the time specified," it was decided that one to whom it was transferred more than three months after its date took it dishonored and subject to defenses which could have been made to it in the hands of the payee.³³

^{32*} Per Lord, J.

Bank, 34 Neb. 71, 51 N. W. 305, 33

³³ First Nat. Bank v. Security Nat. Am. St. R. 618.

§ 428. **Where transferred before but not indorsed until after maturity.**—Where paper is indorsed after maturity the fact that it was transferred or assigned before maturity will not relieve it from the operation of the general rule as to equities or defenses being available against a purchaser after maturity.³⁴ So the fact that there was an equitable assignment of a note before its maturity will not except it in the hands of the assignee from the operation of the general rule as to its being subject to defenses in the hands of one who takes it after maturity, where it is not indorsed to such person until after maturity. Thus under the California civil code, which defines a holder in due course as one who takes the paper in the ordinary course of business and for value before its apparent maturity without knowledge of dishonor and duly indorsed,³⁵ one to whom a note is equitably assigned before maturity, is not a holder in due course where it is not duly indorsed to him until after maturity, and is, in such a case, subject to any equitable defense.³⁶

§ 429. **Non-negotiable note.**—Where a non-negotiable note is assigned by the payee after maturity it is subject to all equities and defenses of the maker against the payee.³⁷

§ 430. **Effect of statute providing that suit by assignee shall be without prejudice.**—The general rule that the holder of a note, transferred after maturity, takes it subject to all equities arising out of the note itself, such as payment, want of consideration, or fraud, but not subject to any independent set-off, is not affected by a statutory provision which applies to the assignee of a chose in action and provides that a suit in his name, which at common law he could not maintain, shall be without prejudice to any set-off or other defense existing before notice of the assignment. And the fact that the transfer was not by indorsement or delivery, but by a formal written assignment, will not abridge the rights of the transferee, though it is provided by statute that: "Notes in writing, made and signed by any person promising to pay to another person or his order, or bearer, or to bearer only, any

³⁴ *Pavey v. Stauffer*, 45 La. Ann.

³⁵ Cal. Civ. Code, § 3123.

354, 361; *Savage v. King*, 17 Me.

³⁶ *Reese v. Bell*, 138 Cal. xix, 71 Pac. 87.

301; *Clark v. Whittaker*, 50 N. H.

474; *Southard v. Porter*, 43 N. H.

379; *Goshen Bank v. Bingham*, 118

N. Y. 349; *Gilbert v. Sharp*, 2 Lans.

(N. Y.) 412.

³⁷ *Graves v. Mining Co.*, 81 Cal. 303, 22 Pac. 665.

sum of money, are negotiable by indorsement or delivery in the same manner as inland bills of exchange, according to the custom of merchants.”³⁸ So in considering this question in the case of an action upon notes payable to a designated payee or bearer the court said: “If they had been passed to plaintiff by mere delivery, without any writing, after maturity, they would not have been subject, in his hands, to the set-off pleaded, which is an independent cause of action existing in favor of the maker against the payee, having no reference whatever to the notes in question. Now, are the rights of the plaintiff abridged by the fact that the notes were transferred by a formal written assignment, and not by mere delivery? We know of no principle of law or reason why this should be so. The written assignment merely gives formal expression to what the law, by the mere delivery of paper payable to bearer, implies, to wit: An intention to vest in the holder the absolute ownership. And if the law gives effect to this unexpressed intention, so far as to vest in the holder a title unincumbered with rights of mere set-off, why should not the expressed intention have equal effect? Had the paper been a non-negotiable chose in action, so that the simple delivery thereof would have conferred upon the holder no right at common law to sue in his own name, the assignee, whether by mere delivery or by written assignment, would take it subject to the set-off or other defenses mentioned in section 2760. And the same is true of a negotiable note, payable to order and transferred by delivery after maturity.”³⁹

§ 431. **Limitations of rule—In general.**—The only defenses against which an indorsee has to guard in accepting overdue bills are declared to be, first, those which have arisen subsequent to the execution of the note, and which are not collateral but which relate to the note itself; and secondly, those which are inherent in the note, and show it to have been void *ab initio*, such as fraud, mistake and absence of a sufficient consideration.⁴⁰ And it has been determined that the equities are such as are connected with the note itself and not such as grow out of distinct and independent considerations between the original parties.⁴¹ “When it is said in the books that the holder of a negotiable

³⁸ Sec. 1794 of Iowa Revision.

⁴¹ *Alabama*.—Robertson v. Breed-

³⁹ Richards v. Daily, 34 Iowa 427, 106, 7 Port. (Ala.) 541.

429, per Day, J.

Connecticut.—Fairchild v. Brown,

⁴⁰ Renwick v. Williams, 2 Md. 356, 11 Conn. 26.

364, per Mason, J.

promissory note, transferred after maturity, takes it as dishonored and subject to all the equities between the original parties, whether he has notice of the same or not, it must be understood that the equities meant are such only as attach to the particular note, and such as between the parties to it would control, qualify or extinguish any rights arising thereon. Equities between the parties to the note arising from other and independent transactions between them are not available against the note in the hands of the assignee.⁴² So, though a note may, in the hands of such a holder, be subject to a set-off, in accordance with an agreement between the maker and the payee, made while the note was in the latter's hands, that a sum then ascertained to be due from the payee to the maker, payable *in futuro*, should be applied on the note, yet the note cannot be affected by an agreement as to a set-off made after it has been transferred.⁴³ Again, it is decided that the infirmity, equity or defense which may be available against an indorsee after maturity must be one which attaches to the paper prior to its transfer.⁴⁴ The right, however, of a party to avail himself as against a purchaser after maturity of a defense arising out of collateral matters or independent transactions may be conferred by statute.⁴⁵

Florida.—Kilcrease v. White, 6 Fla. 45.

Indiana.—Hankins v. Shoup, 2 Ind. 342.

Maryland.—Annan v. Houck, 4 Gill (Md.) 325, 45 Am. Dec. 133.

Missouri.—Barnes v. McMullins, 78 Mo. 260; Cutler v. Cook, 77 Mo. 388; Arnot v. Woolburn, 35 Mo. 98; Unseld v. Stephenson, 33 Mo. 161; Gullett v. Hoy, 15 Mo. 399; Henley v. Holzer, 19 Mo. App. 245; Grier v. Hinman, 9 Mo. App. 213; Haeussler v. Greene, 8 Mo. App. 451.

New York.—Titus v. Himrod, 39 Barb. (N. Y.) 581.

Pennsylvania.—Long v. Phawn, 75 Pa. St. 128; Hughes v. Large, 2 Pa. St. 103; Evans v. McHugh, 2 Woodw. Dec. (Pa.) 21.

Rhode Island.—Trafford v. Hall, 7 R. I. 104, 82 Am. Dec. 589.

South Carolina.—McAlpin v. Wingard, 2 Rich. L. (S. C.) 547.

Vermont.—Armstrong v. Noble, 55 Vt. 428.

But see Davis v. Neligh, 7 Nebr. 78, 84.

⁴² Shipman v. Robbins, 10 Iowa 208. Per Wright, C. J.

⁴³ Robinson v. Lyman, 10 Conn. 30, 25 Am. Dec. 52.

⁴⁴ Robinson v. Lyman, 10 Conn. 30, 25 Am. Dec. 52.

⁴⁵ La Due v. First Nat. Bank, 31 Minn. 33, 16 N. W. 426, decided under Minn. Gen. St. 1878, c. 66, § 27, wherein the court says: "According to the commercial law of England, and in probably all those states where a different rule has not been fixed by statute, an indorsee of an overdue bill or negotiable note takes it subject only to such equities or defenses as attach to the bill or note itself, and not to claims arising out of collateral matters or independent transactions, whether

§ 432. **Pro tanto recovery.**—A purchaser after maturity, who has not paid full value, can, it is decided, only recover to the extent paid, unless he would be liable over for the difference between what he has thus paid and the original amount of the note.⁴⁶ So where an accommodation note, executed to be used by the payees as collateral security, was indorsed by them for that purpose after maturity, and afterwards sold by the indorsee to satisfy an unpaid balance of their debt, it was held that it could be enforced, in the hands of the purchasers, only to the same extent as though still held by the first indorsees, that is, to the amount of the unpaid portion of the debt which it was executed to secure.⁴⁷

§ 433. **Purchaser from bona fide holder—General rule.**—One who purchases negotiable paper after its maturity from an innocent holder, who acquired the same before maturity for value and without notice of any defense or equities, takes the same free from such defenses as the maker might avail himself of in an action by the payee.⁴⁸ Such

they are against the payee or an intermediate holder; the idea being that such commercial paper, although overdue, did not lose its negotiability. Our state, following the example of many others, has by statute entirely changed this rule." Per Mitchell, J.

⁴⁶ *Bond v. Fitzpatrick*, 8 Gray (Mass.) 536; *Preston v. Breedlove*, 36 Tex. 96.

⁴⁷ *First Nat. Bank v. Werst*, 52 Iowa 284, 3 N. W. 711. In this case it appeared that a note of \$3,000 was given as an accommodation note to be used as collateral security for an indebtedness of \$2,500, which was evidenced by a note for that amount. Subsequently the indebtedness was reduced by a payment of \$500 and a new note was given. The renewal note was also reduced by payments so that the debt was only \$1,317.68, principal and interest. The note was sold by the creditor, under authority given it in writing to sell it and apply the proceeds upon the debt and costs

of sale. The plaintiff in this action was the purchaser. The court said: "The note was executed for the purpose of securing the indebtedness of the payees to the Chicago Bank. Under the contract between the maker and the payees it was valid and could be enforced only to the extent necessary to secure the bank. It was indorsed after maturity, and the holders under such indorsement took it with notice of the equities and defenses of the maker. The debt for which it was made as security was paid in part, the note remained valid only for the part of the debt remaining unpaid. The plaintiff acquired no higher right than the Chicago Bank; the circumstances under which it was transferred to plaintiff created no right other than those of the indorsee of overdue paper. It is very plain that plaintiff can recover no greater sum than was due the Chicago Bank." Per Beck, C. J.

⁴⁸ *Illinois*.—*Matson v. Alley*, 141 Ill. 284, 31 N. E. 419.

a purchaser stands, in this respect, in the place of the one from whom he took the paper.⁴⁹ So it has been declared that: "Notwithstanding the plaintiff purchased the note after maturity he holds it free from any and all defenses available to the makers against the payee, for it has become the settled law of this country that where a negotiable note is purchased after due from an innocent holder, the purchaser takes the title of and is entitled to the same protection as his indorser."⁵⁰

§ 434. **Same subject—Application of rule.**—A purchaser after maturity of negotiable paper will not, in an action thereon, be subject to the defense of usury where the one from whom he took it acquired the same before maturity, without notice or knowledge of such taint and occupied the position of a *bona fide* holder.⁵¹ Nor under such circumstances can the defense of want of consideration be set up.⁵² An exception, however, to the general rule is held to exist where the payee becomes the purchaser.⁵³

§ 435. **Demand paper.**—In determining the respective rights of the holder of, and of prior parties to, commercial paper which is payable on demand, it is declared that the meaning of the word "overdue," as used in connection with such paper, is to be considered and that the distinctions made as to the different sense in which this word may be used are to be borne in mind. The test whether a purchaser took such paper subject to equities and defenses is said to be the period of time which it had been outstanding at the time he took it and not to depend upon the question whether it has been presented for payment. If it has been outstanding such a length of time as to put the purchaser upon inquiry he will then be regarded as taking it, charged with notice of defenses thereto.⁵⁴

Louisiana.—Howell v. Crane, 12 La. Ann. 126, 68 Am. Dec. 765.

Michigan.—Host v. Bender, 25 Mich. 515.

Nebraska.—Barker v. Lichtenberger, 41 Neb. 751, 60 N. W. 79.

New York.—Weems v. Shaughnessy, 70 Hun (N. Y.) 175, 24 N. Y. Supp. 271; Beall v. General Electric Co., 16 Misc. (N. Y.) 611, 38 N. Y. Supp. 527; Britton v. Hall, 1 Hilt. (N. Y.) 528; Benedict v. De Groat, 45 How. Pr. (N. Y.) 384.

North Carolina.—Lewis v. Long, 102 N. C. 206, 9 S. E. 637, 11 Am. St. R. 725.

⁴⁹ Matson v. Alley, 141 Ill. 284, 31 N. E. 419.

⁵⁰ Koehler v. Dodge, 31 Neb. 328, 47 N. W. 913.

⁵¹ Woodwarth v. Huntoon, 40 Ill. 131, 89 Am. Dec. 340.

⁵² Cook v. Larkin, 19 La. Ann. 507.

⁵³ Koehler v. Dodge, 31 Neb. 328, 47 N. W. 913.

⁵⁴ La Due v. First Nat. Bank, 31

§ 436. **Defenses and equities between maker and indorser or intermediate holder.**—In determining what equities or defenses may be set up against a purchaser after maturity it may be stated that, as a general rule, such a purchaser takes the paper subject to such equities or defenses as exist between the original parties, to the extent that they were available as against the one from whom he received it.⁵⁵

Minn. 33, 16 N. W. 426. In this case it was said in reference to a bill of exchange: "The term 'overdue' as applied to a demand bill of exchange is used in different connections, in each of which it has a different meaning; and the failure to keep these distinctions in mind has perhaps led to some misapprehension regarding the present case. Sometimes it is used in reference to a right of action against a drawer or indorser. In that connection a bill is not overdue until presented to the drawer for payment and payment refused. Sometimes the term is used in considering whether an indorser has been released by a failure of the holder to present the bill for payment, and to give the indorser notice of its dishonor within a reasonable time. Again, the term is applied to a bill which has come into the hands of an indorser so long after its issue as to charge him with notice of its dishonor, and thus subject it in his hands to the defenses which the drawer had against it in the hands of the assignor. It is in this last connection that the term 'overdue' is considered in the present case. That in this case a bill may be said to be overdue, although it has never, in fact, been presented to the drawee for payment, is recognized everywhere throughout the books. Suppose a draft had been held by the payee for five years, without ever having been presented to the drawee for payment, and is then indorsed

to another party. It would not be due so as to give a right of action against the drawer, because his contract is only to pay in case it is not paid by the drawee on presentation. But there would be no doubt that it would be overdue and dishonored, so as to charge it in the hands of the indorsee with any defenses which the drawer had against it in the hands of the payee, although when he took it it had never been presented for payment. The retention of a demand draft for so long a time without presentment, when no defense exists against it, is so unusual and contrary to business usages that this circumstance would be held to charge the indorsee with notice, when he purchased the draft, that it was dishonored. The lapse of time would in such a case be so great as to put a purchaser upon inquiry as to the reason why it was still outstanding and unpaid. * * *

In determining whether an indorsee takes such paper as overdue paper, subject to such defenses or equities, the question of actual demand and dishonor does not enter into the discussion. The point of inquiry is, had the paper been outstanding so long after its date as to put the purchaser upon inquiry and charge him with notice that there is some defense to it." Per Mitchell, J. See *De Mott v. Starkey*, 3 Barb. Ch. (N. Y.) 403.

⁵⁵ *Alabama*.—*Glasscock v. Smith*, 25 Ala. 474.

This rule operates to subject paper in the hands of such a purchaser to those equities and defenses which were available against his immediate indorser, without regard to whether such indorser is the payee of the paper or an intermediate party.⁵⁶ It has, however, been determined that this rule does not permit the maker of paper to set up against a purchaser after maturity an equity or defense which may exist in his favor against any intermediate holder, but which is not available against his immediate indorser.⁵⁷

§ 437. **Secret equity in favor of entire stranger.**—A purchaser for value of negotiable paper after maturity is not bound by a secret equity *

Georgia.—Thomas v. Kinsey, 8 Ga. 421.

Illinois.—Lord v. Favorite, 29 Ill. 149.

Indiana.—Green v. Louthain, 49 Ind. 139.

Iowa.—Duncan v. Finn, 79 Iowa 658, 44 N. W. 888; Bates v. Kemp, 12 Iowa 99.

Louisiana.—Stern v. Bank, 34 La. Ann. 1119.

Maine.—Sprague v. Graham, 29 Me. 160; Burnham v. Tucker, 18 Me. 179.

Massachusetts.—Mackay v. Holland, 4 Metc. (Mass.) 69; Howard v. Ames, 3 Metc. (Mass.) 308; Sargent v. Southgate, 5 Pick. (Mass.) 312.

Michigan.—Simons v. Morris, 53 Mich. 155, 18 N. W. 625.

Missouri.—Turner v. Hoyle, 95 Mo. 345, 8 S. W. 157; Julian v. Calkins, 85 Mo. 202; Ford v. Phillips, 83 Mo. 530; Livermore v. Blood, 40 Mo. 48; Wheeler v. Barret, 20 Mo. 573; Shipp v. Stacker, 8 Mo. 145.

New Jersey.—Little v. Cooper, 11 N. J. Eq. 224.

Vermont.—Miller v. Bingham, 29 Vt. 82.

Federal.—Andrews v. Pond, 13 Pet. (U. S.) 65; Foley v. Smith, 6 Wall. (U. S.) 492.

English.—Bounsall v. Harrison, 1 Mees. & W. 611, 2 Gale 113.

BUT SEE Eaton v. Corson, 59 Me. 510, wherein it is decided that a purchaser of a note can acquire no greater rights than his vendor can enforce, and that the general rule extends to defenses available against all prior holders. Zeis v. Potter, 105 Fed. 671, in which it is declared that a reasonable rule would seem to be that purchasers of paper which is overdue or non-negotiable take it subject to the equities of all who appear or are known to have had an interest in it.

Want of title in any of the parties acquiring the instrument after its maturity can be set up by the drawer. Davis v. Bradley, 26 La. Ann. 555.

⁵⁶ Butler v. Murison, 18 La. Ann. 363; Shipp v. Stacker, 8 Mo. 145. See also cases cited in preceding note.

⁵⁷ Hayward v. Sterns, 39 Cal. 58, 60; Vinton v. Crowe, 4 Cal. 309; Perry v. Mays, 2 Bailey (S. C.) 354; Nixon v. English, 3 McCord (S. C.) 549. See Favorite v. Lord, 35 Ill. 142; Root v. Irwin, 18 Ill. 147; Hooper v. Spicer, 2 Swan (Tenn.) 494.

which may exist in favor of one who is an entire stranger to the paper, where the purchaser had no knowledge of such equity or notice of any facts which should put him upon inquiry.⁵⁸

⁵⁸ Fairchild v. Brown, 11 Conn. 26; Hibernian Bank v. Everman, 52 Miss. 500.

SEE Crosley v. Tanner, 40 Iowa 136.

In Mohr v. Byrne, 135 Cal. 37, 67 Pac. 11, it is said by the court in this connection: "Nor does the fact that plaintiff took the note after maturity make him any the less a *bona fide* purchaser as against the equities of intervener herein set up. The rule that indorsees after maturity take with notice of prior equities applies only as between the parties thereto, and does not apply as to third persons occupying the position of intervener herein, where rights are merely latent, and do not appear from an inspection of the note or the indorsements thereon. The note, though due when assigned to plaintiff, carried with it the same presumptions as any other chose in action, and quoting from the well-considered case of Duke v. Clark, 58 Miss. 465 (at page 474): 'It is true that the assignee of a chose in action takes it subject to all the equities to which it was subject in the hands of the assignor, but the equities meant are such as obtained in favor of the debtor, and not those claimed by a third person against the assignor.' The supreme court

of Mississippi cite many cases in support of this proposition, including the case from this state, Wright v. Levy, 12 Cal. 257. See also First Nat. Bank of Bridgeport v. Perris Irrigation District, 107 Cal., at page 62, 40 Pac. 47, wherein it is said: 'The law does not require that the assignee for value of a thing in action shall take it subject to the latent equities of third persons of which he has no notice, but only that the assignment shall be subject to the equities existing in favor of the debtor, in this case the defendant.' In Bank v. Everman, 52 Miss. 506, it is said: 'A purchaser of negotiable paper, even after maturity, cannot be bound by any secret equity in favor of an entire stranger to the paper, of which he neither had knowledge, nor anything to put him on inquiry.' To the same effect see Crosley v. Tanner, 40 Iowa 136, where some authorities are cited, and the reason for the rule quoted from an opinion by Chancellor Kent. It seems clear that the note in plaintiff's hands is not subject to the latent claims of the appellant, and for that reason, so far as Mohr and Kowalsky are concerned, the conclusion of the court that the latter should take nothing was correct." Per Gray, C.

CHAPTER XX.

BONA FIDE HOLDERS AND RIGHTS ON TRANSFER.

Sec.	Sec.
438. <i>Bona fide</i> holders—Preliminary statement.	452. Assignment by parol—Suit in own name—Equities.
439. <i>Bona fide</i> holders—Rule.	453. Suit for use or benefit of assignee.
440. Essentials of rule.	454. Subsequent defenses and equities.
441. Exceptions to and qualifications of rule—Generally.	455. Note payable to order or bearer.
442. <i>Bona fide</i> holder generally—Decisions.	456. Transferee without indorsement.
443. Certified bank checks—Discounting paper.	457. Agents and trustees.
444. Notes under seal.	458. Agent's unauthorized acts.
445. Equities generally.	459. Corporate certificates of indebtedness issued in restraint of trade—Anti-trust law.
446. Holder, transferee or assignee—Non-negotiable paper—Equities and defenses.	460. Guarantor—Guaranty.
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448. Assignee—Equities—Construction and essentials of rule—Generally.	462. Pledge of note by holder—Pledgee's rights.
449. Assignee—Negation and qualifications of rule.	463. Note payable to order or bearer.
450. Assignee of void note—Forbearance to sue.	464. Under statutes and codes—Notice or knowledge—Bad faith.
451. So-called assignments—Not subject to equities.	465. Same subject.
	466. Joint and several notes.

§ 438. **Bona fide holders—Preliminary statement.**—The subject of *bona fide* holders, transferees and assignees has been treated so fully throughout this work that only such general rules, principles and decisions will be considered here as are necessary to supply matters omitted or not fully dealt with elsewhere herein.

§ 439. **Bona fide holders—Rule.**—It is a general and constantly asserted rule that a *bona fide* holder of negotiable paper holds it by a good title clear of all equities and defenses between the original or

intermediate parties.¹ Another form of the rule is as follows: A person who takes negotiable securities before due for a valuable consider-

¹*United States*.—*Brown v. Spoford*, 95 U. S. 474, 24 L. Ed. 508. "The *bona fide* holder of a negotiable instrument for value, if acquired before maturity and without notice of any facts which impeach its validity between the antecedent parties, has a good title to the instrument, unaffected by any such prior transaction and may recover the amount," per Clifford, J. *Goodman v. Simmonds*, 20 How. (61 U. S.) 343, 15 L. Ed. 834; *Fossitt & Co. v. Bell*, 4 McLean (U. S. C. C.) 427, Fed. Cas. No. 4,958; *Crosby v. Lane*, Fed. Cas., No. 3,423 (applied to a note received in payment of a pre-existing debt, even though an accommodation note); *National Exch. Bank v. White*, 30 Fed. 412 (applied to commercial paper made by one of the members of a partnership, but case is reversed in *Dowling v. Exchange Bk. of Boston*, 145 U. S. 512, upon the ground that the other partners were entitled in an action by the holder bank to recover on the notes, to have it submitted to the jury, whether, under the circumstances, they were estopped to dispute the authority of their partner to make and put such paper in circulation. Examine on last point *Hardie & Co., In re*, 143 Fed. 553); *Johnson v. Lewis*, 6 Fed. 27. (Holding that the rule that the purchaser of a chattel acquires no better title than his vendor passed, has no application to negotiable paper, as the possession of such paper carries the title with it to the holder for value without knowledge and in good faith and that such title is good against all the world.)

Alabama.—*Pond v. Lockwood*, 8 Ala. 669.

Georgia.—*Jenkins v. Jones*, 108 Ga. 556, 34 S. E. 149; *Haskins v. Throne*, 101 Ga. 126, 28 S. E. 611; *Bedell v. Scarlett*, 75 Ga. 56; *Smith v. Lloyd, Charlt.* (Ga.) 253; *Bond v. Central Bank*, 2 Kelly (Ga.) 92. See *Haug v. Riley*, 101 Ga. 372, 40 L. R. A. 244, 29 S. E. 44.

Illinois.—*Bemis v. Horner*, 165 Ill. 347, 46 N. E. 277, aff'g 62 Ill. App. 38.

Indiana.—*Morrison v. Fishel*, 64 Ind. 177; *Bremmerman v. Jennings*, 60 Ind. 175.

Iowa.—*Council Bluffs Iron Works v. Cuppey*, 41 Iowa 104.

Kansas.—*Holden v. Clark*, 16 Kan. 346.

Kentucky.—*Clarke v. Tanner*, 100 Ky. 275, 19 Ky. L. Rep. 590, 38 S. W. 11.

Louisiana.—*Taylor v. Bowles*, 28 La. Ann. 294; *Gardner v. Maxwell*, 27 La. Ann. 561; *Kohlman v. Ludwig*, 5 La. Ann. 33; *Pralon v. Aymard*, 12 Rob. (La.) 486; *Bush v. Wright*, 10 Rob. (La.) 23; *Maurin v. Chambers*, 6 Rob. (La.) 62; *Melancon v. Melancon*, 4 Rob. (La.) 33; *Bordelon v. Kilpatrick*, 3 Rob. (La.) 159; *Robinson v. Shelton*, 2 Rob. (La.) 277; *Jones v. Young*, 19 La. 553; *Van Pelt v. Eagle Ins. Co.*, 18 La. 64; *Hagan v. Caldwell*, 15 La. 380; *Crosby v. Heartt*, 15 La. 304; *Lancelos v. Robertson*, 3 La. 259; *Abat v. Gormley*, 3 La. 238; *Le Blanc v. Sanglair*, 12 Mart. O. S. (La.) 402, 13 Am. Dec. 377; *Hubbard v. Fulton*, 7 Mart. O. S. (La.) 241; *Thompson v. Gibson*, 1 Mart. N. S. (La.) 150.

Maine.—*Hobart v. Penny*, 70 Me. 248; *Wait v. Chandler*, 63 Me. 257.

Massachusetts.—*Pettee v. Prout*, 3 Gray (Mass.) 502, 63 Am. Dec. 778;

ation without knowledge of any defect of title and in good faith holds such paper by a valid title good as against all the world.² Again:

Cone v. Baldwin, 12 Pick. (Mass.) 545.

Michigan.—*Bostwick v. Dodge*, 1 Doug. (Mich.) 413, 41 Am. Dec. 584.

Minnesota.—*Merchants' Sav. Bank v. Cross*, 65 Minn. 154, 67 N. W. 1147; *Gale v. Birmingham*, 64 Minn. 555, 57 N. W. 659.

Mississippi.—*Mercien v. Cotton*, 34 Miss. 64; *Craig v. Vicksburg*, 31 Miss. 216.

Nebraska.—*First Nat. Bk. v. Pennington*, 57 Neb. 404, 77 N. W. 1084.

New Hampshire.—*Doe v. Burnham*, 11 Fost. (N. H.) 426.

New Jersey.—*Price v. Keen*, 40 N. J. L. 332.

New York.—*Perth Amboy Mut. Loan, Homestead & Bldg. Assn. v. Chapman*, 178 N. Y. 558, 70 N. E. 1104, aff'g 81 N. Y. Supp. 38, 80 App. Div. 556; *Citizens' State Bank v. Cowles*, 80 N. Y. Supp. 598, 39 Misc. 571; *Smith v. Weston*, 88 Hun (N. Y.) 25, 24 N. Y. Supp. 557; *Elwell v. Dodge*, 33 Barb. 336.

North Carolina.—*Toms v. Jones*, 127 N. C. 464, 37 S. E. 480; *Little v. Dunlap*, 44 N. C. 40; *Reddick v. Jones*, 28 N. C. 107, 44 Am. Dec. 68.

Ohio.—*Kitchen v. Loudenback*, 48 Ohio St. 177, 29 Am. St. Rep. 540, 26 N. E. 979 [affirming 3 Ohio Cir. Ct. R. 228]; *Johnson v. Way*, 27 Ohio St. 374; *Second Nat. Bank v. Hemingray*, 31 Ohio St. 168; *Baily v. Smith*, 14 Ohio St. 402.

Pennsylvania.—*Northern National Bank v. Arnold*, 187 Pa. 356, 15 Lanc. L. Rev. 345, 31 Chic. Leg. N. 36, 15 Bkg. L. J. 529, 40 Atl. 794; *Bullock v. Wilcox*, 7 Watts (Pa.) 328.

South Carolina.—*King v. Johnson*, 3 McCord (S. C.) 365.

Texas.—*Rotan v. Maedgen* (Tex. 1900), 59 S. W. 585; *Blair v. Ruth-erford*, 31 Tex. 465.

Virginia.—*Lomax v. Picot*, 2 Rand. (Va.) 247.

West Virginia.—*Quaker City Nat. Bank v. Showacre*, 26 W. Va. 48.

Wisconsin.—*Johnson v. Meeker*, 1 Wis. 436. See *Thorpe v. Minde-man* (Wis.), 101 N. W. 417, 68 L. R. A. 146.

But as to rule under statute in Kentucky, see *Wade v. Foster*, 24 Ky. L. Rep. 1292, 71 S. W. 443.

² *Perth Amboy Mut. Loan, H. & B. Assn. v. Chapman*, 81 N. Y. Supp. 38, 80 App. Div. 556, aff'd (Mem.), 178 N. Y. 558, 70 N. E. 1108.

See *Myers v. Kessler*, 142 Fed. 730. In this case the notes were regular upon their face and plaintiff had purchased them in good faith and for value before maturity, and without notice of any defense whatever. It was held that the defense was not available, that the notes had been given on Sunday and for a stock gambling transaction. See §§ 288-301, herein.

The popular meaning of "negotiate" is the same as that of the negotiable instruments law, 1897, p. 728, c. 612, § 60, which provides that "an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery." *Rogers v. Morton*, 95 N. Y. Supp. 49, 50, 46 Misc. 494.

As to governing principle, see Van

"It is firmly imbedded in jurisprudence that a *bona fide* purchaser for a consideration before maturity is protected, at least to the extent of the amount paid by him; the note he holds is clear of all equities between the parties."³

§ 440. **Essentials of rule.**—To bring the holder within the protection of the rule the paper must have been acquired by him before maturity, in due course of business, in good faith, for value, and without knowledge or notice of any defects, infirmities or defenses or of facts which impeach its validity, subject, however, to such qualifications and exceptions as are hereinafter specified.⁴

§ 441. **Exceptions to and qualifications of rule—Generally.**—The rules precluding defenses and equities against *bona fide* holders for value have been made subject to certain exceptions and qualifications;⁵ as in cases where the note is void at its creation;⁶ or where it is based on an illegal, immoral and void consideration or its circulation is prohibited under the law, or the maker had no power to issue it;⁷ as

Winkle, etc., Co. v. Citizens' Bank (Tex.), 33 S. W. 862.

Bona fide holder not subject to equities, etc., see Walker v. Wilson, 79 Tex. 188, 14 S. W. 798, 15 S. W. 402, per Gaines, J.

³ Clark v. Whitaker, 117 La. 298, 41 So. 580, 581, per Breaux, C. J.

⁴ United States.—National Exch. Bank v. White, 30 Fed. 412.

Colorado.—Rand v. Pantagraph Co., 1 Colo. App. 270, 28 Pac. 661.

Connecticut.—Standard Cement Co. v. Windham, 71 Conn. 668, 42 Atl. 1006.

Georgia.—Keith v. Fork, 105 Ga. 511, 31 S. E. 169; Bedell v. Scarlett, 75 Ga. 56.

Maine.—Hobart v. Penny, 70 Me. 248.

Minnesota.—Daniels v. Wilson, 21 Minn. 530.

New York.—Claflin v. Farmers' Bank, 25 N. Y. 293, rev'g 36 Barb. (N. Y.) 540.

Ohio.—Kitchen v. Loudenback, 48

Ohio St. 177, 29 Am. St. Rep. 540, 26 N. E. 979, aff'g 3 Ohio Cir. Ct. Rep. 228; Bailey v. Smith, 14 Ohio St. 402.

Texas.—Rotan v. Maedgen (Tex. 1900), 59 S. W. 585.

Virginia.—Payne v. Zell, 98 Va. 294, 36 S. E. 379.

Washington.—McNamara v. Jose, 28 Wash. 461, 68 Pac. 903. See also citations in last preceding note.

⁵ Hillhouse v. Adams, 57 Conn. 153, 17 Atl. 698; Barker v. Valentine, 10 Gray (Mass.) 341; Patterson v. Wright, 64 Wis. 289, 25 N. W. 10.

⁶ Baker v. Arnold, 3 Cai. Cas. (N. Y.) 279.

⁷ Jenkins v. Jones, 108 Ga. 556, 34 S. E. 149; Bedell v. Scarlett, 75 Ga. 56; Kitchen v. Loudenback, 48 Ohio St. 177, 26 S. E. 979, 29 Am. St. Rep. 540, aff'g 3 Ohio Cir. Ct. Rep. 228.

As to illegal consideration see §§ 288-301, herein.

in case of bonds issued without authority and so invalid;⁸ or where title is acquired by fraud and without consideration;⁹ or where there is a plea of *non est factum*.¹⁰ Again, a certificate of deposit may be subject to equities and defenses,¹¹ as may also notes which are not for the payment of money.¹² Other exceptions exist and are noted elsewhere herein.

§ 442. **Bona fide holder generally—Decisions.**—The case of *Goodman v. Simonds*^{12*} holds that a *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same became due, holds the title unaffected by these facts and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity. In Georgia, a *bona fide* holder of a negotiable promissory note, purchased for value and before maturity, is protected against a defense that the note was without consideration, and where a negotiable note was payable at a future date was indorsed by the payee to the plaintiff, in the absence of proof to the contrary the law will presume that the plaintiff took before maturity, for value and without notice. So where, in defense to a suit upon a note, the defendant pleads that the plaintiff purchased after maturity, and there is no evidence to sustain the plea, a verdict in favor of defendant is contrary to law.¹³ It is held in New York that under the negotiable instruments law, "where value has at

⁸ *Oswego County Sav. Bk. v. Town of Genoa*, 72 N. Y. Supp. 786.

⁹ *Keegan v. Rock* (Iowa), 102 N. W. 805. See also *Deppen v. German-American Title Co.*, 24 Ky. L. Rep. 1110, 70 S. W. 868, 72 S. W. 868.

Defense of fraud when not available against holder taking negotiable paper in good faith, without notice, before maturity and for value. *Douglas v. Matting*, 29 Iowa 498, 4 Am. Rep. 238; *Clarke v. Tanner*, 100 Ky. 275, 10 Ky. L. Rep. 590, 38 S. W. 11; *Park Bank v. Watson*, 42 N. Y. 490, 1 Am. Rep. 573; *Phelan v. Moss*, 67 Pa. St. 59, 5 Am. Rep. 402.

Defense of fraud available when not taken in regular course of busi-

ness, as where A. obtained the paper by fraud and before maturity indorsed it to plaintiff, who had no knowledge of the fraud, in trust for A.'s creditors and the balance for A.'s wife. *Roberts v. Hall*, 37 Conn. 205, 9 Am. Rep. 308.

¹⁰ *Bedell v. Scarlett*, 75 Ga. 56.

¹¹ *Gregg v. Union County Nat. Bank*, 87 Ind. 238; *Reed v. Stapp*, 9 U. S. App. 34, 3 C. C. A. 244, 52 Fed. 641. See *Shute v. Pacific Nat. Bank*, 136 Mass. 487.

¹² *Shamokin Bank v. Street* 16 Ohio St. 1.

^{12*} 20 How. (61 U. S.) 343, 15 L. Ed. 934.

¹³ *Parr v. Erickson*, 115 Ga. 873, 42 S. E. 240.

any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who become such prior to that time," and one of the conditions which constitute one a holder in due course is, "that he took it in good faith and for value;" therefore, an admission in the defense that the note was ever negotiated for value would be fatal to a demurrer and the allegation of the defense in a suit by the holder that there was no consideration for the execution and indorsement of the note is insufficient.¹⁴ The statute of Iowa, provid-

¹⁴ *Rogers v. Morton*, 95 N. Y. Supp. 49, 46 Misc. 494. The court, per Clarke, J., said: "Two actions are brought on promissory notes by an indorsee; one against the maker and payee, and the other against the maker. The complaints set forth the notes and contain the usual averments. The answers are alike, and each contain a general denial, and three separate defenses, and a counter-claim. The plaintiff demurs to each defense on the ground that the same is insufficient in law upon the face thereof, and also to the counter-claim, as hereinafter stated. The facts admitted by the demurrer to the second defense (the first separate defense) are: Defendants were heavily interested in a railroad company, and, in order to furnish money to said company, executed and indorsed the note, as maker, payee, and indorser, placed the same with a third party for the purpose of having it discounted for the benefit of said company, and the third party informed these defendants after maturity that the note was in her possession, and defendants believe the note now to be in her possession. If these were all the allegations of this defense, it is clear that the demurrer would have to be sustained; but the plea continues, 'and denies that said note was ever duly negotiated or discounted for value.' Plaintiff con-

tends that this denial is a statement of a conclusion of law. I am of opinion that the denial that the note was ever duly negotiated for value is the statement of an ultimate fact, and not of a conclusion of law. * * * The allegation, with reference to this note, which is payable to order, is therefore equivalent to a denial that the note was ever duly indorsed and delivered for value. A denial in these same words was held by *Schnitzer v. Gordon*, 28 App. Div. 342, 51 N. Y. Supp. 152, to be a negative pregnant, but nevertheless sufficient to raise an issue calling for proof upon the trial. It admits the delivery and indorsement, but denies that any value was ever given for the note. * * * An admission that the note was ever negotiated for value is therefore fatal to the demurrer. This determination is not in accord with a ruling in the second department of this court." The court then quotes from *Green v. Brown*, 49 N. Y. Supp. 163, 22 Misc. 279, and *Carter v. Eighth Ward Bank*, 67 N. Y. Supp. 300, 33 Misc. 128, and says: "These decisions are inconsistent with the rule laid down by Judge Andrews in *Douglas v. Phoenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448. * * * A defense differs from a denial, in that the denial puts the plaintiff to his proof, and the de-

ing that if a negotiable note is procured of the maker by fraud and is afterward indorsed before maturity, for value, to an innocent purchaser, yet such innocent purchaser can only recover the sum he paid for the note, enters into and becomes a part of the contract evidenced by a note made in Iowa, and such limitation of the amount payable to

fense is a plea by way of confession and avoidance. General denials are inconsistent with confession, and therefore not properly part of a defense. But to state a valid defense, one that will avoid the cause of action alleged, it may be necessary to deny specific allegations of the complaint which, under our rules of pleading, would otherwise be admitted. All denials in a defense are not, therefore, necessarily surplusage or immaterial. If the plaintiff cannot with safety demur to a pleading containing an immaterial allegation or denial of fact, he has his remedy under the code. He should first move to strike out such allegation or denial. *Steifel v. Tolhurst*, 55 App. Div. 532, 67 N. Y. Supp. 274; *Blant v. Blant*, 41 Misc. Rep. 572, 85 N. Y. Supp. 146. The court should not be required to determine on demurrer matters which may be disposed of on motion. The second demurrer must be sustained. The allegation that 'plaintiff is not a *bona fide* holder in due course of said note' is a conclusion of law. It is impossible to determine which of the conditions specified in section 91 of the negotiable instruments law, constituting a holder in due course, have not been complied with. The allegation 'that said note was executed and indorsed without any consideration' is of itself insufficient. This defense admits the allegation of the complaint that the payee indorsed and delivered the note for value before maturity. Value having been

given prior to the delivery to plaintiff, he is a holder for value (negotiable instruments law, laws 1897, p. 727, § 52), and the fact that there may have been an indorsement without consideration is immaterial. The allegation that the note 'had, before its delivery to said plaintiff, no legal inception,' is a conclusion of law, and is not helped by the immaterial allegation that the 'transfer to plaintiff was made after maturity,' and the insufficient allegation, 'at a rate of discount greater than legal interest, and not in the ordinary course of business, and is usurious and void.' The defense of usury must set up the usurious contract, specifying its terms and the particular facts relied upon to bring it within the prohibition of the statute. *Western T. & Coal Co. v. Kilderhouse*, 87 N. Y. 430, 435; *Manning v. Tyler*, 21 N. Y. 567; *Degal v. Simmons*, 23 N. Y. 491; *Whitehead v. Heidenheimer*, 57 App. Div. 590, 595, 68 N. Y. Supp. 704. The third demurrer must be sustained on the same grounds as the second.

"The additional allegation in this separate defense that 'said note was wrongfully converted by said Agnes Ford, and fraudulently delivered to said plaintiff without the knowledge and assent of these defendants, or either of them,' is a mere conclusion of law. The authorities have long established the rule that the facts constituting the alleged fraud must be pleaded."

the indorsee in such case applies in an action in Missouri on the note.¹⁵ Again, it is declared that commercial necessity requires that only slight evidence should be insisted upon to establish an estoppel *in pais* as to the validity of commercial paper; therefore, the face of the paper itself, when free from suspicion, is sufficient evidence, in the absence of notice, against all who aid to put it into circulation in that condition, unless the note is void by the positive command of a statute.¹⁶ In an action upon a promissory note an affidavit of defense is insufficient in which the defendant admits that he made a note identical with the copy filed in date, in amount, in payee and in time and place of payment, and that the note passed by indorsement to the plaintiff in renewal of his prior note which the plaintiff had discounted, and the only difference averred between the copy filed, and the note alleged to have been made is that the latter contained the words and figures "In renewal of \$5,000 note."¹⁷ Though a person holds a note as collateral security, in the absence of any defense against it, even if it was still in the hands of the payee, judgment may be had for the whole amount due on the note with liability to account for the surplus to the owner of the note.¹⁸ If notes are acquired in good faith for value before maturity they are not vitiated in the hands of the holder

¹⁵ *Creston Nat. Bank v. Salmon* (Mo. App. 1906), 93 S. W. 288.

¹⁶ *Chemical National Bank v. Kellogg*, 183 N. Y. 92, aff'g 87 App. Div. 633. The court, per Vann, J., said: "The business of this country is done so largely by means of commercial paper that the interests of commerce require that a promissory note, fair on its face, should be as negotiable as a government bond. Every restriction upon the circulation of negotiable paper is an injury to the state, for it tends to derange trade and hinder the transaction of business. Commercial necessity requires that only slight evidence should be insisted upon to establish an estoppel *in pais* as to the validity of commercial paper. The only practicable rule is to make the face of the paper itself, when free from suspicion, sufficient evi-

dence in the absence of notice, against all who aided to put it into circulation, unless the note is void by the positive command of a statute, such as the act against usury. No other rule would work well, for it would be intolerable if every bank had to learn the true history of each piece of paper presented for discount before it could act in safety. It is better that there should be an occasional instance of hardship, than to have doubt and distrust hamper a common method of making commercial exchanges."

¹⁷ *Yardley Nat. Bank v. Vansant*, 214 Pa. 250, 63 Atl. 544.

¹⁸ *Camden Nat. Bank of Camden v. Fries-Breslin Co.* (Supreme Ct. Pa. 1906), 63 Atl. 1022, citing 4 Am. & Eng. Ency. of Law (2d Ed.), p. 347, see § 351 et seq., herein.

by subsequent information of the infirmity of their origin,¹⁹ and an equity arising subsequent to the transfer is no defense in favor of the maker against the transferee.²⁰

§ 443. **Certified bank checks—Discounting paper.**—This rule as to *bona fide* holders has been applied to certified bank checks;²¹ and it is held that the fact that a check on the bank has been certified by the bank at the request of the indorsers and before delivery to the holder will not discharge the indorsers, such a certification arouses no implication that the holder intended to release the indorser and look only to the bank.²² The rule has also been applied to one discounting the paper in good faith.²³ So where a note is sued on which was payable to and discounted by a bank, it is incompetent, for the purpose of diminishing the amount recoverable, to show that the bills of the bank were at a depreciation when the note matured, as the bank is entitled to recover the full amount.²⁴

§ 444. **Notes under seal.**—The general rule has been applied in equity to a due bill under seal purporting on its face to have been given for a valuable consideration. Thus where a due bill is a merely voluntary contract without consideration it will not be enforced in equity and even though under seal and purporting on its face to be for value received a court of equity may inquire into the real consideration.²⁵ And under a system which permits law and equity to be blended in one action fraud or mistake in the consideration of a bond may be shown and it may also be proven that part of the consideration was usurious interest, but while fraud in the *factum* might

¹⁹ Hillard v. Taylor, 114 La. 883, 38 So. 594.

²⁰ Campbell v. Rusch, 9 Iowa 337. See Elwell v. Dodge, 33 Barb. (N. Y.) 336.

²¹ Farmers' Bank v. Butchers' Bank, 28 N. Y. 425, 26 How. Pr. (N. Y.) 1; s. c. Farmers', etc., Bank v. Butchers', etc., Bank, 14 N. Y. 623. See Mutual Nat. Bk. v. Rotge, 28 La. Ann. 933, 26 Am. Rep. 126.

²² Willetts v. Phœnix Bank, 2 Duer (N. Y.) 121.

²³ Waynesville Nat. Bank v. Irons,

8 Fed. 1; First Nat. Bank v. Schuyler, 39 N. Y. Super. Ct. (N. Y.) 440; Salina Bank v. Babcock, 21 Wend. (N. Y.) 499. But see Merchants', etc., Bank v. Millsaps, 71 Miss. 361, 15 So. 659; National Park Bank v. German-American Security Co., 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673, rev'g 53 N. Y. Super. Ct. 367, a corporation note.

²⁴ Commercial Bank v. Atherton, 1 Smedes & M. (Miss.) 641.

²⁵ Snyder v. Jones, 36 Md. 542.

avoid a bond altogether, fraud or mistake in the consideration, so far as the consideration is legal, may be shown.²⁶

§ 445. **Equities generally.**—Generally those equities only can be pleaded by defendant which operate in his favor; he cannot rely upon those which belong to the party to whom he is liable.²⁷ And secret equities will not be of any avail against a *bona fide* holder of a note transferred before maturity.^{27*} If the defense relates simply to the consideration and can be availed of at law, equity will refuse its aid to reform the instrument.²⁸ But where conspiracy in obtaining a note is relied upon and plaintiff can show that certain defendants co-operated in the alleged wrongful acts, equity will give relief to the extent so proven.²⁹ An answer may be compelled to interrogatories to show what consideration defendant received and also that received by other parties to the extent of his knowledge.³⁰ But defenses of an acceptor against the drawer cannot be availed of in equity against such *bona fide* holder.³¹

§ 446. **Holder, transferee or assignee—Non-negotiable paper—Equities and defenses.**—In case of non-negotiable paper the equities and defenses between prior parties may be such as will preclude a recovery by the holder, transferee or assignee, even though such party obtained the paper before maturity, for value, and without notice or knowledge of such equities or defenses, as non-negotiable paper rests upon a different rule from that which governs negotiable paper in so far as its transfer and the rights of holders are concerned.³²

²⁶ Hughes v. Boone, 102 N. C. 137, 9 S. E. 286.

²⁷ Ran v. Latham, 11 La. Ann. 276.

^{27*} Clark v. Whitaker, 117 La. 298, 41 So. 580, 582.

²⁸ Hausbrandt v. Hofer, 117 Iowa 103, 90 N. W. 494.

²⁹ More v. Finger, 128 Cal. 313, 60 Pac. 933, 58 Pac. 322.

³⁰ Culverhouse v. Alexander, 2 Younge & C. Exch. 218; Glengall v. Edwards, 2 Younge & C. Exch. 125.

³¹ Morrison v. Farmers' Bank, 9 Okla. 697, 60 Pac. 273.

³² California.—Neale v. Head, 133 Cal. 42, 65, Pac. 131; San Jose

Ranch Co. v. San Jose Land & W. Co., 132 Cal. 582, 64 Pac. 1097; Bouche v. Souttit, 104 Cal. 230, 37 Pac. 902; Graves v. Mining Co., 81 Cal. 303, 22 Pac. 665; McGarvey v. Hall, 23 Cal. 140.

Florida.—Reddish v. Ritchie, 17 Fla. 867.

Georgia.—Cohen v. Prater, 56 Ga. 203.

Illinois.—Haskell v. Brown, 65 Ill. 29. See Barker v. Barth, 192 Ill. 460, 61 N. E. 388, aff'g 88 Ill. App. 23.

Indiana.—Henry v. Gilliland, 103 Ind. 177; Herod v. Snyder, 48 Ind.

§ 447. **Defenses against assignees.**—Defenses or equities existing against the payee at the time of the assignment or before notice thereof are available against the assignee to preclude his recovery on the paper.³³ And the maker may show the true consideration as

480. See *Rosenthal v. Rambo*, 165 Ind. 584, 76 N. E. 404.

Kansas.—*South Bend Iron Works v. Paddock*, 37 Kan. 510, 15 Pac. 574; *Graham v. Wilson*, 6 Kan. 489.

Kentucky.—*Gaines v. Bank*, 19 Ky. L. Rep. 171, 39 S. W. 438.

Massachusetts.—*Dyer v. Homer*, 22 Pick. (Mass.) 253; *Willis v. Twambly*, 13 Mass. 204.

Missouri.—*Smith v. Busby*, 15 Mo. 388, 57 Am. Dec. 207.

New Hampshire.—*Sanborn v. Little*, 3 N. H. 539.

New York.—*Meuer v. Phoenix Nat. Bk.*, 88 N. Y. Supp. 83, 94 App. Div. 331, aff'g 86 N. Y. Supp. 701, 42 Misc. 341; *Kohn v. Consolidated Butter & Egg Co.*, 63 N. Y. Supp. 265, 30 Misc. 725; *Chamberlain v. Gorham*, 20 Johns. (N. Y.) 144.

North Carolina.—*Havens v. Potts*, 86 N. C. 31; *First Nat. Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604.

North Dakota.—See *Massachusetts Loan & Trust Co. v. Twichell*, 7 N. Dak. 440, 75 N. W. 786.

Oklahoma.—*Dickerson v. Higgins* (Okla.), 82 Pac. 649; *Cotton v. John Deere Plow Co.*, 14 Okla. 605, 78 Pac. 321.

Pennsylvania.—*Welter v. Kiley*, 95 Pa. St. 461; *Miller v. Kreiter*, 76 Pa. St. 78; *White v. Heylman*, 34 Pa. St. 142; *Thompson v. McClelland*, 29 Pa. St. 475; *Bircleback v. Wilkins*, 22 Pa. St. 26.

Texas.—*Sonnenthiel v. Skinner*, 67 Tex. 453, 3 S. W. 686.

³³ *United States*.—*Omaha Nat. Bank v. Walker*, 5 Fed. 399, 403; *Bradley v. Trammel*, 1 Hemp. (U. S.) 164, Fed. Cas., No. 1,788a.

Alabama.—*Clemens v. Loggins*, 1 Ala. 622; *Hudson v. Tindall*, 1 Stew. & P. (Ala.) 237.

Arkansas.—*Coolidge v. Burns*, 25 Ark. 241; *Tatum v. Kelly*, 25 Ark. 209, 94 Am. Dec. 717; *Oldham v. Wallace*, 4 Pike (Ark.) 559.

California.—*Wright v. Levy*, 12 Cal. 257.

Illinois.—*Sims v. Rice*, 67 Ill. 88; *Jeneson v. Jeneson*, 66 Ill. 259; *Bradley v. Marshall*, 54 Ill. 173. Compare *Mann v. Merchants' Loan & Trust Co.*, 100 Ill. App. 224.

Indiana.—*Second Nat. Bank v. Brady*, 96 Ind. 498; *Sheffield School v. Address*, 56 Ind. 157; *Shane v. Lowry*, 48 Ind. 205; *Marshall v. Billingsley*, 7 Ind. 250; *Henry v. Scott*, 3 Ind. 412; *Doremus v. Bond*, 8 Blackf. (Ind.) 368. See *First Nat. Bk. v. Beach*, 34 Ind. App. 80, 72 N. E. 287.

Iowa.—*Hecker v. Boylan*, 126 Iowa 162, 101 N. W. 755; *Sayre v. Wheeler*, 31 Iowa 112; *Pearson v. Cummings*, 28 Iowa 344; *Merchants', etc., Bank v. Hewitt*, 3 Clarke (Iowa) 93.

Kentucky.—*Harrigan v. Advance Thresher Co.*, 26 Ky. L. Rep. 317, 81 S. W. 261; *Power v. Hambrick*, 25 Ky. L. Rep. 30, 74 S. W. 660; *Huber v. Egner*, 22 Ky. L. Rep. 1800, 61 S. W. 353; *Rogge v. Cassidy* (Ky. 1890), 13 S. W. 716; *Garrott v. Jaffray*, 10 Bush. (Ky.) 413; *Bement v. McClaren*, 1 B. Mon. (Ky.) 296; *Triplett v. Holly*, 4 Litt. (Ky.) 130; *Chiles v. Corn*, 3 A. K. Marsh. (Ky.) 230; *Highbaugh v. Hubbard*, 6 Ky. L. Rep. 511. Examine *Cunningham*

against the assignee of a note as in case of a peddler's note.³⁴ If a note has been given by the vendee, for purchase money, and the vendor is unable to make title, equity will allow, against the assignee equitable defenses which were available against the assignor.³⁵ And where a railroad company negotiated one of its bonds and delivered with it the note of the defendant as security, even had the note been indorsed in the usual mode, before maturity, the assignee, by a proceeding in

v. Potter, 23 Ky. L. Rep. 847, 64 S. W. 493.

Louisiana.—*Kugler v. Taylor*, 19 La. Ann. 100.

Maine.—*Litchfield v. Dyer*, 46 Me. 31; *Calder v. Billington*, 3 Shep. (Me.) 398.

Maryland.—*Steele v. Sellman*, 79 Md. 1, 28 Atl. 811.

Massachusetts.—*Stevens v. Parker*, 5 Allen (Mass.) 333.

Mississippi.—*Scott v. Searles*, 7 Smedes & M. (Miss.) 498, 45 Am. Dec. 317.

Missouri.—*Munday v. Clements*, 58 Mo. 577; *Thompson v. Roatcup*, 27 Mo. 283.

Montana.—*Helena Nat. Bk. v. Rocky Mountain Teleg. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 8 Am. & Eng. Corp. Cas. N. S. 782, 51 Pac. 829.

Nebraska.—See *Gaylord v. Nebraska Sav. & Exch. Bk.*, 54 Neb. 104, 74 N. W. 415.

New York.—*Chase v. Kellogg*, 59 Hun (N. Y.) 623, 13 N. Y. Supp. 351.

Pennsylvania.—*Lancaster Bank v. Huver*, 114 Pa. St. 216, 6 Atl. 1; *Weaver v. Lynch*, 25 Pa. St. 449, 64 Am. Dec. 713; *Edgar v. Kline*, 6 Pa. St. 327; *Baker v. Nipple*, 16 Pa. Co. Ct. 659.

South Dakota.—*Searles v. Seipp*, 6 S. D. 472, 61 N. W. 804.

Tennessee.—*Vatterlein v. Howell*, 5 Sneed (Tenn.) 441; *Robinson v. Keyes*, 9 Humphr. (Tenn.) 144;

Wormley v. Lowry, 1 Humphr. (Tenn.) 468.

Texas.—*Petigrew v. Dix*, 33 Tex. 277; *Boyd v. Tarrant*, 14 Tex. 230; *Weathered v. Smith*, 9 Tex. 622, 60 Am. Dec. 186. *Examine National Bk. of Commerce v. Kenney* (Tex.), 83 S. W. 368, rev'g 80 S. W. 555.

Vermont.—*Sanford, etc., Co. v. Hull*; *Brayt.* (Vt. 231; *Wetmore v. Blush, Brayt.* (Vt.) 55.

Certificates of deposit non-negotiable and assignee subject to defenses. *Humboldt Safe-Deposit & Trust Co.*, 3 Pa. Co. Ct. R. 621.

When agreement that payee would not hold maker responsible may be shown, in action by assignee after maturity. *Citizens' Nat. Bk. v. Cammer* (Tex. Civ. App.), 86 S. W. 625.

Purchaser of note, when recovery limited to price paid, see *Theard v. Gueringer*, 115 La. 242, 38 So. 579.

Defense of usury available against assignee. *Stokeley v. Buckler*, 22 Ky. L. Rep. 1740, 61 S. W. 460.

Note purchased at execution sale is subject to equities. *Neale v. Head*, 133 Cal. 32, 65 Pac. 131.

Defense of fraud available against assignee of note payable to order. *Kennedy v. Jones* (Miss.), 29 So. 819.

³⁴ *Burns v. Sparks*, 26 Ky. L. Rep. 688, 82 S. W. 425.

³⁵ *Smith v. Pettus*, 1 Stew. & P. (Ala.) 107.

equity to collect the same by foreclosure of a mortgage given to secure it, which is not negotiable, will take, subject to any defenses the maker had as against the original mortgagees, because in such suit the mortgage is a foundation of the suit and the note is only the incident or evidence of the debt.³⁶ So the payment to the assignor by the maker of a non-negotiable instrument may constitute a good defense to an action thereon by the assignee when such payment was made without notice of the assignment and in good faith.³⁷ So an action on a note may be barred by a release by the payee before notice given of assignment.³⁸ Under a Missouri decision if a negotiable instrument is assigned only those equities may be availed of as are apparent upon the paper.³⁹ Again, in an action by the assignee it is unnecessary to consider the question whether a written assignment of certain notes was properly executed or admitted in evidence, where the complaint alleged the assignment and delivery of the notes to the plaintiff and the testimony showed that the said notes were transferred and delivered to the plaintiff long before the written assignment was made; no objection being interposed to the admission of this testimony it was declared to be *prima facie* sufficient under the pleadings to sustain the right to recover.⁴⁰ The holder of negotiable paper indorsed in blank to which he has no legal title, or in which he has no beneficial interest, may maintain after maturity a suit thereon against the maker, with the consent of the real owner to whom, when recovered, he is accountable for the proceeds.⁴¹

³⁶ Haskell v. Brown, 65 Ill. 29.

³⁷ Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4, Code Civ. Proc., §§ 570, 571, Civ. Code, § 1982. See also Sykes v. Citizens' Nat. Bk. 69 Kan. 134, 76 Pac. 393; Dickerson v. Higgins, 15 Okl. 588, 82 Pac. 649.

Payment of overdue interest to payee by maker before notice of assignment when available against assignee, see Hecker v. Boylan, 126 Iowa 162, 101 N. W. 755. Compare Walter v. Logan, 63 Kan. 193, 65 Pac. 225.

³⁸ Lowrey v. Danforth, 95 Mo. App. 441, 69 S. W. 99.

³⁹ Caldwell v. Dismukes, 111 Mo. App. 570, 86 S. W. 270.

⁴⁰ First National Bank of Council

Bluffs v. Moore (C. C. A.), 137 Fed. 505.

⁴¹ Jump v. Leon (Mass. 1906), 78 N. E. 532, declaring that this rule has been settled by repeated decisions beginning with Little v. O'Brien, 9 Mass. 423, and citing with other cases Fay v. Hunt, 190 Mass. 378, 77 N. E. 502; Haskell v. Avery, 181 Mass. 106, 63 N. E. 15, 92 Am. St. Rep. 401; New England Trust Co. v. New York Belting & Packing Co., 166 Mass. 42, 45, 43 N. E. 928.

Jurisdiction of federal court—assignee—bona fide holders. The provisions of the act of August 13, 1888, 25 Stat. at L. 433, 434, provides that no circuit court shall

§ 448. **Assignee—Equities—Construction and essentials of rule—Generally.**—The equities within the rule are such as existed in favor of the original debtor and not a collateral matter not growing out of the notes⁴² and such as the holder ought to have ascertained by such inquiry as the facts and the law require.⁴³ So the equities must be existing ones between the maker and payee in order to be available by the maker to defeat the assignee;⁴⁴ the equities must also be such as attach to the particular contract⁴⁵ in connection with which the note is given. And the rule applies, even though the note is secured by col-

have cognizance of any suit to recover the contents of any promissory note in favor of any assignee, or subsequent holder if such instrument be payable to bearer, unless such suit might have been prosecuted in such court to recover, if an assignment or transfer had not been made. Notes were made by a corporation payable to the order of its own treasurer, a citizen of the same state as a matter of custom and convenience and he indorsed and delivered them to a citizen of another state, a *bona fide* holder, who furnished directly to the corporation the money evidenced by the note. It was decided that the treasurer was not in fact the assignee of the note within the statute and that the holder could maintain suit in the federal circuit court of competent jurisdiction, even though as to the treasurer diversity did not exist; "as the notes were made payable to the order of 'Markham B. Orde, Treas.,' and there is no allegation that Orde was not a citizen of the state of Illinois, of which state the defendant companies were corporations and citizens, it is insisted that the jurisdiction must fail, under the provisions of the statute just referred to. Assuming

without deciding that this question could be raised by way of defense to the ancillary bill, we think the objection must fail, for under the allegations of the declaration the money was furnished directly to the defendants by the Guaranty Trust Company, and that company was the first taker of the notes. In *Falk v. Moebis*, 127 U. S. 597 (32 L. Ed. 266, 8 Sup. Ct. 1319), it was held that notes made in this form, payable to the treasurer, indorsed before delivery by him are notes of the company. And when it appears that the indorser is not in fact an assignee of the paper, suit may be brought in a federal court by a holder having the requisite diverse citizenship, notwithstanding the indorser might have been a citizen of the same state with the defendant. *Holmes v. Goldsmith*, 147 U. S. 150 (37 L. Ed. 118, 13 Sup. Ct. 288)." *Blair v. Chicago*, 201 U. S. 400, 447, 448, 26 Sup. Ct. 427, per Day, J.

⁴² *Fairchild v. Brown*, 11 Conn. 26; *Duke v. Clark*, 58 Miss. 465, 474.

⁴³ *Fairchild v. Brown*, 11 Conn. 26. See *Summers v. Hutson*, 48 Ind. 228.

⁴⁴ *Reece v. Knott*, 3 Utah 451, 24 Pac. 757.

⁴⁵ *Wright v. Levy*, 12 Cal. 257.

lateral.⁴⁶ The maker must also have some interest to justify an inquiry into the validity of the assignment.⁴⁷

§ 449. Assignee—Negation and qualification of rule.—Notwithstanding the preceding general rule, there are decisions which hold to the contrary, either upon principle or by reason of the particular circumstances, or which are, at least, qualificative.⁴⁸ Said general rule may also be subject to qualification by code provision.⁴⁹

§ 450. Assignee of void note—Forbearance to sue.—A note given for an improvement on public land, where there is no right of pre-emption, is for an illegal consideration and void, and where, subsequent to the assignment of the note, there is a promise to pay on condition of forbearance to sue, it is held that such note is subject to defenses, as, the note being void, the forbearance to sue could not give it validity.⁵⁰

§ 451. So-called assignment—Not subject to equities.—Where a so-called assignment is written on the back of a note, acknowledges the receipt of a consideration, employs apt words to transfer the full and complete title to the paper, and actually purports to make such trans-

⁴⁶ *Reddish v. Ritchie*, 17 Fla. 867. See §§ 364-367, herein.

⁴⁷ *Terrill v. Gamblin*, 10 La. Ann. 623.

⁴⁸ *United States*.—*Arthurs v. Hart*, 17 How. (U. S.) 6, 15 L. Ed. 30.

Arkansas.—*McLain v. Coulter*, 5 Pike (Ark.) 13.

Colorado.—*Parkinson v. Boddiker*, 10 Colo. 503, 15 Pac. 806.

Illinois.—*Van Buskirk v. Day*, 32 Ill. 260.

Indiana.—*Glover v. Jennings*, 6 Blackf. (Ind.) 10.

Iowa.—*Schleissman v. Kallenberg*, 72 Iowa 338, 33 N. W. 459.

Kentucky.—*Walker v. McKay*, 2 Metc. (Ky.) 294; *Reid v. Cain*, 3 Ky. L. Rep. 329.

Missouri.—*Powers v. Heath*, 20 Mo. 319.

New York.—*Cooke v. Smith*, 3

Sandf. Ch. (N. Y.) 333; Snyder v. Gruniger, 77 N. Y. Supp. 234.

Ohio.—*Ehrman v. Union Cent. Life Ins. Co.*, 35 Ohio St. 324; *Pan-coast v. Ruffin*, 1 Ham. (Ohio) 381; *Block v. Espy*, 6 Ohio Dec. 833.

Pennsylvania.—*Harrisonburg Bk. v. Meyer*, 6 Serg. & R. (Pa.) 537.

Virginia.—*M'Neil v. Baird*, 6 Munf. (Va.) 316.

Equities against assignee may be cut off by assignment under statute. *Peck v. Bligh*, 37 Ill. 317.

⁴⁹ *Adams v. Robinson*, 69 Ga. 627 (this case makes a distinction between a negotiable and a non-negotiable paper under code, § 2244. It also distinguishes the case of *Cohen v. Prather*, 56 Ga. 203). See § 446, herein.

⁵⁰ *Lindsey v. Sellers*, 4 Cushm. (26 Miss.) 169.

fer it is not merely an assignment of a chose in action, subject in the assignee's hands to defenses available against the assignor, but is in all essential respects, the equivalent of a blank indorsement and relieves an innocent holder from equities existing between the maker and payee; especially so when there are no words of a conditional or restrictive character employed, and the state statute makes a note, whether payable to a person or his assigns, or to a person or his order, equally negotiable. And any one receiving the paper with a transfer in blank may treat it as a blank indorsement and transfer it by delivery, or may so fill it up as to make a special indorsement.⁵¹

§ 452. Assignment by parol—Suit in own name—Equities.—In the absence of a statute to the contrary an assignment by parol of a note payable to order is sufficient, a written assignment being unnecessary to transfer the equitable title to the assignee. In such case the title so transferred being equitable it is subject to defenses which the maker might have made prior to the transfer and although irrespective of the code an action to recover on the note could be prosecuted only by the holder in the name of the payee, yet under the code system a negotiable unindorsed promissory note, payable to order, may, for a valuable consideration, be assigned by mere delivery, so as to give the transferee a right to recover thereon in his own name.⁵²

§ 453. Suit for use or benefit of assignee.—Defenses and equities are available the same as if the note had not been assigned where the action is brought for the use or benefit of the assignee.⁵³

⁵¹ *Leahy v. Haworth*, 141 Fed. 850, 859-861; *Neb. Comp. Stat. 1901*, § 3380. The so-called assignment read: "For value received the Dakota Mortgage Loan Corporation hereby assigns and transfers the within note and coupons, together with all its right, title and interest under the real estate mortgage securing the same, without recourse to ———. [Signed.] The Dakota Mortgage Loan Corporation, by Allison Z. Mason, Treasurer." The court cites and considers *Evans v. Gee*, 11 Pet. (36 U. S.) 80, 9 L. Ed. 639; *Sears v. Lanz*, 47 Iowa 658; *Adams v. Blethen*, 66 Me. 19, 22 Am. Rep. 547; *Markey v. Corey*, 108 Mich. 184, 66 N. W. 493, 62 Am. St. Rep. 698, 36 L. R. A. 117; *Maine Trust & Banking Co. v. Butler*, 45 Minn. 506, 48 N. W. 333, 12 L. R. A. 370; *Everett v. Tidball*, 34 Neb. 803, 52 N. W. 816; *Lovell v. Evertson*, 11 Johns. (N. Y.) 52; *Davidson v. Powell*, 114 N. C. 575, 19 S. E. 601; *Bisbing v. Graham*, 14 Pa. 14, 53 Am. Dec. 510; *Merrill v. Hurley*, 6 S. D. 593, 63 N. W. 958, 55 Am. St. Rep. 859.

⁵² *First National Bank of Council Bluffs v. Moore* (C. C. A.) 137 Fed. 505.

⁵³ *Gildersleeve v. Caraway*, 19 Ala.

§ 454. **Subsequent defenses and equities.**—Equities arising between the maker and assignor of a note after the assignment cannot avail against the assignee.⁵⁴

§ 455. **Note payable to order or bearer.**—Where a note payable to order or to bearer is assigned defenses in equity are available against the assignee.⁵⁵ This rule has been also applied to a writing payable to order.⁵⁶

§ 456. **Transferee without indorsement.**—A note may be transferred by delivery when payable to the maker's order and indorsed in blank.⁵⁷ So a note may pass by delivery in due course of business.⁵⁸ The title to warehouse receipts may also pass by delivery without formal indorsement.⁵⁹ And a check payable to a certain person may pass title by its delivery.⁶⁰ It is held, however, that the legal title does not pass by the delivery only of negotiable paper, though indorsed to the "order of" over the holder's signature.⁶¹ It is also decided that a consideration must be proven to warrant a recovery by a transferee without indorsement of a negotiable instrument.⁶² If a note is transferred without the payee's indorsement the transferee cannot hold a person as indorser thereof where his signature had been procured on the promise of the maker to procure the payee's indorsement before negotiating the note.⁶³ And it is decided that one is not a *bona fide* holder of paper payable to order transferred to him by delivery only without indorsement, although he acquires title thereto by the payment of value.⁶⁴ Under the negotiable instruments law of New York "where the holder of an indorsement, payable to his order,

246; *Dunning v. Sayward*, 1 Greenl. (Me.) 366; *Dyer v. Homer*, 22 Pick. (Mass.) 253.

⁵⁴ *Daviess v. Newton*, 5 J. J. Marsh. (Ky.) 89.

⁵⁵ *Woodward v. Mathews*, 15 Ind. 339; *Kennedy v. Jones* (Miss.), 29 So. 819.

⁵⁶ *Chase v. Kellogg*, 59 Hun (N. Y.) 623, 13 N. Y. Supp. 351.

⁵⁷ *Meyer v. Foster*, 147 Cal. 166, 81 Pac. 402. See *Swenson v. Stoltz*, 36 Wash. 318, 78 Pac. 999.

⁵⁸ *Barnard State Bank v. Fesler*, 80 Mo. App. 217.

⁵⁹ *Sloan v. Johnson*, 20 Pa. Super. Ct. 643.

⁶⁰ *Meuer v. Phenix Nat. Bank*, 86 N. Y. Supp. 701, 42 Misc. 341, aff'd 88 N. Y. Supp. 83, 94 App. Div. 331.

⁶¹ *Gaylord v. Nebraska Sav. & Exch. Bk.*, 54 Neb. 104, 74 N. W. 415.

⁶² *Farris v. Wells*, 68 Ga. 604.

⁶³ *Gibson v. Miller*, 29 Mich. 355, 18 Am. Rep. 98.

⁶⁴ *Moore v. Miller*, 6 Oreg. 254, 25 Am. Rep. 518. See *Breese v. Crumpton*, 121 N. C. 122, 28 S. E. 351.

transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect at the time when the indorsement is actually made."⁶⁵ In case a bill is not transferable by delivery, defenses which may be set up against the payee may be availed of as against a transferee without indorsement.⁶⁶ This rule has been applied where a co-partnership holds a note without indorsement payable to one of its members;⁶⁷ where a note has been transferred for the benefit of creditors by assignment from the payee;⁶⁸ where the transfer is not by indorsement and the note is ostensibly given for a pretended conveyance in fraud of the rights of creditors;⁶⁹ and where a person is the transferee in the first instance without indorsement of a note payable to another.⁷⁰

§ 457. **Agents and trustees.**—An indorsee for collection only without an interest other than to apply the money collected on his indorser's debt holds subject to equities.⁷¹ So an indorsement to a bank of a draft "for collection" is such a restricted indorsement as vests no general property to the paper in the indorsee but only constitutes him an agent for the purpose of collecting the paper.⁷² And the payee's collecting agent is likewise subject to equities.⁷³ So an agent

⁶⁵ *Negot. Inst's Law* 1897, ch. 712, § 79; 3 *Cumming & Gilbert's Annot. Gen'l Laws & Stat. N. Y.*, p. 2550.

Warranty when negotiation by delivery, etc. See *Negot. Inst's Law*, § 115, appendix herein.

⁶⁶ *United States*.—*Trust Co. v. National Bank*, 101 U. S. 68; *Lyman v. Warner*, 113 Fed. 87.

Alabama.—*Ferguson v. Hill*, 3 *Stew. (Ala.)* 485.

Indiana.—*Foreman v. Beckwith*, 73 *Ind.* 515.

Kentucky.—*Gray v. Farmers' Bank (Ky.)*, 60 *S. W.* 537.

Michigan.—*Gibson v. Miller*, 29 *Mich.* 355.

Missouri.—*Weber v. Orten*, 91 *Mo.* 677, 4 *S. W.* 271.

Nebraska.—*Camp v. Sturdevant*, 16 *Neb.* 693, 21 *N. Y.* 449.

New Hampshire.—*Dunn v. Meserve*, 58 *N. H.* 429.

Tennessee.—*Ingram v. Morgan*, 4 *Humphr. (Tenn.)* 66, 40 *Am. Dec.* 626. But see *Central Bank v. Lang*, 1 *Bosw. (N. Y.)* 202.

⁶⁷ *Norton v. Pickens*, 21 *La. Ann.* 575.

⁶⁸ *Sims v. Wilson*, 47 *Ind.* 226.

⁶⁹ *Davis v. Sittig*, 65 *Tex.* 497.

⁷⁰ *Boody v. Bartlett*, 42 *N. H.* 558; *Marvin v. McCullum*, 20 *Johns. (N. Y.)* 288.

⁷¹ *Solomons v. Bank of England*, 13 *East* 135, note.

⁷² *First Nat. Bk. of Hastings v. Farmers' & Merchants' Bank (Neb. 1901)*, 95 *N. W.* 1062. Plaintiff was an assignee of the check.

⁷³ *Sinnot v. Schlater*, 22 *La. Ann.* 201.

to sell holds the purchase-money note taken in his own name subject to defenses.⁷⁴ And where an agent holds a note payable to him as trustee but not indorsed by him, equitable defenses are available against such note in the principal's hands.⁷⁵ Again the rule allowing defenses applies to a payee who is partner and agent of plaintiff.⁷⁶ Nor does the repurchase of a note from a *bona fide* holder aid the payee to preclude defenses originally available against him.⁷⁷

§ 458. Agent's unauthorized acts.—Where an agent, without apparent authority, individually executes notes to the creditor for the purchase of property, assuming the vendor's debts, and indorses the name of the non-resident corporation for which he was agent on each note, and the creditor releases the debtor, such notes are in excess of the agent's power, even though he was the sole official representative of the company in the state, and the corporation was not liable as principal on the notes; otherwise if the agent acted upon due authority.⁷⁸

§ 459. Corporate certificate of indebtedness issued in restraint of trade—Anti-trust law.—Where certificates of indebtedness of a corporation are negotiable paper it is no defense that they were executed as a part of a scheme in restraint of trade prohibited by an anti-trust law of a state as against a purchaser of the certificates who had bought them before maturity and without notice of the invalidating facts.⁷⁹

§ 460. Guarantor—Guaranty.—The determination of the question whether equities and defenses between original parties are available against a *bona fide* holder in case of a contract of guaranty, must rest largely upon the construction placed upon that contract in the different jurisdictions, and where it is determined that a payee or holder, who writes above his indorsement of negotiable paper a guaranty of payment, stands in the position of an indorser with an enlarged liability, such a transfer constitutes an indorsement of the paper.⁸⁰

⁷⁴ *Rutherford v. Newsom*, 30 Ga. 1906), 94 S. W. 1117; *Manhattan Liquor Co. v. German National Bank* (Tex. Civ. App. 1906), 94 S. W. 1120.

⁷⁵ *Thomson Co. v. Capital Co.*, 56 Fed. 849.

⁷⁶ *Kelley v. Pember*, 35 Vt. 183.

⁷⁷ *Kost v. Bender*, 25 Mich. 515.

⁷⁸ *Manhattan Liquor Co. v. Joseph A. Magnus & Co.* (Tex. Civ. App.

⁷⁹ *National Salt Co. v. Ingraham* (C. C. A.), 143 Fed. 805, 807, per Wallace, C. J.

⁸⁰ *Dunham v. Peterson*, 5 N. D.

The Nebraska Statute⁸¹ modifies the law merchant concerning what is a negotiable instrument, since the statute extends negotiability to a

414, 419, 67 N. W. 293, 57 Am. St. Rep. 556, 36 L. R. A. 232. But see *contra*, Tuttle v. Bartholomew, 12 Metc. (Mass.) 454; Belcher v. Smith, 7 Cush. (Mass.) 482; Lamourieux v. Hewitt, 5 Wend. (N. Y.) 307; Trust Co. v. National Bank, 101 U. S. 70; Dunham v. Peterson, 5 N. D. 414, 419, 67 N. W. 293, 57 Am. St. Rep. 556, 36 L. R. A. 232. See Robinson v. Lair, 31 Iowa 9; Helmer v. Commercial Bank, 28 Nebr. 474, 44 N. W. 482; State Nat. Bank v. Haylen, 14 Nebr. 480, 16 N. W. 754; Partridge v. Davis, 20 Vt. 499.

Transfer of title to note in form of guaranty when and when not an indorsement. See note 36, L. R. A. 232.

In Georgia it is held that a guaranty "for a consideration not herein named" for the payment of a claim payable to order of the person to whom the guaranty is made constitutes a guaranty and not an indorsement. Geysor Mfg. Co. v. Jones, 90 Ga. 307, 17 S. E. 81. Under the Illinois statute providing that every indorser of paper payable to bearer shall, unless otherwise expressed, be deemed a guarantor, one who writes his indorsement below that of the maker on a negotiable instrument payable to order is liable as second indorser and not as guarantor. Chicago Trust & S. Bank v. Nordgren, 157 Ill. 663, 42 N. E. 148. Under other decisions in that state a guarantor of a note is not regarded as a surety but as an original promisor. Duncanson v. Kirby, 90 Ill. App. 15. See Davis v. Wolff Mfg. Co., 84 Ill. App. 579. And under another decision a contract of indorsement

and not of guaranty is created by the words "indorsed by" written above the name of one not a party to the note. Delameter v. Kearns, 35 Ill. App. 634.

Under a Missouri decision the rights of the first indorsee pass to a *bona fide* purchaser of a note indorsed in blank by the payee, and having a written assignment and guaranty of payment, even though not a technical indorsement. Hawes v. Mulholland, 78 Mo. App. 493, 2 Mo. A. Rep. 279. Under a Kansas decision if a guaranty is written in blank by the payee before delivery it passes by such delivery for value. Crissey v. Interstate Loan & T. Co., 59 Kan. 561, 53 Pac. 867, 8 Am. & Eng. Co. Corp. Cas. N. S. 781. Again, guarantors will be obligated by a guaranty of prompt payment of a corporation note, even though the corporation is not bound. Holm v. Jamieson, 173 Ill. 295, 59 N. E. 702, rev'g 69 Ill. App. 119. In case a negotiable note is transferred by delivery an action on a guaranty for its payment is not within the terms of a statute making liable only those persons whose signature appears on negotiable paper. Swenson v. Stolz, 36 Wash. 318, 78 Pac. 999.

⁸¹ Comp. Stat. Neb. 1901, § 3380, reads as follows: "All bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order, or to any person or assigns, shall be negotiable by indorsement thereon, so as absolutely to transfer and vest the property thereof in each and every indorsee successively, but nothing in this section

note payable to some person or his assigns, while under the law merchant a note to be negotiable must be payable to the order of some person or to bearer. The statute further provides that in case a note is payable to some person or his assigns the assignment may be made by a blank indorsement. Therefore, under the laws of that state a guaranty signed by the payee, before its maturity, on the back of a note payable to his order, constitutes in itself a transfer of the legal title, equivalent to a blank indorsement, and is such a transfer as entitles the transferee or subsequent holder to maintain suit upon the note for its collection free from equities existing between the maker and the payee.⁸²

§ 461. **Same subject.**—If one guarantees notes given in settlement of a claim against him he is precluded as against a *bona fide* holder from availing himself of defenses between himself and the original transferee, and defenses available against the immediate payee cannot be urged against a *bona fide* holder by a guarantor.⁸³ Under a North Dakota decision an innocent purchaser of a note transferred before maturity by an indorsement of guaranty waiving notice of protest and demand is not subject to defenses available between the original parties.⁸⁴ Again, the fact that the maker of a note payable to his own order has never indorsed it does not avail a guarantor to defeat a recovery in an action against him, neither party having any knowledge of the fact as to said indorsement until after date of payment.⁸⁵ But it is also decided that all the equities available in behalf of the maker can be urged by a guarantor who is not a party to the instrument.⁸⁶ A failure of consideration constitutes a defense available by guarantors who have not received a consideration direct from creditors.⁸⁷

shall be construed to make negotiable any such bond, note or bill of exchange, drawn payable to any person or persons alone, and not drawn payable to order, bearer or assigns: *Provided*, That all such bonds, promissory notes and bills of exchange, made payable to bearer, shall be transferable by delivery without indorsement thereon * * *."

⁸² *Leahy v. Haworth* (C. C. A.), 141 Fed. 850, 856-859. See §§ 212, 352, herein.

⁸³ *Jackson v. Foote*, 12 Fed. 37.

⁸⁴ *Dunham v. Peterson*, 5 N. Dak. 414, 36 L. R. A. 232, 67 N. W. 293.

⁸⁵ *Jones v. Thayer*, 12 Gray (Mass.) 443, 74 Am. Dec. 602.

⁸⁶ *Brou v. Becnel*, 20 La. Ann. 254.

⁸⁷ *Walter A. Wood Mowing & R. Mach. Co. v. Laud*, 98 Ky. 516, 17 Ky. L. Rep. 791, 792, 32 S. W. 607, 608. *Examine Evansville National Bank v. Kaufman*, 93 N. Y. 273, 45 Am. Rep. 204.

§ 462. **Pledge of note by holder—Pledgee's rights.**—The holder of a note may pledge a note, secured by collateral, as security for his own note, and the security given the pledgor passes with his note into the pledgee's hands, who may collect the pledged note by suit thereon or sale of the collateral or both.⁸⁸

§ 463. **Note payable to order or bearer.**—Under the rule by which equities and defenses between original parties are not available against *bona fide* holders generally such holder of a note payable to order or bearer is entitled to protection.⁸⁹ A transfer by indorsement has, however, been held necessary to preclude defenses which might be available where a note is payable to order.⁹⁰ And where a note is payable to a person or bearer, it is determined that the maker can avail himself of any defenses which might have been set up against the payee in an action on such note by a transferee by delivery brought in his name.⁹¹ And it is decided that a transfer by delivery only of negotiable paper payable to order and secured by mortgage vests in the assignee of the note and mortgage an equitable and not the legal title and subjects him to all equitable defenses available as against such note and mortgage.⁹²

§ 464. **Under statutes and codes—Notice or knowledge—Bad faith.**—One who has taken an instrument complete and regular upon its face is a holder in due course under the negotiable instruments law of New York.⁹³ But one who takes an incomplete instrument is not a holder

⁸⁸ *Eddy v. Fogg* (Mass. 1906), 78 N. E. 548. See §§ 351 *et seq.*, herein as to collateral security.

⁸⁹ *Musselman v. McElhenny*, 23 Ind. 4, 85 Am. Dec. 445; *Potter v. Sheets*, 5 Ind. App. 506, 32 N. E. 811; *Winstead v. Davis*, 40 Miss. 785; *Stokes v. Winslow*, 31 Miss. 518; *Dunham v. Peterson*, 5 N. D. 414, 417, 67 N. W. 293, 57 Am. St. Rep. 556, 36 L. R. A. 232.

When such note not within statute allowing defenses, see: *Robinson v. Crenshaw*, 2 Stew. & P. (Ala.) 276; *Sweetzer v. First Nat. Bank*, 73 Miss. 96, 15 So. 138; *Columbus Ins. Co. v. First Nat. Bank*,

73 Miss. 96, 15 So. 138; *Winona Bank v. Wofford*, 71 Miss. 711, 14 So. 262; *Central Bank v. Lang*, 14 N. Y. Super. Ct. 202.

⁹⁰ *Yunker v. Martin*, 18 Iowa 143; *Hadden v. Rodkey*, 17 Kan. 429; *Lebchar v. Lambert*, 23 Utah 1, 63 Pac. 628.

⁹¹ *Rabberman v. Muchlausen*, 3 Bradw. (Ill.) 326, Rev. Stat., c. 96, § 4; *Osborn v. Kistler*, 35 Ohio St. 99. See § 358 herein.

⁹² *McCrum v. Corby*, 11 Kan. 464. See §§ 364-368, 376, herein.

⁹³ *Elias v. Whitney*, 98 N. Y. Supp. 667, Neg. Inst. Law, Laws 1897, pp. 732, 745, c. 712, § 91; 2 Cumming &

in due course.⁹⁴ And paper payable on demand should be negotiated within a reasonable time after its issue to constitute one such a holder.⁹⁵ Again, the rule which precludes those defenses against *bona fide* holders which might be available between prior parties is expressly made applicable to holders in due course under the New York statute above noted.⁹⁶ And the title of a *bona fide* holder will not be defeated by construction of the terms of a statute not expressly invalidating the paper.⁹⁷ So one who purchases a note for less than its face value is none the less a *bona fide* holder because of such fact.⁹⁸ And the fact that a note was not stamped as required by a revenue law when received by the assignee, does not subject him to equities between prior parties.⁹⁹ Under the negotiable instruments law of congress, (act of congress, January 12, 1899) one purchasing a note for value without notice has a good title, even though such note is based on a gambling transaction.¹⁰⁰

§ 465. **Same subject.**—One is a holder in due course who discounts, in good faith, without knowledge of infirmities in the paper, a note payable to bearer.¹⁰¹ And one may be a *bona fide* holder of negotiable paper, though tainted, under a statute, with illegality in the hands of the payee.¹⁰² If the circumstances, though sufficient to put a reasonably prudent man on inquiry, do not show bad faith a purchaser of a check is a *bona fide* holder under the Montana code.¹⁰³ And mere suspicion, or even gross negligence not amounting to bad faith will not prevent recovery by an assignee under a statute provid-

Gilbert's Annot. Genl. Laws and Stat. N. Y., p. 2551. See Appendix, herein.

⁹⁴ Davis Sewing Machine Co. v. Best, 105 N. Y. 59, 6 N. Y. St. R. 779, 26 W. D. 182.

⁹⁵ Negot. Inst. Law, N. Y. Laws 1897, c. 712, § 92; 2 Cumming & Gilbert's Annot. Genl. Laws and Stat. N. Y., p. 2551. See also Crim v. Starkweather, 88 N. Y. 339. Examine McLean v. Bryer, 24 R. I. 599, 54 Atl. 373.

⁹⁶ Broadway Trust Co. v. Mannheim, 95 N. Y. Supp. 93, 47 Misc. 415, 34 Civ. Proc. 310.

⁹⁷ Citizens' State Bk. v. Nore 67 Neb. 69, 93 N. W. 160.

⁹⁸ McNamara v. Jose, 28 Wash. 461, 68 Pac. 903; Sess. Laws 1899, p. 350, § 57. Examine Orr v. Sparkman, 120 Ala. 9, 23 So. 829. See § 188 *et seq.*, 240, 376, herein.

⁹⁹ Ebert v. Gitt, 95 Md. 186, 52 Atl. 900; U. S. Int. Rev. Act 1898.

¹⁰⁰ Wirt v. Stubblefield, 17 App. D. C. 283.

¹⁰¹ Massachusetts Nat. Bk. v. Snow, 187 Mass. 159, 72 N. E. 959; Rev. Laws, c. 73, §§ 69-76.

¹⁰² National Bk. of Commerce v. Pick (N. Dak.), 99 N. W. 63; Rev. Codes, 1899, § 3265.

¹⁰³ Harrington v. Butte & Boston Min. Co. (Mont.), 83 Pac. 467.

ing that actual knowledge or bad faith are necessary to defeat such title.¹⁰⁴ Again, a merchant who accepts a check, which had been indorsed in blank and lost, is not guilty of bad faith in receiving it from a customer, although a stranger to him, a few days after it was drawn, without the latter's identification.¹⁰⁵ But a holder of a note not duly indorsed before its apparent maturity is subject to defenses.¹⁰⁶ And certificates of deposit may give such actual notice of infirmity as to necessitate inquiry or subject the holder to the charge of bad faith.¹⁰⁷ So bad faith or knowledge may constitute one not a holder in due course under the statute.¹⁰⁸ And, under the Iowa statute an assignee of a note and mortgage, whose title is based upon fraud and is without consideration, is not a *bona fide* holder.¹⁰⁹

¹⁰⁴ Valley Savings Bk. v. Mercer 97 Md. 458, 55 Atl. 435.

¹⁰⁵ Unaka Nat. Bk. v. Butler 113 Tenn. 574, 83 S. W. 655; Negot. Inst. Law, Acts 1899, c. 94, § 56, p. 150.

¹⁰⁶ Reese v. Bell, 138 Cal. 1, XIX, 71 Pac. 87.

¹⁰⁷ Ford v. H. C. Brown & Co., 114 Tenn. 467, 1 L. R. A. N. S. 188, 88 S. W. 1036; Negot. Inst. Law, Acts 1899, c. 94, § 56, p. 150.

¹⁰⁸ Keene v. Behan, 40 Wash. 505, 82 Pac. 884; Negot. Inst. Law, Sess. Laws 1899, p. 350, c. 149, § 56.

¹⁰⁹ Keegan v. Rock (Iowa), 102 N. W. 805; Negot. Inst. Act, 29th Genl. Assemb., c. 130, § 52, Code Supp., § 360a, 52.

Who is and is not holder in due course under Bills of Exchange Act 1882, § 29. See Lewis v. Clay (Q. B.), 77 Law T. R. 653, 67 L. J. Q. B. N. S. 224, 30 Chic. Leg. N. 211.

When defenses not available under codes or statutes, see:

Arkansas.—Worthington v. Curd, 22 Ark. 277 (after 1873).

Indiana.—Hankins v. Shoup, 2 Ind. 342.

Massachusetts.—Thayer v. Bufum, 11 Metc. (Mass.) 398.

Mississippi.—Winona Bank v.

Wofford, 71 Miss. 711, 14 So. 262; Meggett v. Baum, 57 Miss. 22; Coffman v. Bank, 41 Miss. 212; Winstead v. Davis, 40 Miss. 785; Mercien v. Cotton, 34 Miss. 64; Stokes v. Winslow, 31 Miss. 518.

Washington.—McNamara v. Jose, 28 Wash. 461, 68 Pac. 903 (Wash. Sess. Laws 1899, p. 350, §§ 56, 57).

Defense under code when one is not a bona fide holder. Van Valkenburgh v. Stuppelbeen, 49 (N. Y.) 99.

When defenses available under codes or statutes, see: Woodruff v. Webb, 32 Ark. 612 (unless the note contained the words "without defalcation"); Worthington v. Curd, 22 Ark. 277; Hankins v. Shoup, 2 Ind. 342 (Rev. Stat. 1843, pp. 577, 578); Aldrich v. Stockwell, 9 Allen (Mass.) 45; Spring v. Lovett, 11 Pick. (Mass.) 417; Robertshaw v. Britton, 74 Miss. 873, 21 So. 523; Merchants' &c. Bank v. Millsaps, 71 Miss. 361, 15 So. 659 (Code, § 3503); Union Nat. Bank v. Fraser, 63 Miss. 231; Etheridge v. Gallagher, 55 Miss. 458 (under code Miss., § 3503).

See further as to defenses under codes and statutes the following cases:

§ 466. **Joint and several notes.**—Where one not appearing to be a party to a negotiable promissory note, either as payee or indorsee, puts his name on the back of it in blank, at its inception and before its negotiation, is presumed by the law of the state to be a joint and several promisor, such presumption will prevail in favor of an innocent indorsee who receives the note for value before due and in the ordinary course of business, and his rights cannot be infringed by proof of any extrinsic facts which might affect the original parties to the contract or those occupying their position and having their rights only.¹¹⁰ It is also decided that where a note is payable to several jointly and they unite in indorsing it to one of their number the indorsees will stand in the same position in respect to the defense of

United States.—Oates v. Montgomery Bank, 100 U. S. 239, 25 L. Ed. 580 (immunity from set-off, discount, or equities, Act Ala. 1873, p. 111).

Alabama.—Bostick v. Scruggs, 50 Ala. 10 (Rev. Code, § 2542, as to set-off).

Indiana.—Shirk v. North, 138 Ind. 210, 37 N. E. 500 (Burns' Rev. Stat. 1894, § 6962; Rev. Stat. 1881, § 5117, when married women bound by estoppel *in pais* against *bona fide* purchaser).

Iowa.—Jack v. Hosmer, 97 Iowa 17, 65 N. W. 1009 (code as to assignment counter-claim and defense); Richards v. Monroe, 85 Iowa 359, 52 N. W. 339, 39 Am. St. Rep. 301 (Code 1873, § 2114, as amended, Acts 22d General Assem., c. 90, as to *bona fide* purchaser of note tainted with fraud); Dowling v. Gibson, 52 Iowa 517, 5 N. W. 620 (Code, § 2546, as to counter-claim or defense).

Kentucky.—Spencers v. Biggs, 2 Metc. (Ky.) 123 (statute as to assignee defenses, discount, or set-off); Kelly v. Smith, 1 Metc. (Ky.) 313 (statute as to assignment, defenses, discount, or set-off).

Massachusetts.—Shoe & Leather

Bank v. Wood, 142 Mass. 563, 8 N. E. 753 (statute as to defenses, discounts, and off-sets); Thayer v. Buffum, 11 Metc. (Mass.) 398 (Stat. 1829, c. 121, allowing defenses against indorsee on demand note does not apply to firm note payable to member or order).

Minnesota.—Savage v. Laclede Bank, 62 Minn. 586 (Code 1880, § 1124, as to set-offs on assigned bill of exchange).

New Jersey.—Youngs v. Little, 15 N. J. L. 1 (Rev. Laws 396 offsets and discounts against payees and indorsees; note payable "without defalcation or discount").

New York.—Smith v. Van Loan, 16 Wend. (N. Y.) 659 (2 Rev. Stat., p. 354, § 18, subd. 10, as to right of set-off).

Tennessee.—Snoddy v. American Bank, 88 Tenn. 573, 13 S. W. 127, 17 Am. St. Rep. 918, 7 L. R. A. 705 (Code 1884, §§ 2444, 5708, gaming or wagering consideration; *bona fide* holder).

Vermont.—Alden v. Parkhill, 18 Vt. 205 (Act 1836, set-off against indorsee).

¹¹⁰ Merchants' Trust & Bkg. Co. v. Jones, 95 Me. 335, 50 Atl. 48.

want of consideration as a payee where the note is to him alone by the other payees without alleging notice of such want to him. So another person, by becoming a holder jointly with the payee, is held to be subject to the same defense.¹¹¹ So a negotiable note, payable to two or more persons jointly, indorsed by one only of two joint payees, is subject to any equities existing in favor of the maker, the same as if it had not been indorsed by either; such a note is payable to all the payees or to their joint order and cannot be transferred except by the joint indorsement of all the payees.¹¹²

¹¹¹ Saxton v. Dodge, 57 Barb. (N. Y.) 116.

¹¹² Haydon v. Nicolette, 18 Nev. 290, 3 Pac. 473.

CHAPTER XXI.

BONA FIDE HOLDERS AND RIGHTS ON TRANSFER CONTINUED.

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| <p>Sec.</p> <p>467. Overdue paper.</p> <p>468. Overdue paper—Default in payment of interest.</p> <p>469. Overdue paper—Demand notes.</p> <p>470. Delivery of paper to impostor or wrong party—Liability to drawee or <i>bona fide</i> holder.</p> <p>471. Application by bank of proceeds to credit of depositor.</p> <p>472. Notice or knowledge—Generally.</p> <p>473. Notice or knowledge—Continued.</p> <p>474. Notice or knowledge—Matters apparent from the paper itself.</p> <p>475. Notice or knowledge—Suspicious circumstances—Gross negligence—Bad faith.</p> <p>476. Same subject—Decisions.</p> | <p>Sec.</p> <p>477. Same subject—Rule in Vermont.</p> <p>478. Indorsement subsequent to notice.</p> <p>479. Notice—Fraud.</p> <p>480. Notice—Fraudulent alteration.</p> <p>481. Erasures—Forgery — Notice — Negligence—Recovery.</p> <p>482. Knowledge—Purchaser of married woman's note.</p> <p>483. Notice—Accommodation paper.</p> <p>484. Notice—Notes of a series.</p> <p>485. Notice—Corporation—Agency.</p> <p>486. Same subject.</p> <p>487. Corporation indorsement — Accommodation paper.</p> <p>488. Notice—Purchaser of bonds.</p> <p>489. Transferee of <i>bona fide</i> holder — Notice.</p> |
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§ 467. Overdue paper.¹—Ordinarily the indorsee or transferee of overdue commercial paper obtains no better title than that of the transferrer.^{1*} Under the negotiable instruments law, one of the require-

¹ See § 239, herein.

^{1*} *United States*.—Fowler v. Brantley, 14 Pet. (U. S.) 318; Foley v. Smith, 6 Wall. (U. S.) 492.

Alabama.—Marshall v. Shiff, 130 Ala. 545, 30 So. 335.

Georgia.—Harrell v. Citizens' Bkg. Co., 111 Ga. 846, 36 S. E. 400; Steed v. Groves, 103 Ga. 550; 30 S. E. 626.

Illinois.—Morgan v. Bean, 100 Ill. App. 114.

Missouri.—Williams v. Baker, 100 Mo. App. 284, 73 S. W. 339; Mayer v.

Columbia Sav. Bk., 86 Mo. App. 108.

Nebraska.—May v. First Nat. Bk. (Neb.), 104 N. W. 184.

Louisiana.—Metropolitan Bk. v. Bouny, 42 La. Ann. 439, 7 So. 586.

New Hampshire.—Quimby v. Stoddard, 67 N. H. 283, 35 Atl. 1106.

Texas.—Walker v. Wilson, 79 Tex. 188, 14 S. W. 798, 15 S. W. 402, per Gaines, J.; Mayfield Grocer Co. v. Andrew Price & Co. (Tex. Civ. App. 1906), 95 S. W. 31.

ments of a holder in due course is that he became a holder of the instrument "before it was overdue without notice that it had been previously dishonored, if such was the fact;" and "In the hands of any other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable."² So the purchaser from a bank, of overdue paper, is subject to equities, even though he had no actual notice of the bank's want of authority to sell, and only knowledge of circumstances which ought to have put him on inquiry.³

Washington.—Gordon v. Decker, 19 Wash. 188, 52 Pac. 856. See Merchants' Loan & Trust Co. v. Welter, 205 Ill. 647, 68 N. E. 1082.

Rights of holder of negotiable paper transferred after maturity. See note 46 L. R. A. 753, under the following headings: "(I.) Effect of transfer after maturity on negotiability; (II.) rights acquired under transfer: (a) the general doctrine; (b) different statements of the rule; (c) the correct rule; (III.) defenses which maker may make: (a) general rules as to right to defend; (b) want or failure of consideration; (c) illegal consideration; (d) usury; (e) fraud in inception; (f) violation of contemporaneous agreement; (g) that it was partnership paper; (h) that it was accommodation paper; (i) that it was intended for collateral security; (j) that it had been lost or stolen; (k) that transfer was unauthorized; (l) that debt had been attached or garnished; (m) payment: (1) as a defense generally; (2) payment by person only secondarily liable; (3) effect of reissue after payment; (n) right of the transferee to sue; (IV.) equities of intermediate holders; (V.) exception as to paper taken from *bona fide* holder; (VI.) exception as to collateral matters: (a) the general rule; (b) what matters are collateral—instances; (VII.) excep-

tions as to set-offs and counter-claims: (a) the general rule; (b) under statutes as to set-off of mutual claims; (c) under special statutes; (d) equitable set-offs; (e) interposition of set-off against set-off; (f) effect of agreement for set-off; (VIII.) exception as to instruments drawn payable without defalcation or discount; (IX.) effect of dishonor as to interest, instalments, or part of a series; (X.) effect of transfer and indorsement at different times; (XI.) effect of extension of time; (XII.) effect of renewal of note; (XIII.) effect of action brought; (XIV.) rights of holder against indorser: (a) general rules as to effect of transfer; (b) demand and notice to charge indorser: (1) on time notes; (2) on demand notes; (XV.) special rules based on character of the instrument: (a) checks; (b) certificates of deposit; (c) negotiable bonds; (XVI.) actions against transferees to enforce equities; (XVII.) proof with reference to equities."

² Negot. Insts. Law N. Y., Laws 1897, c. 712, §§ 91 (subd. 2), 97; 2 Cumming & Gilbert's Annot. Genl. Laws & Stat. N. Y., pp. 2551, 2553. See Lawrence v. Clark, 36 N. Y. 127.

³ Cussen v. Brandt, 97 Va. 1, 5 Va. Law Reg. 98, 1 Va. Sup. Ct. Rep. 193, 32 S. E. 791.

This rule is, however, subject to qualifications and exceptions, or at least there are certain cases in which purchasers of overdue paper have not been precluded from recovering thereon.⁴ And it is held that the equities to which a purchaser of overdue paper is subject are limited to those which arise out of the note itself and not out of independent transactions between prior parties.⁵ A purchaser from the transferee of a note secured by mortgage may, it is decided, obtain a title free from equities where he pays value therefor in good faith, even though the paper was obtained by fraud and was overdue in the owner's hands before it was assigned to the transferee.⁶ Again, where a negotiable promissory note has been, before its maturity, duly indorsed and delivered in escrow, with the contract of its purchaser to convey in consideration of it certain land, and proceedings were necessary to enable the purchaser of the note to convey the land and carry out the contract for which the note was taken, the fact that such proceedings were not completed, and the contract not fulfilled and the note not delivered by the depositary to the purchaser until after it matured, will not deprive the buyer of the rights of the *bona fide* purchaser before maturity, where he has completed the transaction in ignorance of any defense.⁷

§ 468. **Overdue paper—Default in payment of interest.**—The rule that one who takes notes after they become due and payable, or after maturity, is not a holder in due course, and takes the paper subject to the equities between the original parties, applies to a person who takes notes after they have become due and collectible for default in

⁴Examine the following decisions:

California.—Reese v. Bell, 138 Cal. 1, XIX, 71 Pac. 87.

Colorado.—Beach v. Bennett, 16 Colo. App. 459, 66 Pac. 567.

Illinois.—Young Men's Christian Association Gymnasium Co. v. Rockford Nat. Bk., 179 Ill. 599, 54 N. E. 297, 46 L. R. A. 753, aff'g 78 Ill. App. 180.

Nebraska.—Cunningham v. Holmes, 66 Neb. 723, 92 N. W. 1023; Shabata v. Johnson, 53 Neb. 12, 73 N. W. 278.

New York.—Fealey v. Bull, 163

N. Y. 397, 57 N. E. 631, aff'g 50 N. Y. Supp. 1126.

Tennessee.—Equitable Ins. Co. v. Harvey, 98 Tenn. 636, 40 S. W. 1092.

⁵Hunleath v. Leahy, 146 Mo. 408, 48 S. W. 459.

⁶Gardner v. Beacon Trust Co., 190 Mass. 27, 76 N. E. 455. See Whitney Nat. Bk. v. Cannon, 52 La. Ann. 1484, 27 So. 948.

Note indorsed after maturity but taken before maturity. Transferee may be holder in good faith. Ft. Dearborn Nat. Bk. v. Berrott, 23 Tex. Civ. App. 662, 57 S. W. 340.

⁷Cunningham v. Holmes, 66 Neb. 723, 92 N. W. 1023.

payment of the annual interest, said notes expressly stipulating that any delinquency in the payment of interest should cause the whole note to become immediately due and collectible.⁸

§ 469. **Overdue paper—Demand notes.**—The general rule above stated as to overdue paper^{8*} applies to a note payable on demand.⁹ But a demand note is not overdue and subject, as against the indorsee or transferee, to equities between the parties, where it is kept alive for a period of time beyond which it would otherwise have been overdue, by continuous payments of monthly interest to the original payee, and it also appears that if payments were made as principal the note was to run for a certain period, which period extended beyond the time of the transfer. And in such case the special equity that payments made as principal had been credited as interest amounting in all to enough to pay the notes, with interest, was held not available where the maker knew that the payments were applied as interest.¹⁰

§ 470. **Delivery of paper to impostor or wrong party—Liability to drawee or bona fide holder.**—The drawer of a check, draft, or a bill

⁸ Hodge v. Wallace (Wis. 1906), 108 N. W. 212. The court, per Casody, C. J., declared this case distinguishable from those cases "where the stipulation for accelerating the maturity of the note or notes on non-payment of interest or other default is contained in a mortgage or trust deed given to secure the same" from "those where one of a series of notes or an instalment of interest has become due and unpaid, with no stipulation as here, that 'such delinquency shall cause the whole note to immediately become due and collectible;'" from those cases "where the stipulation for accelerating the maturity of the note or notes contained therein is made optional with the payee or mortgagee, or his representatives or assigns;" and the court also says: "It was held by this court, several years ago, that 'one who takes a

promissory note, which shows that interest on the principal sum therein named is past due and unpaid, takes it subject to all equities between the original parties.' Hart v. Stickney, 41 Wis. 630, 22 Am. Rep. 728. That case followed Newell v. Gregg, 51 Barb. (N. Y.) 263. To the same effect: First National Bank v. Forsyth, 67 Minn. 257, 69 N. W. 909, 64 Am. St. Rep. 415. Such ruling, however, was out of harmony with the decisions of this court already cited, and goes beyond what was necessary to sustain the contention of the defendants in this case, based on such express stipulation." Laws 1899, p. 705, c. 356, §§ 1676-22.

^{8*} See § 467, herein.

⁹ Causey v. Snow, 122 N. C. 326, 29 S. E. 359. See §§ 464, 465 herein.

¹⁰ McLean v. Bryer, 24 R. I. 599, 94 N. W. 695.

of exchange, who delivered it to an impostor, supposing him to be the person whose name he has assumed, must, as against the drawee or a *bona fide* holder, bear the loss where the impostor obtains payment of, or negotiates the same. In such a case the fact that the check was drawn by the trust department of a trust company on its own banking department and payment of it refused by the banking department, because of lack of identification of the person presenting the check immediately after it was issued, is immaterial.¹¹ Again, a telegraph company which, upon order by telegraph, issues and delivers its check by mistake to the wrong party, is liable in the amount thereof to an innocent purchaser for value, who takes the same upon his indorsement. *Prima facie* such indorser is the payee intended, and a purchaser who takes the check from him in good faith, believing him to be the payee, is not called upon to inquire any further than may be necessary to establish the identity of the indorser and the party to whom the check was delivered as payee.¹²

¹¹ *Land Title & Trust Co. v. Northwestern National Bank*, 211 Pa. 211, 60 Atl. 723 (Dean, J., and Potter, J., dissenting). The court relied upon *Land Title & Trust Co. v. Northwestern National Bank*, 196 Pa. 230, 46 Atl. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717, which holds that a bank is not liable for the payment of a check on a forged indorsement where the person who committed the forgery and received the money was in fact the person to whom the drawer delivered the check, and whom he believed to be the payee named. In this case the facts were as follows. A person calling himself A called on B, a property owner, under the pretense of desiring to purchase real estate, and secured from his title papers. A took the papers to a responsible conveyancer, to whom he applied for a loan on mortgage, representing himself as B. The conveyancer, believing the man to be B, negotiated the loan, and a settlement was made through a trust company, to

which the conveyancer introduced A as B. A signed the mortgage as B, and received the trust company's check drawn on itself to the order of B. This check, indorsed with B's name, was deposited in a bank by a person who had opened an account with it as R, and was collected by the bank of the trust company in the usual course of business. It did not appear that A and R were the same person. The fraud was discovered six months later, when B was called upon to pay the interest on the mortgage. The money was drawn out of the bank by R four weeks after it was deposited. A and R disappeared, and were not heard of afterwards. It was held that the trust company could not recover from the bank the amount of the check. (Green, C. J., and Dean, J., dissented.)

¹² *Burrows v. Western Union Telegraph Co.*, 86 Minn. 499, 90 N. W. 1111. The court, per Lewis, J., said: "This presents a question somewhat difficult of solution. We have found

§ 471. Application by bank of proceeds to credit of depositor.—

We have considered elsewhere the case where a bank discounts paper

no case in the books presenting exactly the same facts. It is well settled that a bank has no authority to pay out the money of its depositors upon a check where the name of the payee has been forged. It is also the law that where the entire transaction is fictitious, and the payee and check have no existence in fact, and at no time does such check obtain legal status, no matter whether parties deal with it in good faith or not. It has been decided that when a check has been issued, payable to a certain party as payee, and another party of the same name comes into possession of it either by mistake or fraud, and forges the signature of the real party, this does not give the check any legal status, so as to protect a bank against which it was drawn. *Mead v. Young*, 4 Term R. 28; *Graves v. American*, 17 N. Y. 205; *Famous v. Crosswhite*, 124 Mo. 34, 27 S. W. 397. The authorities on this subject are quite thoroughly reviewed in the note to *Land v. Northwestern*, 196 Pa. St. 230, 50 L. R. A. 75, 84, and thus * * * the test to be applied is whether, by the usual custom with reference to identification, appellant was negligent in failing to have the party presenting the check identified as the party to whom it was given. It was said in the case of *Estes v. Lovering Shoe Co.*, 59 Minn. 504, 61 N. W. 674, that a check is within the purview of G. S. 1878, c. 73, § 89, which provides that possession of a note or bill is *prima facie* evidence that the same was indorsed by the person by whom it purports to be indorsed, and checks were brought within

this provision of the statute for the reason that they are negotiable instruments, much used and growing in use in business transactions, and possessing all of the characteristics of inland bills. If, therefore, a check is indorsed when presented, it is to be received as *prima facie* evidence that it is the indorsement of the payee, because such rule is required by the necessities of the business. For like reason, when the person indorsing the check as payee, and presenting it, has been identified as the party who received it from the maker, and whom the maker designated as payee, he is presumed to be the payee, and entitled to receive the proceeds. Appellant was required to do no more in this instance. He was required to determine whether the party presenting the check to him was the person to whom it had been delivered as the payee by the telegraph company. He could have ascertained that fact by accompanying the indorser across the street to the office of the telegraph company and asking them if this was the party entitled to the check. Or *Bellevean*, who was waiting at the door of the store, might have been called in, and repeated the identification made to the telegraph company. In such case appellant would have been justified in taking the check. Instead of so doing he took his chances as to his being the same man. He was the same, and hence inquiry was unnecessary. Respondent sent the man out with the check, and with the authority to dispose of it in the usual course of business to any one who in good

for one of its depositors, giving him credit therefor upon its books for the proceeds, it being held that it is not a *bona fide* holder unless some other and valuable consideration passes, as such a transaction simply creates the relation of debtor and creditor. A distinction is also made between crediting the amount of a note on undrawn deposits and a credit on a pre-existing indebtedness.¹³ Where, however, a bank discounts a note to extinguish a debt due from it to the holder, or the proceeds are applied towards discharge of his liability, such acts are equivalent to paying value at the time and constitute the bank a holder for a valuable consideration.¹⁴

§ 472. Notice or knowledge generally.^{14*}—It may be stated generally that if the purchaser has a sufficient notice or knowledge of defects or infirmities, or of defenses or equities against the paper, he is not such a *bona fide* holder as to be entitled to protection against equities and defenses which would be available against the payee.¹⁵ A person

faith believed him to be the party to whom the check had been delivered as payee; and, as against such innocent purchaser, it is estopped from denying the validity of the instrument which it set afloat in the commercial world. However, it is claimed that appellant was negligent in taking no steps to make inquiry about the personality of the party presenting the check, for the reason, if he had, he might possibly have discovered that the party was not the real Jerome. We have already answered this objection. It was not the duty of appellant to go beyond the necessities of identification as above outlined, and the mere fact that he might have discovered more than he was required to cannot be charged against him as an act of negligence unless there were facts which should put him upon inquiry. The facts in this case are undisputed. There was nothing to arouse suspicion, and appellant is entitled to the relief sought as a matter of law.”

¹³ See § 243 herein considering City Deposit Bank of Columbus (Iowa 1906), 106 N. W. 942. See Symonds v. Riley, 188 Mass. 470, 74 N. E. 926; Citizens' State Bank v. Cowles, 180 N. Y. 346, 73 N. E. 33, rev'g 86 N. Y. Supp. 38, 89 App. Div. 281, and other cases. Compare United States Nat. Bank v. First Nat. Bank, 79 Fed. 296, 49 U. S. App. 67; Israel v. Gale, 77 Fed. 532, 45 U. S. App. 219, 23 C. C. A. 274, aff'd 174 U. S. 391, 19 Sup. Ct. 768, 43 L. Ed. 1019. See §§ 243, 284-287, herein, as to antecedent indebtedness.

¹⁴ Bank of Sandusky v. Scoville, 24 Wend. (N. Y.) 116.

^{14*} See §§ 464, 465, herein.

¹⁵ *United States*.—Fowler v. Brantly, 14 Pet. (U. S.) 318.

Alabama.—Gilman v. Railroad Co., 72 Ala. 566.

Illinois.—Belleville Sav. Bank v. Bornman (Ill.), 10 N. E. 552.

Maine.—Burrill v. Stevens, 73 Me. 395.

Massachusetts.—Chelsea Bank v. Goodsell, 107 Mass. 149; Robb v.

is not a *bona fide* purchaser who, before purchase, is told that the maker refuses to pay it.¹⁶ But although there is fraud in the transaction constituting the consideration of a note, yet the fact that another note given for the same consideration was due, or that the interest on the notes remained unpaid, is no such notice as to affect the *bona fides* of a plaintiff's purchase.¹⁷ So notes indorsed in blank are payable to bearer, and when the bearer presents them for discount to a bank the presumption is raised that the bearer is the owner of them, and if the bank discounts the note without actual knowledge of any infirmity or defect, or knowledge of such facts that its action in taking the instrument amounts to bad faith, it is a *bona fide* holder in due course.¹⁸ But if a bank to whom a note is transferred has knowledge of the usurious character of the note in the hands of its transferer, the bank is not a holder in due course, and such facts constitute a good defense to an action on said note.¹⁹ Evidence, however, that the holder paid value for a check is not conclusive evidence of the fact of *bona fides*, although entitled to great weight.²⁰ It is held in New York that where a check is without consideration and the original holder could not have recovered thereon, it is immaterial upon the transferee suing thereon to show the circumstances under which he came into possession

Mudge, 14 Gray (Mass.) 534; Fisher v. Leland, 4 Cush. (Mass.) 456.

Minnesota.—Daniels v. Wilson, 21 Minn. 530.

Missouri.—Wagner v. Diedrich, 50 Mo. 484.

New Jersey.—Zabriskie v. Spielman, 46 N. J. L. 35.

New York.—Prall v. Hinchman, 6 Duer (N. Y.) 351; Holbrook v. Mix, 1 E. D. Smith (N. Y.) 154; Small v. Smith, 1 Den. (N. Y.) 583; Powell v. Waters, 8 Cow. (N. Y.) 669 [affirming 17 Johns. (N. Y.) 176]; McFadden v. Maxwell, 17 Johns. (N. Y.) 188; Wiggin v. Bush, 12 Johns. (N. Y.) 306; De Mott v. Starkey, 3 Barb. Ch. (N. Y.) 403.

Ohio.—Jacobs v. Mitchell, 46 Ohio St. 601, 22 N. E. 768; Stone v. Vance, 6 Ohio 246.

Tennessee.—Tennessee Bank v. Johnson, 1 Swan (Tenn.) 217.

Washington.—Murray v. Reed, 17 Wash. 1, 48 Pac. 343.

Wisconsin.—Knott v. Tidyman, 86 Wis. 164, 56 N. W. 632; Case, etc., Co. v. Wolfenden, 63 Wis. 185, 23 N. W. 485; Moulton v. Posten, 52 Wis. 169.

England.—Lloyd v. Davis, 3 L. J. K. B. 38.

¹⁶ Old National Bk. of Ft. Wayne v. Marcy (Ark. 1906), 95 S. W. 145.

¹⁷ Patterson v. Wright, 64 Wis. 289, 25 N. W. 10.

¹⁸ Massachusetts National Bank v. Snow, 187 Mass. 159, 72 N. E. 959; R. L., c. 73, § 26, cl. 5, *id.*, §§ 69, 76, 207.

¹⁹ Schlesinger v. Lehmaier (Sup. Ct. App. Term), 99 N. Y. Supp. 389, 50 Misc. 610; Negot. Inst. Law 1897, p. 732, c. 612, § 91; Banking Laws 1892, p. 1869, c. 689, § 55.

²⁰ Tischler v. Shurman, 97 N. Y. Supp. 360.

of the paper and that he acted in good faith.²¹ It is also decided in that state that it devolves upon the defendant to show that plaintiff is not a *bona fide* holder, and he can be examined by the defendant to enable him to frame his answer since he must allege the fact that the plaintiff is not a *bona fide* holder in his answer in order to avail himself of the defense.²² If a note is based upon a consideration which is illegal and against public policy it is held to be invalid in the hands of a transferee with notice and knowledge.²³ Defenses or equities are also especially available where an assignee is chargeable with knowledge or notice thereof.²⁴

§ 473. Notice or knowledge continued.—A person is not a *bona fide* holder of paper when he has actual notice or knowledge, or constructive notice amounting to actual notice or knowledge of infirmities constituting valid defenses and equities between prior parties,²⁵ and

²¹ *Tischler v. Shurman*, 97 N. Y. Supp. 360.

²² *Koppel v. Hatch*, 98 N. Y. Supp. 619. See *Smith v. Weston*, 159 N. Y. 194, 54 N. E. 38, aff'g 34 N. Y. Supp. 557, 88 Hun 25.

Burden of proof, see notes 17 L. R. A. 326; 10 L. R. A. 676.

²³ *Dickson v. Kittson*, 75 Minn. 168, 74 Am. St. Rep. 447, 77 N. W. 820.

²⁴ *Alabama*.—*Griggs v. Woodruff*, 14 Ala. 9.

California.—*More v. Finger* (Cal.), 58 Pac. 322, 128 Cal. 313, 60 Pac. 933.

Connecticut.—*Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580.

Illinois.—*Haskell v. Brown*, 65 Ill. 29; *Jay v. Reed*, 56 Ill. 130.

Indiana.—*Black v. Mitchell*, 14 Ind. 397.

Ohio.—*Bradford v. Beyer*, 17 Ohio St. 388.

Tennessee.—*Ryland v. Brown*, 2 Head. (Tenn.) 270.

Vermont.—*Pierce v. Kibbee*, 51 Vt. 559.

Examine also the following cases:
Alabama.—*Gildersleeve v. Caraway*, 19 Ala. 246.

Arkansas.—*Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717.

Indiana.—*Bostwick v. Bryant*, 113 Ind. 448, 16 N. E. 378; *Tellon v. City Bank*, 9 Ind. 119 (1 Rev. Stat., p. 378, § 3); *Bartholomew v. Hendrix*, 5 Blackf. (Ind.) 572; *Westbrook v. Robinson*, 5 Blackf. (Ind.) 105.

Iowa.—*Allison v. Barrett*, 16 Iowa 278.

Kentucky.—*Walker v. McKay*, 2 Metc. (Ky.) 294; *Chiles v. Corn*, 3 A. K. Marsh. (Ky.) 230.

Massachusetts.—*Murphy v. Barnard*, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340.

Pennsylvania.—*Reed v. Mitchell*, 18 Pa. St. 405.

²⁵ *United States*.—*Hutch v. Johnson Loan & T. Co.*, 79 Fed. 828.

Arkansas.—*Old Nat. Bk. of Ft. Wayne v. Marcy* (Ark.), 95 S. W. 145; *Evans v. Speer Hardware Co.*, 65 Ark. 204, 3 Chic. L. J. Wkly. 282, 45 S. W. 370.

matters apparent on the instrument itself, coupled with other facts, may necessitate inquiry.²⁶ And knowledge may arise from papers delivered with the note.²⁷

§ 474. **Notice or knowledge—Matters apparent from the paper itself.**—If the instrument itself contains matters sufficient, within the rules governing the question of notice or knowledge, to necessitate

California.—Russ Lumber & Mill Co. v. Muscupiabe Land & W. Co., 120 Cal. 521, 52 Pac. 995.

Georgia.—Shelden v. Heard, 110 Ga. 461, 35 S. E. 707; Snyder v. Webb, 100 Ga. 793, 28 S. E. 976.

Indiana.—Irving v. Guthrie (Ind. App.), 62 N. E. 709.

Iowa.—State Bank of Indiana v. Meutzer, 125 Iowa 101, 100 N. W. 69; Wray v. Warner, 111 Iowa 64, 82 N. W. 455.

Minnesota.—See First Nat. Bk. v. Buchan, 79 Minn. 322, 82 N. W. 641.

Missouri.—Vette v. Sacher, 114 Mo. App. 363, 89 S. W. 360.

Nevada.—Swinney v. Patterson 25 Nev. 411, 62 Pac. 1.

North Carolina.—Loftin v. Hill, 131 N. C. 105, 42 S. E. 548.

Oregon.—Benson v. Keller, 37 Ore. 120, 60 Pac. 918.

Pennsylvania.—Troxell v. Malin, 9 Pa. Super. Ct. 383, 43 W. N. C. 547.

Texas.—Kersey v. Fuqua (Tex. Civ. App.), 75 S. W. 56.

West Virginia.—Merchants' & Mfrs. Nat. Bk. v. Ohio Valley Furniture Co. (W. Va.), 50 S. E. 880.

Wisconsin.—Collins v. Schmidt, 126 Wis. 227, 105 N. W. 671.

Wyoming.—Kinney v. Hynds, 7 Wyo. 22, 49 Pac. 403, 52 Pac. 1081.

When knowledge that note given for land and that there was a lien thereon does not preclude recovery. Merchants' & P. Bank v. Penland, 101 Tenn. 445, 47 S. W. 693, 9 Am. & Eng. Corp. Cas. N. S. 298. Exam-

ine Campbell v. Brown, 100 Tenn. 245. See Biegler v. Merchants' Loan & T. Co., 164 Ill. 197, 45 S. E. 512.

When knowledge not given by newspaper advertisement. English-American Loan & Trust Co. v. Hiers, 112 Ga. 823, 38 S. E. 103.

When pendency of suit not constructive notice. Fulton v. Andres, 70 Minn. 445, 73 N. W. 256.

Knowledge that guaranty was consideration of note does not put on notice. Hudson v. Best, 104 Ga. 131, 30 S. E. 688.

Failure to inquire as to maker's financial condition when does not prevent being *bona fide* holder. Christianson v. Farmers' Warehouse Assoc., 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730. See Germania Bank v. La Follette, 72 Fed. 145.

Knowledge as to parties when prevents being *bona fide* holder. Merchants' Nat. Bk. v. Sullivan, 63 Minn. 468, 65 N. W. 924. Examine Hardy v. First Nat. Bk., 56 Kan. 493, 43 Pac. 1125; American Exch. Nat. Bk. v. New York Belting Co., 148 N. Y. 698, 43 N. E. 168.

²⁶ Orr v. South Amboy Terra Cotta Co., 94 N. Y. Supp. 524, 47 Misc. 604; Wisconsin Yearly Meeting of Freewill Baptists v. Babler, 115 Wis. 289, 91 N. W. 678.

²⁷ Bristol Bank & T. Co. v. Jonesboro Bkg. & T. Co., 101 Tenn. 545, 48 S. W. 228, 9 Am. & Eng. Corp. Cas. N. S. 790.

inquiry on the part of the taker, his failure to make such inquiry will prevent him from claiming the protection and rights of a *bona fide* holder.²⁸ Where a check is not complete and regular upon its face at the time it is taken, and a mere inspection shows its defect and that it had been changed or altered, the holder has notice of its infirmity when he takes it and is not a holder in due course.²⁹ A transferee is not charged with notice of equities by the fact that the note is insufficiently stamped, as required by a revenue statute.³⁰

²⁸ *Illinois*.—Chicago Title & Trust Co. v. Brugger, 196 Ill. 96, 63 N. E. 637; Lang v. Metzger, 86 Ill. App. 117.

Kentucky.—Gaskill v. Huffaker, 20 Ky. L. Rep. 1555, 49 S. W. 770.

Massachusetts.—North Ave. Savings Bk. v. Hayes, 188 Mass. 135, 74 N. E. 311.

Minnesota.—Fuller v. Quesnel, 63 Minn. 302, 65 N. W. 634.

Missouri.—See Bishop v. Chase, 156 Mo. 158, 56 S. W. 1080.

Nebraska.—First Nat. Bank v. Farmers' & Merchants' Bank (Neb.), 95 N. W. 1062; Stough v. Ponca Mill Co., 54 Neb. 500, 74 N. W. 868, 8 Am. & Eng. Corp. Cas. N. S. 285.

New York.—Spero v. Holoschutz, 74 N. Y. Supp. 852, 36 Misc. 764.

North Carolina.—Breese v. Comp-ton, 121 N. C. 122, 28 N. E. 351.

Pennsylvania.—Brown v. Pettit, 178 Pa. 17, 35 Atl. 865, 34 L. R. A. 723.

South Dakota.—Rochford v. McGee (S. Dak.), 94 N. W. 695.

Tennessee.—Ford v. H. C. Brown & Co., 114 Tenn. 467, 1 L. R. A. (N. S.) 188, 88 S. W. 1036.

Wisconsin.—Pelton v. Spider Lake Sawmill & Lumber Co., 117 Wis. 569, 94 N. W. 293.

When matters apparent on instrument itself do not charge with notice or knowledge.

See *United States*.—Troy & Cohoes Shirt Co., *In re*, 136 Fed. 420.

Colorado.—Posey v. Denver Nat. Bk., 24 Colo. 199, 49 Pac. 282.

Georgia.—Post v. Abbeville & W. R. Co., 99 Ga. 232, 25 S. E. 405.

Illinois.—Merritt v. Boyden, 93 Ill. App. 613, aff'd 191 Ill. 136, 60 N. E. 907.

Minnesota.—American Trust & S. Bk. v. Gluck, 68 Minn. 129, 70 N. W. 1085; Collins v. McDowell, 65 Minn. 10, 67 N. W. 845.

New York.—Hathaway v. Delaware County, 93 N. Y. Supp. 436, 103 App. Div. 179.

Tennessee.—Tradesman's Nat. Bk. v. Looney, 99 Tenn. 278, 42 S. W. 149, 38 L. R. A. 837.

²⁹ Elias v. Whitney, 98 N. Y. Supp. 667.

³⁰ Ebert v. Gitt, 95 Md. 186, 194-196, 52 Atl. 900, act congress, June 13, 1898 (U. S. Inter. Rev. Act). The court, per Jones, J., said: "Proof of the note established *prima facie* the right of the plaintiff to recover upon it. When the circumstances attending the origin of the note and its transfer to the plaintiff (appellee) were made to appear in evidence, the burden of proof was put upon him to show that he acquired title to the note in the usual course of business, before maturity, for a valuable consideration, and *bona fide*. Totten v. Bucy, 57 Md. 452; Williams v. Huntington, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477; McCosker v. Banks, 84 Md. 292, 297,

35 Atl. 935, and cases there cited. Whether the plaintiff in any case gratifies this burden of proof is a deduction from the facts and circumstances in evidence. It is not perceived how it can be predicated of any one circumstance, as matter of law, which the prayer in question does, that it is sufficient to prove notice of infirmity of title by which negotiable paper is held. Especially is it not perceived how the particular fact relied upon in the prayer in question to have such effect could give notice here to the appellee (plaintiff below) of the circumstances attending the origin and the fraud in the transfer of the note here in suit. At best it could only be a circumstance to excite suspicion and lead to inquiry, and could only be allowed such probative force, as reflecting upon the question of notice as might attach to it in connection with other evidence. In *Totten v. Bucy*, *supra*, it was said: 'The transferee of the note was not bound to show that he had acted vigilantly, or even cautiously, in inquiring into the origin and history of the instrument, in order to sustain his position as *bona fide* holder for value. The question is not what are facts the knowledge of which will or will not be sufficient to put the party on inquiry? but the question is whether the party had knowledge of the infirmity of the note at the time of the transfer to him, or, in other words, whether he procured the note in good faith, for valuable consideration.' This statement of the law was cited and reaffirmed in the case of *Williams v. Huntington*, *supra*, where it was also said, adopting the language of the United States Supreme Court: 'Suspicion of defect of title, or the knowledge of circum-

stances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.' And in the case of *Cover v. Myers*, 75 Md. 406, 23 Atl. 850, 32 Am. St. Rep. 394, a prayer granted by the court below was approved by this court, which affirmed that 'merely suspicious circumstances sufficient to put a prudent man upon inquiry, or even gross negligence on the part of the plaintiff at the time of the purchase and delivery of said note, are not sufficient of themselves to prevent a recovery by the plaintiff, unless the jury find from the evidence that in taking said note the plaintiff acted in bad faith.' Now in this case the proof in the facts admitted, shows that the appellee acquired title to the note in suit in the usual course of business, before maturity, for a valuable consideration, and without any actual notice of any infirmity in the title of Alteman, the payee, who transferred it to him. It also appears from the proof that the omission of the proper amount of stamps from the note was not due to any attempted fraud upon the revenue act of the United States government. In the bill filed by the appellant in the equity case, which has been referred to, there appears the express averment that, 'through mistake or inadvertence, and without any attempt to defraud the government of the United States, an insufficient amount of stamps were put on said note.' It is further admitted as a fact that at the time of the transfer of the note in suit to him the appellee 'overlooked the fact that the note was insufficiently

§ 475. Notice or knowledge—Suspicious circumstances—Gross negligence—Bad faith.³¹—Merely suspicious circumstances³² or carelessness are insufficient to necessitate inquiry and prevent a person from being a *bona fide* holder,³³ nor is mere suspicion evidence of negligence which will defeat a right to recover as a *bona fide* holder.³⁴ So under a California decision such suspicion is insufficient without circumstances creating a presumption that facts impeaching the validity of the paper were known by the holder.³⁵ And in Connecticut it is held that the holder of negotiable paper is not put upon inquiry by a knowledge of facts which, although capable of supporting a suspicion of some unknown defect, are fully consistent with a valid title in the vendor.³⁶ So under other decisions the acts of the holder in failing to make inquiry must have amounted to bad faith to preclude recovery.³⁷ And even gross negligence without bad faith is insufficient.³⁸ But if the acts of the holder in obtaining the paper constitute bad faith he will not be entitled to protection as a *bona fide* holder.³⁹ It may therefore be stated as a rule that suspicious circumstances alone, even though sufficient to put an ordinarily prudent man on inquiry, will not, in the absence of bad faith, or a wilful disregard of the facts showing an infirmity in the paper, destroy the title of a taker of negotiable paper as that of a *bona fide* holder.⁴⁰

stamped.' There was, therefore, proof going to establish every requisite to sustain the title of the appellee to the note in controversy."

³¹ See §§ 464, 465.

³² *Brewer v. Slater*, 18 App. D. C. 48; *Lehman v. Press*, 106 Iowa 389, 76 N. W. 818.

³³ *Lehman v. Press*, 106 Iowa 389, 76 N. W. 818.

³⁴ *Bank of Ind. Ty. v. First Nat. Bank*, 109 Mo. App. 665, 83 S. W. 577. See *Setzer & Russell v. Deal*, 135 N. C. 428, 47 S. E. 406.

³⁵ *Sinklar v. Siljan*, 136 Cal. 356, 68 Pac. 1024.

³⁶ *Rockville Nat. Bank v. Citizens' Gas Light Co.*, 72 Conn. 576, 582. See *Mack v. Starr*, 78 Conn. 184, 187.

³⁷ *Massachusetts Nat. Bk. v. Snow*, 187 Mass. 159, 72 N. E. 959; *Goetting v. Day*, 87 N. Y. Supp. 510; *New*

York Nat. Exch. Bk. v. Crowell, 177 Pa. 313, 39 W. N. C. 228, 35 Atl. 613; *Unapa Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. 655.

³⁸ *McCarty v. Louisville Bkg. Co.*, 100 Ky. 4, 18, Ky. L. Rep. 569, 37 S. W. 144.

³⁹ *Robbins v. Swinburne Print. Co.* 91 Minn. 491, 98 N. W. 331, 867; *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884.

⁴⁰ *United States.—Doe v. Northwestern Coal & T. Co.*, 78 Fed. 62; *Atlas Nat. Bk. v. Holm*, 71 Fed. 489, 34 U. S. App. 472.

Colorado.—St. Joe & M. F. Consol. Min. Co. v. First Nat. Bank, 10 Colo. App. 339, 50 Pac. 1055, s. c. 24 Colo. 537, 52 Pac. 678.

Georgia.—Montgomery v. Hunt, 93 Ga. 438, 21 S. E. 50.

Illinois.—Metcalfe v. Draper, 98 Ill.

§ 476. **Same subject—Decisions.**—In a case in the United States Supreme Court, where an accepted and indorsed bill of exchange was placed by the drawer as collateral security for his own debt in the hands of his creditor, and the latter sued the acceptor, an instruction was held erroneous “that if such facts and circumstances were known to the plaintiff as caused him to suspect, or that would have caused one of ordinary prudence to suspect, that the drawer had no interest in the bill, and no authority to use the same for his own benefit, and by ordinary diligence he could have ascertained these facts,” then the jury should find for defendant.⁴¹ In Maryland if the indorsements

App. 309; *Merritt v. Boyden*, 93 Ill. App. 613, aff’d 191 Ill. 136, 60 N. E. 907.

Maine.—*Wing v. Ford*, 89 Me. 140, 35 Atl. 1023.

Minnesota.—*Tourtelot v. Reed*, 62 Minn. 384, 64 N. W. 928. See *Burrows v. Western Union Teleg. Co.*, 86 Minn. 499, 91 Am. St. Rep. 380, 90 N. W. 1111, 58 L. R. A. 433.

Missouri.—*Bergen Invest. Co. v. Vette*, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; *First State Bk. v. Hammond*, 104 Mo. App. 403, 79 S. W. 493; *Wilson v. Riddler*, 92 Mo. App. 335; *Schroeder v. Seitz*, 68 Mo. App. 233. Examine *Brown v. Hofelmeir*, 74 Mo. App. 385, 1 Mo. App. Rep’r 303.

Montana.—*Harrington v. Butte & Boston Min. Co. (Mont.)*, 83 Pac. 467.

Pennsylvania.—*Lancaster County Nat. Bk. v. Garber*, 178 Pa. 91, 39 W. N. C. 55, 13 Lanc. L. Rev. 377, 35 Atl. 848.

Texas.—*Hynes v. Winston (Tex. Civ. App.)*, 40 S. W. 1025.

West Virginia.—*Merchants’ & Mfrs. Nat. Bk. v. Ohio Valley Furniture Co. (W. Va.)*, 50 S. E. 880.

⁴¹*Goodman v. Simonds*, 20 How. (61 U. S.) 343, 15 L. Ed. 934. This leading case is cited in the following decisions in the federal courts:

Lytle v. Lansing, 147 U. S. 59, 71, 37 L. Ed. 78. (Negotiable securities, holding that it is the duty of one who purchases municipal bonds from litigating parties with actual notice of a suit must do so at their peril; “no rule of law protects a purchaser who wilfully closes his ears to information, or refuses to make inquiry when circumstances of grave suspicion imperatively demand it”); *King v. Doane*, 139 U. S. 166, 173, 35 L. Ed. 84, 11 Sup. Ct. 465 (to the point that the payment of value being established, the indorsee will be entitled to recover unless it is proved that he purchased with actual knowledge of defect in the title, or in bad faith, implying guilty knowledge or wilful ignorance); *Montclair v. Ramsdell*, 107 U. S. 147, 158, 27 L. Ed. 431, 2 Sup. Ct. 391 (to the point that the holder of bonds is presumed to have acquired them in good faith and for value); *Swift v. Smith*, 102 U. S. 442, 444, 26 L. Ed. 193 (to the point that where mercantile paper is not due and there is nothing upon it or in the indorsement to show want of good faith the purchaser of such paper from one apparently the owner, who gives consideration, obtains a good title, though he may know facts and circumstances that

on paper are the only suspicious circumstances they are not sufficient to constitute bad faith and prevent recovery on a note taken before

cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. "He can lose his right only by actual knowledge or bad faith. It is true that if the bill or note be so marked on its face as to show that it belongs to some other person than the one who offers to negotiate it, the purchaser will be presumed to have knowledge of the true owner and his purchase will not be *bona fide*"; *Brooklyn City & Newtown R. Co. v. National Bank of the Republic*, 102 U. S. 14, 38, 41, 26 L. Ed. 61. In concurring opinion: "Possession of such an instrument before maturity, if indorsed in blank and payable to bearer, is *prima facie* evidence that the holder is the owner and lawful possessor of the same; and nothing short of proof that he had knowledge, at the time he took it, of the facts which impeach the title as between antecedent parties, not even gross negligence, if unattended with *mala fides*, is sufficient to overcome the effect of that evidence, or to invalidate the title of the holder supported by that presumption," and also that the doctrine of *Gill v. Cubett*, 3 Barn. & Cress. 466, holding that the transferee could not recover if the circumstances under which the transfer took place were such as would naturally have excited the suspicion of a prudent and careful man, although erroneously followed by state court decisions in many cases, "has been authoritatively overruled

in the tribunal where it had its origin, and the old rule as re-established by the later adjudications, has been in repeated instances adopted by this court and by the highest courts of the state where the controversy arose"); *Shaw v. Railroad Co.*, 101 U. S. 557, 564, 25 L. Ed. 892 (cited to the point that the transferee of a bill or note may hold it, though he took it negligently and when there were suspicious circumstances attending the transfer. "Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it; that is, nothing short of *mala fides* will defeat his right, * * * the purchaser is not bound to look beyond the instrument. * * * The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note," even though a statute makes a bill of lading negotiable by indorsement); *Oates v. First National Bank of Montgomery*, 100 U. S. 239, 247, 248, 25 L. Ed. 580 (cited upon the point that one taking negotiable paper before its maturity as collateral security for a preëxisting debt, without knowledge of facts impeaching the title between antecedent parties is a holder in due course, at least to the extent of the debt); *Brown v. Spofford*, 95 U. S. 474, 478, 481, 483, 24 L. Ed. 508 (to the point that possession of paper payable to bearer or indorsed in blank is *prima facie* evidence of lawful ownership and possession; and nothing short of fraud, not even gross negligence, if unattended with

mala fides, is sufficient to overcome the effect of that evidence, or to invalidate the title of the holder so supported; and that the holder must be shown to have had knowledge of the impeaching facts and circumstances at the time the transfer was made); *Cromwell v. County of Sac*, 94 U. S. 362, 24 L. Ed. (to the point that presumption is that note payable to bearer was negotiated at time of execution in the usual course of business for value and without notice of equities between prior parties); *Commissioners of Marion County v. Clark*, 94 U. S. 278, 286, 24 L. Ed. 59 (to same point as last case and that nothing short of fraud, not even gross negligence, will overcome this presumption and invalidate his title); *Angle v. Northwestern Mut. L. Ins. Co.*, 92 U. S. 330, 341, 23 L. Ed. 556 (to the point that holders of negotiable securities are chargeable with notice where the marks on the instrument are of a character to apprise one of the alleged defect. The case was one of material alteration); *Hotchkiss v. National Bank*, 21 Wall. (88 U. S.) 354, 359, 22 L. Ed. 645 (to the point that "a suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or wilful ignorance, and the burden of proof lies on the assailant of the title"); *Chambers County v. Clewes*, 21 Wall. (88 U. S.) 317, 323, 22 L. Ed. 517 (to the point of transferee being presumptively a holder for value without notice); *National Bank of*

Washington v. Texas, 20 Wall. (87 U. S.) 72, 90, 22 L. Ed. 295 (cited generally in a case of overdue paper; burden of proof and presumption of being holder *bona fide*); *Sawyer v. Prickett and Wife*, 19 Wall. (86 U. S.) 146, 166, 22 L. Ed. 105 (cited to point that part consideration sufficient to constitute *bona fide* holder who receives note before maturity without notice of defenses); *Smith v. Sac County*, 11 Wall. (78 U. S.) 139, 150, 153, 20 L. Ed. 102 (cited in a case of fraud and negotiable security in dissenting opinion to the point that transferee, without notice, etc., has presumptively good title, free from equities); *Merchants' National Bank v. State National Bank*, 10 Wall. (77 U. S.) 604, 671, 19 L. Ed. 1008 (cited in dissenting opinion: "Where the defect or infirmity appears on the face of the instrument, the question whether the party who took it had notice or not is a question of law" for the court); *The Lulu*, 10 Wall. (77 U. S.) 192, 201, 19 L. Ed. 906 (a case of master's authority to obtain credit for repairs of ship in foreign port; to the point that express knowledge is not necessary to maintain the charge of bad faith; that where a party's rights are liable to be injuriously affected by notice he cannot wilfully shut his eyes to the means of knowledge which he knows are at hand; "or, in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made"); *Supervisors v. Schenck*, 5 Wall. (72 U. S.) 772, 784,

18 L. Ed. 556 (county bonds: "It is well settled that a negotiable security of a corporation which, upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in point of fact issued for a purpose, and at a place not authorized by the charter of the corporation"); *Murray v. Lardner*, 2 Wall. (69 U. S.) 110, 121, 17 L. Ed. 857 (coupon bonds; cited to point that suspicion of defect of title or knowledge which would excite suspicion in mind of prudent man, or gross negligence of taker at time of transfer will not defeat his title; only bad faith can produce that result; and burden of proof is on person assailing title); *Bank of Pittsburgh v. Neal*, 22 How. (63 U. S.) 96, 108, 16 L. Ed. 323 (cited to point that *bona fide* holder, without notice of facts which impeach validity between antecedent parties, may recover); *Perris Irrigation District v. Thompson*, 116 Fed. 832, 834, 54 C. C. A. 336, 341, in error, dismissed for want of jurisdiction, 196 U. S. 637 (*bona fide* holder of bonds of irrigation district; cited to point: "It was not enough that the circumstances might have been such as to create suspicion in the mind of one ordinarily prudent. In order to render the transaction invalid, facts must have come to the notice of the defendant in error or his agent of such a nature that to refrain from pursuing further inquiry would of itself amount to evidence of bad faith"); *Pickens Tp. v. Post*, 99 Fed. 659, 662, 41 C. C. A. 1 (*bona fide* holder of municipal bonds; to the point that "to impeach the title of a holder for value of nego-

tiabile paper, by proof of any facts and circumstances outside of the instrument itself, it must be first shown that he had knowledge of such facts and circumstances at the time the transfer was made"); *D'Esterre v. City of Brooklyn*, 90 Fed. 586, 592 (to the point that a person is a *bona fide* purchaser of bonds where he surrenders other bonds held as collateral and substitutes the bonds in suit, as there exists a good consideration in such case); *John Hancock Mut. Life Ins. Co. v. City of Huron*, 80 Fed. 652, 653 (negotiable bonds; to the point of presumption that one holds in good faith without notice, etc. But presumption was overcome by proof of invalidity); *Kaiser v. First Nat. Bank of Brandon*, 78 Fed. 281, 284 (to the point that purchaser for value, before maturity, from apparent owner obtains a good title, though he may know facts and circumstances that would cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts); *Doe v. Northwestern Coal & Transportation Co.*, 78 Fed. 62, 68 (corporation notes: "In the federal courts it is the well-settled rule that the purchaser of a promissory note is not deprived of his character of purchaser in good faith by proof that he took the note with knowledge of such circumstances as ought to put an ordinarily prudent man upon inquiry to ascertain the facts. The proof must go further and show that he had, at the time of the transfer, knowledge of facts that would impeach the title as between the antecedent parties to the note, or

knowledge of such facts that his abstention from further inquiry will be tantamount to a wilful closing of the eyes to the means of knowledge which he knows are available, and therefore presumptive evidence of bad faith on his part"); *Atlas Nat. Bank v. Holm*, 71 Fed. 489, 491, 492, 19 C. C. A. 94—aff'd *Holm v. Atlas Nat. Bank*, 84 Fed. 119—(to the point that an assignee of commercial paper, before maturity, for value without notice of infirmity is *bona fide* holder, that it is not enough that he neglected to make inquiry which a prudent man ought to make or would have made; that it is not a question of negligence but of bad faith; that the question is, did the purchaser have knowledge? and that every one must conduct himself honestly and not wilfully shut his eyes to the means of knowledge at hand, as such conduct would be evidence of bad faith. The note in this case was held invalid except in the hands of an innocent purchaser); *Long Island Loan & Trust Co. v. Columbus & Indianapolis Cent. Ry. Co.*, 65 Fed. 455, 457 (negotiable railroad bonds and *bona fide* holder; to the point that mere suspicion or gross negligence or knowledge sufficient to excite the suspicion of a prudent man will not affect the title of the holder "nothing short of bad faith on the part of the purchaser of negotiable bonds passing by delivery, and which are fair upon their face, will destroy their validity; and the burden of proof lies upon the party who assails the title of the party in possession"); *Thomson-Houston Electric Co. v. Capitol Electric Co.*, 65 Fed. 341, 350, 12 C. C. A. 643 (generally to the point of notice and rights of pledgee of negotiable paper as collateral); *Bank of Edge-*

field v. Farmers' Co-operative Mfg. Co., 52 Fed. 98, 103, 2 C. C. A. 637 (to the point that it is well settled in the courts of the United States since this leading case, "that one who acquires mercantile paper before maturity from another who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that would cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained these facts." In this case three of the notes were taken before maturity and three others then taken were past due protested notes by the same makers and indorsers and the court applying the above principle said: "It follows that, although the three notes of the same date as those acquired by the plaintiff were past due, and that the plaintiff was informed of that fact, still that would not be notice that the three notes not yet due were in any wise tainted by defective consideration, or for any other cause"); *Sawyer v. Equitable Accident Ins. Co. of Cincinnati*, 42 Fed. 30, 36 (to the point that: "Even holders of negotiable securities taken before maturity, in the usual course of business, are held chargeable with notice when the marks on the instrument are of a character to apprise one to whom the same is offered of the alleged defect." Applied to a case of misstatements by an agent made by alteration of answers in an application for insurance by such agent without the applicant's knowledge, such alteration being patent upon the face of the paper); *Anderson v.*

maturity and for value, especially so where inquiry would not have disclosed fraud, or failure of consideration or defect of title.⁴² So in Minnesota, where the only circumstance from which the suspicion

Kissam, 35 Fed. 699, 704 (to the point that defendants were given full benefit of the distinction between negligence and *mala fides* in the purchase of negotiable paper, and that the jury were instructed that mere suspicion was insufficient to charge defendants with notice that the agent from whom they were obtained was using them without authority. In this case the checks were made by a bank cashier without authority, and the purchaser was held charged with notice or rather that there was an obligation to ascertain the cashier's authority. The case was reversed in Kissam v. Anderson, 145 U. S. 435, 36 L. Ed. 765, 12 Sup. Ct. 960); Third Nat. Bank v. Harrison, 10 Fed. 243, 248 (cited generally to the point that the bank was a *bona fide* holder of a note, no evidence being given that it had notice of the infirmity of the paper, said note being based on an illegal contract or "option deal"); Bank of Sherman v. Apperson, 4 Fed. 25, 28 ("In the courts of the United States, where the rule is that there must be actual notice, or bad faith, to charge the holder for value, there can be no question that the recitals of this note are not sufficient to charge the plaintiff with any equities between the defendants and the payee." The note recited value received and also that the consideration was for land, "being for a part of the third payment on the Goree plantation as per agreement").

The doctrine of Goodman v. Simmonds (at the head of this note) is declared by Carpenter, J., to be the law of Connecticut and also of this

country. Credit Company v. Howe Machine Co., 54 Conn. 357, 384, 8 Atl. 476, 1 Am. St. Rep. 129. The rule of the principal case is applied to bonds in Gilman Sons & Co. v. New Orleans & Selma R. Co. & Immigrant Assoc., 72 Ala. 566, 582, 583, 585. It is also applied to purchaser before maturity of note in possession of payee. Winship & Bros. v. Merchants' Nat. Bk., 42 Ark. 22. Bank had right to treat paper as property of payee and was not obliged to inquire whether held as agent or owner.

⁴²Valley Savings Bk. of Middletown v. Mercer, 97 Md. 458, 55 Atl. 435. The court, per Fowler, J., in considering certain instructions and requests to charge the jury, says: "In the leading case of Totten v. Bucy, 57 Me. 446, the former learned chief justice of this court said: 'The question is not what facts will or will not be sufficient to put the party on inquiry, but the question is whether the party had knowledge of the infirmity of the note at the time of the transfer to him; or, in other words, whether he procured the note in good faith for valuable consideration.' Maitland v. Bank, 40 Md. 568, 17 Am. Rep. 620; Bank v. Hooper, 47 Md. 88; Williams v. Huntington, 68 Md. 590-601, 13 Atl. 336, 6 Am. St. Rep. 477. And so in the case last cited the present chief justice quotes the language of Judge Alvey, with approval and says: 'The question is one of fraud or bad faith on the part of the taker of the note.' In Cheever v. Pittsburg R. R. Co., 150 N. Y. 65-67, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646, it is said: 'The rights of

could arise that one discounting negotiable paper was not a *bona fide* purchaser is the fact that he purchased them from his son, such evidence will not impeach the character of his holding in good faith.⁴³ And in that state bad faith in the purchase for value of an invalid and void bank check may be partly evidenced by the gross negligence of the purchaser; and it may also be shown by a variety of circumstances, some of them slight in character and others of a greater significance. But whether a purchaser has notice or knowledge, or has means of knowledge, which he wilfully disregards, is usually for the jury rather than the court. A distinction has also been made between banking houses and individuals not engaged in banking in respect to good faith in discounting paper.⁴⁴ In Missouri neither suspicion nor negligence in its purchase will destroy the title of a purchaser of a note. Such indorsee must be held an innocent purchaser unless he had actual knowledge of infirmities.⁴⁵ In New Hampshire mere suspicion on the part of the plaintiff that there was infirmity in the notes sued on would not be sufficient to show that he was not a *bona fide* holder,

the holder are to be determined by the simple test of honesty and good faith and not by a speculative issue as to his diligence or negligence.' Equally clear, simple and broad is the rule expressed in § 75, of Art. 13 (our Negotiable Instruments Act) by which, of course, we must be governed. The notice, that section provides, which will prevent a holder of a note from recovering is 'actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.'" The action in the principal case (97 Md. 458) was by a savings bank against the makers upon a joint and several note. The following indorsements were upon its face: "Received of J. W. Downey thirty-three 33-100 dollars on within note, and he is hereby released from any further payment on the same," and "Received of E. D. Hobbs thirty-three 33-100 dollars on within note." Neither of these was signed, then followed the indorsement written

when the note was delivered to plaintiff. The note was one of three, each for a like amount, and were received by the bank as collateral security for money loaned. The makers of the note were thirteen defendants and another.

⁴³ *Monat v. Wells*, 76 Minn. 438, 79 N. W. 499.

⁴⁴ *Drew v. Wheelihan*, 75 Minn. 68, 77 N. W. 558.

⁴⁵ *Creston National Bank v. Salmon* (Mo. App. 1906), 93 S. W. 288. Ellison, J., said: "The policy of the law is to encourage commercial affairs and to facilitate the transaction of that class of business. To that end it protects indorsees of commercial paper unless they have actual knowledge of its infirmity." Citing *Borgess Investment Co. v. Vette*, 142 Mo. 560, 573, 44 S. W. 754, 64 Am. St. Rep. 567. (Where Burgess, J., said: "Nor will mere suspicion alone that the note is without consideration brought home to the transferee before he acquires the note be sufficient to defeat a re-

or to put him upon inquiry concerning their original character. To constitute a person a *bona fide* holder of a note he is not required, as a matter of law, to make inquiries concerning the character and financial standing of the parties to the notes, nor to act as a reasonably prudent man would act in making the purchase, and although the circumstances may be such as to excite his suspicion concerning the validity of the notes, he is not required to desist from the purchase on that account, nor to investigate the matter with a view to ascertaining whether his suspicion is well grounded or not. The law only requires him to act honestly and in good faith, and if he so acts his rights and title will be upheld even though his action was imprudent and unusual.⁴⁶ In New Jersey^{46*} it is held that suspicious circum-

covery upon the note by him. Bad faith alone upon the part of the holder in taking the note will not defeat a recovery by him against the party thereto"); *Mayes v. Robinson*, 93 Mo. 114, 5 S. W. 611; *Hamilton v. Marks*, 63 Mo. 167.

⁴⁶ *Hallock v. Young*, 72 N. H. 416, 419, 420, 57 Atl. 236, per Chase, J. The evidence was in substance that the plaintiff purchased the notes before their maturity with no knowledge concerning the character and financial ability of the makers except what the seller gave him, and no knowledge of the latter's financial ability, and slight and apparently very unreliable knowledge of his character, and gave therefor a horse and \$500 in money, and it was held that this did not prevent his being a *bona fide* holder. The court also said: "It was said in the leading case on the subject in this country, that 'every one must conduct himself honestly in respect to the antecedent parties when he takes negotiable paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not wilfully shut his eyes to the means of knowledge which he knows are at hand * * * for the

reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith.' *Goodman v. Simonds*, 20 How. (61 U. S.) 343, 366, 15 L. Ed. 934. See also *Lytle v. Lansing*, 147 U. S. 59, 71, 13 Sup. Ct. 254, 37 L. Ed. 78. While negligence of the holder, though gross, will not of itself deprive him as matter of law of the character of a *bona fide* holder, it may be evidence of bad faith. *Goodman v. Harvey*, 4 A. & E. 870. See also, *Canajoharie Nat'l Bk. v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676. Suspicious circumstances attending the transaction, though, as above stated, insufficient in and of themselves to prevent the holder from having the rights of a *bona fide* holder, are proper matters for the consideration of the jury on the question of his good faith. *Smith v. Livingston*, 111 Mass. 342, 345; *Sullivan v. Langley*, 120 Mass. 437. In applying the general rule by which such evidence is competent upon questions of good faith, the law does not except a case of this kind." The evidence as to the character of the holding came mostly from the plaintiff and his witness.

^{46*} *Hamilton v. Vought*, 34 N. J. L. 187. The court said: "An examina-

stances are not sufficient unless such circumstances prove *mala fides*, and that mere carelessness in taking a note fraudulent in its inception will not of itself impair the title, but carelessness may, however, be so gross that bad faith may be inferred therefrom. So in New York it is declared in a recent case that mere surmise or suspicion is no longer sufficient to put a purchaser of negotiable paper upon inquiry; the facts necessary to cause such inquiry must be such as to show dishonesty or bad faith on his part in refraining from making the inquiry, and that this rule applies to negotiable bonds and coupons held by one who derived his title through a holder in due course, who is an innocent purchaser for value not affected as a party to any fraud or illegality in the paper.⁴⁷ And in another case in that state the rule that suspicion of defect of title, or the knowledge of circumstances such as would excite suspicion in the mind of a prudent man, or gross negligence on the part of a taker at the time of the transfer, will not defeat his title, as such a result can only be produced by bad faith on his part, and that the question is one of honesty or dishonesty and that guilty knowledge and wilful ignorance involve the result of bad faith, and fraud established is fatal to the title applies to negotiable securities, and this is declared to be settled law in New York.⁴⁸

tion of the American reports will disclose a similar mutation of judicial opinion upon this subject. For a time, in several of the states, the rule broached in the case of *Gill v. Cubitt*, 3 Barn. & Cress, 466, has been acted upon; but now in most of them, and in those of the most commercial importance, that rule has been entirely discarded." *Id.*, 191. The principal case is cited in *Second Nat. Bk. v. Hewitt*, 59 N. J. L. 57, 58; in *Dowden v. Cryder*, 55 N. J. L., 329, 331 ("this legal rule is thoroughly established"); *Fifth Ward Sav. Bk. v. First Nat. Bank*, 48 N. J. L. 513, 516 (coupon bonds payable to bearer and issued under legislative authority: "Proof that such a holder took the securities under suspicious circumstances is not sufficient to defeat his title. That result

can be produced only where he has taken title in bad faith"); in *Heberd v. Southwestern Land and Cattle Co.*, 55 N. J. Eq. 18, 29, 36 Atl. 132 (bonds payable to bearer and transferable by delivery); in *Hackettstown Nat. Bank v. Wing*, 52 N. J. Eq. 156, 161, 27 Atl. 920 (married woman's note discounted by bank and bank official had notice that note was made without consideration and for discount, and wife was held estopped to defend that she was surety only). See also *National Bank of Republic v. Young*, 41 N. J. Eq. 531, 7 Atl. 488.

⁴⁷ *Hibbs v. Brown*, 98 N. Y. Supp. 353.

⁴⁸ *Perth Amboy Mut. Loan H. & B. Assn. v. Chapman*, 81 N. Y. Supp. 38, 80 App. Div. 556, aff'd (mem.), 178 N. Y. 558 70 N. E. 1108.

§ 477. **Same subject—Rule in Vermont.**—In Vermont it is declared that the purchaser of negotiable paper must exercise reasonable prudence and caution in taking it, if the circumstances are such as ought to excite the suspicion of a prudent and careful man as to the validity of a paper as between the parties to it, or the propriety of the transfer, and if the purchaser takes it without inquiry he does not stand in the position of a *bona fide* holder, but in the position of the party from whom he takes it, though he may have paid value for it.⁴⁹ This declaration is quoted in a comparatively recent case, which holds that when the payee of a check, which, on account of his fraud, is invalid as between him and the drawer, transfers it to a third person, who brings suit thereon against the drawer, the burden is on the plaintiff to show that he took the check in the usual course of business, for a valuable consideration, without knowledge of facts which impeached its validity as between the original parties thereto, and without knowledge of facts or circumstances which would lead a careful and prudent man to suspect that the check was invalid as between the antecedent parties. In such case, if the circumstances would excite the suspicion of a prudent man as to the validity of the paper as between the antecedent parties to it, and the purchaser takes it without inquiry, he is not a *bona fide* purchaser, though he paid value for it; and whether the plaintiff, as a careful and prudent person, had reason to suspect when it took the check, that it was invalid as between the parties thereto, is a question of fact. The facts of this case were as follows: A check for \$1,000 was invalid as between the drawer and payee because of the latter's fraud. The payee, for valuable consideration, transferred the check to the plaintiff, who brought suit thereon against the drawer. The trial court found that when the plaintiff took the check its officers knew that the payee was financially irresponsible and a forger; that he had four days before defrauded the plaintiff by procuring it to discount, as genuine, a note for \$300, on which he had forged the name of the surety and the approval of plaintiff's president; that the plaintiff's president had reason to suspect—what was the fact—that the payee had forged the name of the surety to a \$1,700 note which he had fraudulently procured the plaintiff to discount as genuine, and which it then owned. It was held that the failure of the trial court to find that plaintiff, as a careful and prudent person, had no reason to suspect, when it took the check, that

⁴⁹ *Bromley v. Hawley*, 60 Vt. 50, 12 Atl. 222.

the same was invalid as between the original parties thereto would not be reversed; and that it could not be said that the equities were with the plaintiff and it was entitled to recover the amount of the check notwithstanding the failure of the trial court to make said finding.⁵⁰

⁵⁰ *Capital Savings Bank & Trust Co. v. Montpelier Savings Bank & Trust Co.*, 77 Vt. 189, 190, 59 Atl. 827. The court, per Stuart, J., said: "The plaintiff insists that it is entitled to a judgment on the facts found and relies upon the case of *Bank v. Goss*, 31 Vt. 315, and *Bromley v. Hawley*, 60 Vt. 46, 12 Atl. 220. But the facts as reported in those cases are unlike those in the case at bar. In *Bank v. Goss*, the defendant, Goss, procured the defendant, Page, to sign the note in suit for the purpose of enabling Goss to obtain a loan at the bank in the usual course of business. At the time the note was signed it was agreed by Goss that he would not use it, unless he could also procure the signature of one Brown upon it. Goss, in violation of this agreement, procured the plaintiff to discount the note, without the signature of Brown. Neither the bank nor any of its officers had any knowledge or notice of the alleged agreement. In *Bromley v. Hawley*, the trial court rendered judgment for the plaintiff and this court said that the fact that the note was overdue; that it amounted to over four thousand dollars; that it had different numbers on it, one placed there by the maker and the other by the bank, were not sufficient to put the plaintiff upon inquiry; it appearing that he took the note in good faith; and that the party with whom he negotiated was a man of extensive business, and his character and financial standing high, and, in so doing, quoted with approval the rule, here-

in referred to, respecting the duty of the purchaser of negotiable paper. In the case at bar, the plaintiff, in negotiating for the check was dealing with a party known to it to be irresponsible and a forger. Harkness had only four days before perpetrated a fraud upon the plaintiff by procuring it to discount, as genuine, a note for three hundred dollars in which he had forged the name of the surety, and the approval of the plaintiff's president. Also, the plaintiff, in negotiating for the check, was dealing with a party who had before defrauded the plaintiff in procuring it to discount, as genuine, a note for \$1,700, to which the party had forged the name of a surety appearing thereon, and it is found that, at the time of the transfer of the check, the plaintiff's president had reason to suspect that the name of the surety on this note was forged. In view of these and other facts and circumstances and appearing from the findings of a court might well consider that the plaintiff's officers knew of the fraudulent and dishonest methods resorted to by Hawkins to obtain money and credit; that they had reason to suspect that the check was obtained from the defendant by the same methods, and hesitate to find that the plaintiff had no reason to suspect that Harkness had procured the check from the defendant by fraud. In these circumstances it cannot be said that the equities are with the plaintiff, or that it is entitled to recover the amount of the check notwithstanding the failure

§ 478. **Indorsement subsequent to notice.**—An indorsement made subsequent to notice of the payor's defense, will not relate back to the

of the court to find that it had no reason to suspect, when it took the check, that the same was invalid as between the original parties thereto. The case of *Ormsbee v. Howe*, 54 Vt. 182, was for the benefit of one Healey, who purchased the note before due of one Preston the payee. The note was given in settlement of a fraudulent debt and was wholly without consideration. The case was tried by the court, and it was found that Healey had such knowledge, in regard to the way in which orders and notes for wire were obtained by Preston that he might reasonably expect that the note in suit was obtained in the same manner. Notwithstanding this finding the trial court rendered judgment for the plaintiff to recover on the note, but this court on the finding reversed the judgment and rendered judgment for the defendant to recover his costs. See *Limerick Nat. Bk. v. Adams*, 70 Vt. 133, 40 Atl. 166.

Bona fide holder—Suspicious circumstances—Gross negligence—Bad faith—Opinions of text writers.—Mr. Bigelow says: "Negligence only, even though gross, accordingly, was and still is in England held insufficient to defeat the claim of one whose right to recover is otherwise perfect; nothing short of bad faith will suffice to subject him to the equities which the defendant seeks to set up. And that has long been the prevailing rule in this country, the most of our courts which had at first accepted the earlier doctrine, having, since 1836, abandoned that doctrine for the one just stated * * *. Proof of bad faith will subject the plaintiff to

equities, if such exist; and bad faith may be shown, for instance, by evidence that he himself actually had reasonable suspicion, from facts within his knowledge, that the prior holder's title was somehow tainted or defective, and still went forward and purchased the instrument, closing his eyes to the facts and not making inquiry. To that extent the doctrine of constructive notice, a term which may cover cases of bad faith as well as negligence, obtains in the law of bills, notes, and cheques, and to that extent only, except in the few states in which the courts still adhere to the English doctrine of 1824." *Bigelow on Bills, Notes and Cheques* (2d ed. 1900), pp. 235, 236.

In *Byles on Bills* it is said: "A wilful and fraudulent abstinence from inquiry into the circumstances where they are known to be such, as to invite inquiry, will (if a jury think that the abstinence from inquiry arose from a belief or suspicion that inquiry would disclose a vice in the bill) amount to general or implied notice. But mere negligence, however gross, not amounting to wilful or fraudulent blindness and abstinence from inquiry, will not of itself amount to notice, though it may be evidence of it." *Byles on Bills* (6th Amer. ed., 1874), p. 195 [*122].

Mr. Chalmers says: "The test *bona fides* as regards bill transactions has varied greatly. Previous to 1820 the law was much as it is under the act. But under the influence of Lord Tenterden due care and caution was made the test, and this principle seems to be adopted

by section 9 of the Indian Negotiable Instrument Act. In 1834 the Court of King's Bench held that nothing short of gross negligence could defeat the title of a holder for value. Two years later Lord Denman states it as settled law that bad faith alone could prevent a holder for value from recovering. Gross negligence might be evidence of bad faith, but was not conclusive of it. This principle has never since been shaken in England, and it seems now firmly established in the United States." Chalmers on Bills of Exch. (6th ed., 1903), p. 276.

Mr. Daniel says: "The circumstances of the transaction may be of such a character as to intimate strongly a defect in the title, and if they are such as to invite inquiry they will suffice, provided the jury think that abstinence from inquiry arose from a belief or suspicion that inquiry would disclose a vice in the paper. Then indeed his *bona fides* would be impeached. But further than this, gross negligence, which is not in itself proof of *mala fides*, may be so great as to amount to proof of notice * * * the more correct opinion as it seems to us, that the circumstances must be so pointed and emphatic as to amount to proof of *mala fides* in the abstinence of inquiry, or such as to be *prima facie* inconsistent with any other view than that there is something wrong in the title, and thus amount to constructive notice. In other words, we would say that if the circumstances are of such a character as to create such a distinct legal presumption and *prima facie* proof of fraud, or of some equity between prior parties, it would operate as legal information and constructive notice to the transferee. This rule fixes a criterion for judgment which

is definite, and seems to us the one which should be adopted. The proof of the existence of the circumstances amounting to implied notice must be clear." Daniel on Negot. Inst. (5th ed., 1903), §§ 795b, 796.

Messrs. Eaton and Gilbert say: "Suspicious circumstances are not, in themselves, sufficient to constitute one who takes an assignment of commercial paper before maturity, paying value therefor, a purchaser in bad faith; nor is it enough that he neglected to make the inquiry, which, under the circumstances, a prudent man would or ought to have made." Eaton & Gilbert's Commercial Paper (ed. 1903), p. 371, § 75.

Mr. Edwards says: "The question is, not whether the holder took the bill or note negligently and without exercising sufficient prudence and care, but whether he took it under such circumstances as to charge him with receiving it *mala fide*. For, unless he is chargeable with notice of the misuse or misappropriation of the paper, even gross negligence will not affect his right of recovery. passed to the plaintiff, without any proof of bad faith in him, there is no objection to his title." Edwards on Bills and Promissory Notes (2d ed., 1863), p. 300, *318. See also *id.*, p. 353, *372, p. 651, *688.

Mr. Justice Maclaren cites the statute as follows: "A thing is deemed to be done in good faith, within the meaning of this act, where it is in fact done honestly whether it is done negligently or not. Imp. Act, § 90, and says: 'The old rule in England was similar to that laid down in the recent cases and adopted by the act. Some American authorities followed Gill v. Cubitt, 3 B. & C. 466. * * * This rule has been generally recognized

in Canada; although there are expressions in certain cases that are not quite consistent with it." MacLaren on Notes, Bills and Cheques (3d ed., 1904, Bills of Exch. Act, 1890, and Admts., Canada), § 89, p. 428. See *id.*, § 29, pp. 175 *et seq.*

Mr. Norton says: "It is now the rule of the law merchant that mere knowledge of any facts sufficient to put a reasonably prudent man on inquiry is not sufficient, but that to defeat his claim to be considered a *bona fide* holder he must be guilty of bad faith. Actual *mala fides* must be shown to the satisfaction of the jury to deprive a holder for value of the character of *bona fide* holder, and negligence in not inquiring into facts which ought to have put him on inquiry is not sufficient. Gross carelessness, even, on the part of the holder is not conclusive of notice, though it is, of course, perfectly competent evidence to go to the jury on the question of bad faith. * * * The question is simply one of good faith in the purchaser; and unless the evidence makes out a case upon which the jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict for the holder." Norton on Bills and Notes (3d ed., 1900), pp. 319-321.

Mr. Parsons says: "The 'good faith' required of the holder certainly does not require reasonable care and diligence on his part to ascertain the right of the transferor to give him the paper. There was, however, a period, though not a long one, when this requirement was a part of the English law of negotiable paper. Then gross negligence was adopted as the rule. Afterwards gross negligence was held

merely to be evidence of *mala fides*, and not the thing itself. And now, to use the emphatic words of Lord Denman, the last remnant of that doctrine is shaken off. It may now be said to be the law in that country, that the holder of negotiable paper does not lose his rights by proof that he took the paper negligently, nor unless fraud be shown. The doctrine of *Gill v. Cubitt*, 3 B. & C. 466, has been followed in several cases in this country, but on principle and on high authority we incline to the opinion that the rule of the late English cases is better adapted to the free circulation of negotiable paper, and the true interests of trade. But it must still be true that while gross or even the grossest negligence is a different thing from fraud, negligence may be such, and so accompanied, as to afford reasonable and sufficient grounds for believing that it was intentional and fraudulent. Thus, although notice or knowledge of defeating circumstances may not be proved, the facts of the case, the relations between the parties and their method of dealing may be such as to show that there was either knowledge or an intentional and careful avoidance of knowledge; this, we should say, must have the same effect in law as knowledge." 1 Parsons on Notes & Bills (ed. 1869), pp. 258-260.

Mr. Selover says: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it was negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. A mere suspicion of infirmity

time of purchase, so as to cut off the equities of the payor against the payee.⁵²

§ 479. **Notice—Fraud.**—Where it has been judicially adjudged by a competent court that dividends were regularly declared and that thereupon a corporation note was given, thus admitting that said note was given in payment or part payment of such dividends, an affidavit of defense, in a suit upon the note, is insufficient which sets up that said dividends had not been earned but had been made to appear as due and earned by means of fictitious inventories, when in fact they had not been earned, said judgment establishing their regularity not having been opened, modified or reversed and there being no averment that said judgment was not still standing, even though if the note had been procured by fraud the holder would be put to proof of consideration that it had acted fairly, paid value and had no notice of the alleged fraud; and the fact that the defendant company had been enjoined from paying to the payee of the notes certain alleged profits is immaterial as long as the judgment declaring the regularity of the dividends stands unimpeached.⁵³

will not constitute notice." Selover's Negotiable Instrument Law (ed. 1900), § 183, p. 221.

Mr. Story says: "It is agreed on all sides that express notice is not indispensable; but it will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction and to put the holder upon inquiry. For a considerable length of time the doctrine prevailed, that, if the holder took the note under suspicious circumstances, or without due caution and inquiry, although he gave value for it, yet he was not to be deemed a holder *bona fide* without notice. But this doctrine has been since overruled and abandoned, upon the ground of its inconvenience, and its obstruction to the free circulation and negotiation of exchange and transferable paper."

Story on Promissory Notes (7th ed., 1878), § 197.

Mr. Tiedeman says: "It is not every suspicion that good faith would require to be investigated. * * * The purchaser cannot claim to be a *bona fide* holder, if he is guilty of gross negligence not pursuing an inquiry that would, under the circumstances, be suggested to a reasonably prudent man. But the better opinion is that the suspicion must be so well-grounded as to be almost proof of *mala fides*." Tiedeman on Commercial Paper (ed. 1889), § 300.

⁵² Osgood v. Artt, 17 Fed. 575; Pavay v. Stauffer, 45 La. Ann. 353, 12 So. 512, 19 L. R. A. 716. But compare Beard v. Dedolph, 29 Wis. 136.

⁵³ Camden Nat. Bank of Camden v. Fries-Breslin Co., 214 Pa. 395, 63 Atl. 1022. Plaintiff averred that it was the holder of the note in suit for

§ 480. **Notice—Fraudulent alteration.**—An indorsee, even without notice, is not such a *bona fide* holder as to enable him to recover on an instrument which is, without negligence on the maker's part, so vitiated by fraudulent alteration as to change the relation of the immediate parties and the identity and legal effect of the instrument.⁵⁴ Where the statute provides that the indorsement of all the payees is necessary to give good title to the transferee; that every indorser who indorses without qualification warrants to all subsequent holders in due course that the instrument is genuine and in all respects what it purports to be; and that if "a negotiable instrument is materially altered without the assent of all the parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers;" and the maker of a note to which there are several payees alters it by substituting, without authority, his own name in place of one of the payees, and as thus altered, without the indorsement of the payee whose name is thus changed, negotiates the note, said note is not enforceable according to its "tenor" against an indorser who had no knowledge of such alteration, even though the plaintiff be assumed to be a holder in due course, and even if the maker in such a case could be assumed to be an agent of the indorser to alter the note the agency would, to the knowledge of the plaintiff, be of such a limited character as to preclude the defendant being barred by any departure from the strict terms of the agency.⁵⁵

§ 481. **Erasures—Forgery—Notice—Negligence—Recovery.**—The mere erasure of a signature made by a rubber stamp upon a corporation note, otherwise regular upon its face, does not give notice to a purchaser of the note of any defect therein or notice of any agreement between an indorser and the corporation tending to relieve the former of liability, or notice that the note would be used for any improper purpose or that the corporate funds obtained by the negotiation of said note would be wrongfully used. This rule was applied in a case where one of the members of a corporation who was about to leave the state for a time was informed by the secretary and treasurer of the corporation of its need to borrow money for corporation purposes and was requested, with another member of the company, to indorse a note in blank to be drawn by the corporation and used by it as its

value before maturity, and without notice of any defense that the maker might have.

⁵⁴ Rochford v. McGee, 16 S. D. 606, 94 N. W. 695.

⁵⁵ First National Bank v. Gridley,

secretary should determine. This was refused, but said member agreed to sign a note which bore a rubber stamp signature of the corporation name with a dotted line below and the word "Treasurer" at the end of such line, the corporate signature being made complete by the name of the treasurer and it was not complete until it bore said treasurer's name. The note was in the latter's possession, indorsed by the corporation and each of its officers, the proceeds of the note were credited to the corporation and the funds were paid in upon the checks of the corporation in the regular course of business and were placed in the manner above stated, with said treasurer, for the purpose of raising funds for the corporation. It was claimed that the erasure constituted a forgery and notice of the defect and of the agreement, but the defense was held not sustained and as the evidence did not show that the corporation ever signed the note as maker that it was for the indorsers to pay the obligation.⁵⁶ It is held in a recent case in North Dakota that the drawee of a check who has paid the same without detecting the forgery, may, upon discovery of the forgery, recover the money paid from the party who received the money, even though the latter was a good faith holder, provided the latter had not been misled or prejudiced by the drawee's failure to detect the forgery.⁵⁷

112 App. Div. 398, 98 N. Y. Supp. 445; *Negot. Inst. Law*, Laws 1897, ch. 612, §§ 71, 116, 205; *Laws* 1898, ch. 336, 333. •

⁵⁶ *Nassau Trust Co. v. Matherson* (Sup. Ct. App. Div.), 100 N. Y. Supp. 55, 113 App. Div. 693.

⁵⁷ *First National Bank of Lisbon v. Bank of Wyndmere* (N. D., 1906), 108 N. W. 546. The court, per Engerud, J., said: "Most of the courts now agree that one who purchases a check or draft is bound to satisfy himself that the paper is genuine; and that by indorsing it or presenting it for payment or putting it into circulation before presentation he impliedly asserts that he has performed this duty. Consequently it is held that if it appears that he has neglected this duty, the drawee who has, without actual negligence on his part, paid the forged demand

may recover the money paid from such negligent purchaser. The recovery is permitted in such cases, because, although the drawee was constructively negligent in failing to detect the forgery, yet if the purchaser had performed his duty, the forgery would in all probability have been detected and the fraud defeated. * * * While all these authorities agree that negligence on the part of the purchaser in taking a forged check subjects him to liability for the loss, they are not in accord as to what constitutes such negligence. * * * It must be conceded that the majority of the courts that have passed on the question are committed to the doctrine that the drawee who has paid a spurious check can recover the payment from a good faith holder only when the latter has been negligent. If the

§ 482. **Knowledge—Purchaser of married woman's note.**—Where a statute makes certain provisions as to the debts which a married woman may contract it is obligatory upon the purchaser of a negotiable paper issued by her, and he must take notice of the coverture and the existence or the want of existence of the circumstances and facts that would authorize her to execute a contract such as the statute authorizes.⁵⁸ If the seller of corporate stock knows that it is worthless and carries on negotiations for its sale with the husband who obtains his wife's signature for the purchase price, the circumstances are sufficient to put the seller upon notice that the husband or some one else must have misrepresented the value of the stock or that she was incompetent to protect herself in a business transaction.⁵⁹ A married woman who, at her residence in the state of New Jersey, indorses in blank and solely for the benefit of her husband's promissory note, dated and payable in the state of New York, where it is discounted in good faith, without notice that the indorser was a non-resident, or that the indorsement was made in another state, is estopped from denying that her indorsement is a New York contract and from claiming that it is a New Jersey contract, the laws of which state do not

law of this state is to be determined by the mere weight of authority alone, as evidenced by the decisions in other states, then we should be constrained to hold that this complaint shows no liability on defendant's part, because it does not show that the defendant has been in any degree negligent. However valuable the decisions of courts in other jurisdictions may be as guides to aid us in coming to a correct decision, it can not be admitted that such decisions, however numerous and uniform, conclusively establish the law for this jurisdiction. They are, after all, only arguments in support of the views entertained by the judges who uttered them. Unless the doctrines advocated by them have become part of the law of this state by the adoption of them by positive law or general usage and opinion, they must be received and consid-

ered by us merely as arguments to be weighed, and adopted or rejected according as we deem them sound or unsound. If, in our opinion, a doctrine advocated by the courts of other states is an unwarranted departure from the fundamental principles of law, it is our duty to reject it, unless the rule so advocated, even though fundamentally erroneous, has become part of our common law by general usage and custom; or has been expressly or impliedly made part of our law by statute."

⁵⁸ *Haas v. American Nat. Bank of Austin* (Tex. Civ. App., 1906), 94 S. W. 439, 440.

⁵⁹ *Ditto v. Slaughter* (Ky. Ct. App., 1906), 92 S. W. 2. As to obligation of purchaser of note of married woman to take notice of coverture, see *Haas v. American Nat. Bk. of Austin* (Tex. Civ. App., 1906). 94 S. W. 439.

permit a married woman to become a simple accommodation indorser.⁶⁰

§ 483. Notice—Accommodation paper.—The manner of discounting a note may sufficiently apprise the discounter that the indorsement is for accommodation, as where it is discounted by the maker for his own benefit.⁶¹ If notes are presented for discount by a customer of a trust company at its banking house and such agent states that they were made and delivered to his principal for advances made and there is nothing upon the notes or in the facts known to the company to show that such was not the truth, and there is nothing improbable in the fact, there is nothing to charge the party so discounting the notes with notice of their true character, as notes executed by a corporation for accommodation and so unenforceable against it; nor would such notice be chargeable from the form of the execution and indorsement where the notes were payable to the corporation's order and indorsed with the name of the corporation, and then with the names of the president and treasurer individually, although said corporation was one having its place of business in another state and said notes having been thus made and indorsed were delivered to the vice-president who, without consideration, indorsed and delivered them to a firm and co-partnership in the same state, composed solely as to membership of the said three corporation officers, but carrying on a separate and distinct business from that of the corporation; nor would the fact that the discounting company knew the relations of the corporation officers as members of the co-partnership, that fact appearing on the face and back of the notes in question, charge such holder with notice of the character of the notes.⁶²

⁶⁰ *Chemical National Bank of New York v. Kellogg*, 183 N. Y. 92, *aff'd* 87 App. Div. 633. See §§ 30 *et seq.* herein.

⁶¹ *First National Bank v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445.

⁶² *In re Troy & Cohoes Shirt Co.*, 136 Fed. 420; *aff'd* on opinion below, 142 Fed. 1038. Ray, Dist. J., said: "It is probably true that, had either the president or secretary and treasurer taken these notes, indorsed as they were, to the International Trust

Company for discount with the statement that he desired the money for his own purposes, or that he was procuring the discount for himself and not for the maker, this would have been notice to the International Trust Company of the invalidity of the notes; but the notes were not presented for discount by any officer of the maker. On the other hand, each note was presented on the day of its date by an agent * * * of an independent company, doing an independent business, who

§ 484. **Notice—Notes of a series.**—A bank which has discounted from time to time a series of notes upon the representations of the

sought to discount the note for the benefit of this independent company. * * * In *Wilson v. the Metropolitan E. R. Co.*, 120 N. Y. 145 (30 N. Y. St. R. 787), the court says, at page 150 (24 N. E. 385, 17 Am. St. Rep. 625): 'Undoubtedly the general rule is that one who receives from an officer of a corporation the notes or securities of such corporation in payment of or as security for, a personal debt of such officer, does so at his own peril. *Prima facie* the act is unlawful, and, unless specially authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation. *Garrard v. Pittsburgh & Connellsville R. Co.*, 29 Pa. 154; *Pendleton v. Fay*, 2 Paige (N. Y.) 202; *Shaw v. Spencer*, 100 Mass. 388, 97 Am. Dec. 107, 1 Am. Rep. 115.' The cashier of a bank is not presumed to have power to bind it as an accommodation indorser on his individual note, and the payee cannot, unless he proves authority to make the indorsement, recover against the bank. *West St. Louis Bank v. Shawnee Bank*, 95 U. S. 557, 24 L. Ed. 490. It is conceded that such are the rules. In *Collins v. Gilbert*, 94 U. S. 753, 24 L. Ed. 170. * * * The headnotes are: '(1) A negotiable instrument, payable to bearer, or indorsed in blank, produced by a transferee suing to recover its contents, is, when received in evidence, clothed with the *prima facie* presumption that he became the holder of it for value at its date in the usual course of business, without notice of anything to impeach his title. (2) The title of a *bona fide* holder for value of an ac-

cepted draft, indorsed in blank, is not affected by the fact that the party from whom he received it before its maturity had possession of it for certain purposes, and misappropriated it.' And in that case, at page 758 of 94 U. S. (24 L. Ed. 170), the court said: 'Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of the transfer, the question whether the party who took it had notice or not is, in general, a question of construction, and must be determined by the court as a matter of law. *Andrews v. Pond*, 13 Pet. (38 U. S.) 65, 10 L. Ed. 61; *Fowler v. Brantley*, 14 Pet. (39 U. S.) 318, 10 L. Ed. 473; *Brown v. Davis*, 3 T. R. 86.' In *Chemical National Bank v. Colwell* (Sup.), 9 N. Y. Supp. 285, * * * it was held that: 'The fact that Jones was a director of the company, and that the proceeds of the note were applied by him to his own use, does not show that the note was made for his accommodation, nor did the possession of the note by him naturally give rise to the question as to whether he was not confederating with the president of the company to make an improper use of the credit and the paper of the company. The note was signed "New York Lumber Company, Limited, D. C. Wheeler, Pres.," and was drawn to the order of "New York Lumber Co., Lim.," and it was indorsed exactly as it was signed. Such a note, so indorsed, though presented for discount by a director of the company twenty days after it bore date, did not, upon its face, suggest that it was an accommoda-

payee and of the firm which made them, that they were given for value, and which were promptly paid, is not chargeable with negligence or

tion note; nor did the possession of it by a director argue that it was used for a dishonest purpose. If, in point of fact, the proceeds of the note went into the company business; or if the note, after having been used in the business of the company, had found its way into the hands of a director (and the bank had nothing before it to show that either state of affairs was unlikely), what reason was there why it should not be discounted? The second headnote is as follows: 'A note of such a company, drawn to its own order, and signed and indorsed by the president when presented for discount, although so presented by a director some time after its date, does not, on its face, suggest that it was an accommodation note, nor does the possession of it by the director tend to show that it was used for a dishonest purpose.' The court cites and considers, also, *Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515 (to the point that "The bad faith in the taker of negotiable paper which will defeat a recovery by him must be something more than a mere failure to inquire into the consideration upon which it was made or accepted, because of rumors or general reputation as to the bad character of the maker or drawer"); *Hotchkiss v. National Banks*, 21 Wall. (88 U. S.) 354, 22 L. Ed. 645; *Atlas Nat. Bank v. Holm*, 71 Fed. 489, 19 C. C. A. 94 (to the point that "In order to deprive one of the character of a *bona fide* purchaser, it is not enough that he neglected to make the inquiry which a prudent man would or ought to have made, but he must

have acted in bad faith. There is no presumption that a purchaser of a note was aware of existing defenses thereto"); *Tod v. Kentucky Union L. Co.*, 57 Fed. 52; *Richmond R. & E. Co. v. Dick*, 52 Fed. 379, 3 C. C. A. 149 (to the point that "a manufacturing corporation received negotiable notes for property sold. The notes were discounted by a banking firm, in which the president of the corporation was a partner, but he had no actual knowledge as to the consideration for the notes, or of the transaction in which they were given. Held, that the mere fact of his connection with the two concerns was not sufficient to affect the banking firm with constructive notice of the consideration for the notes and of an alleged failure thereof"); *National Park Bank of New York v. Remsen* (C. C.), 43 Fed. 226; *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547; *Smith v. Weston*, 159 N. Y. 194, 54 N. E. 38 (to the point that "When a promissory note was not received by the holder from any party prior in order of liability or possession to the indorser, it is not within the rule that when a note is presented by the maker the purchaser has, from that fact, notice that the indorsements were not made in the ordinary course of business"); *Cheever v. The Pittsburg, Shenango & Lake Erie R. Co.*, 150 N. Y. 59, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646; *American Exchange Nat. Bk. v. New York Belting & Packing Co.*, 148 N. Y. 698, 43 N. E. 168; *National*

bad faith, and a verdict is properly directed in its favor on that issue, where it subsequently discounted accommodation notes executed to the same payee by a member of the same firm, in the name of the firm, but after its dissolution, of which fact no sufficient notice was given, where the payee represented that the notes were based upon a valid consideration, and the purchase by the bank of notes at a discount of eight per cent. per annum, when the legal rate of interest is six per cent., is not such an excessive rate of discount as to warrant the inference of bad faith.⁶³ If there are several notes constituting one transaction but due at different times, the fact that one is overdue and unpaid is notice to the purchaser of all to put him on his guard as to each.⁶⁴ Where certain notes have serial numbers on their face and the cashier of a bank knew that the notes were the last of a series, and the consideration thereof and the course of business of the payee were sufficient to justify the conclusion that the notes were given for a single consideration, the bank is not a purchaser for value of such notes.⁶⁵ Knowledge that notes were the first of a series may be imputed to the cashier of a bank which was assignee by purchase of the notes, where the face of the notes showed that they were of a series and the cashier knew for what the notes were given and the

Park Bank of New York v. German American M. W. & S. Co., 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673; Hart v. Potter, 4 Duer (N. Y.) 458; 3 Cook on Corp. (5th ed.), § 761, p. 1978; 1 Cook on Corp. (5th ed.), § 293, p. 640.

⁶³ Second National Bank v. Weston, 172 N. Y. 250, 64 N. E. 949, rev'g 61 N. Y. S. 1147. The court, per Cullen, J., said: "While after proof had been given on behalf of defendants that the notes were fraudulently and illegally issued, it became incumbent upon the plaintiff, in order to succeed, to establish that it had acquired the notes in good faith for value, still the question was solely one of good faith. 'The rights of a holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence.' Magee v. Badger, 34 N. Y. 247; Can-

ajoharie National Bank v. Deefendorf, 123 N. Y. 202; American Exchange National Bank v. New York Belting & P. Co., 148 N. Y. 698. Negligence of the holder is simply material so far as it goes to show lack of good faith. "The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrine, will prevail." Cheever v. Pittsburgh, S. & L. E. R. R. Co., 150 N. Y. 59, 66, 44 N. E. 701.

⁶⁴ Harrell v. Broxton, 78 Ga. 129, 3 S. E. 5.

⁶⁵ Old Nat. Bk. of Ft. Wayne v. Marcy (Ark. 1906), 95 S. W. 145.

payee's course of business; and, although the authorities are not in harmony as to the effect of notice of dishonor in cases of series of notes based upon the same consideration, yet an instruction in an action by the indorsee is not improper that "In order for you to find for the defendant in this case you must find that the plaintiff bank knew that all of these notes were given for a single consideration, or that the bank had such notice of that fact as would amount to bad faith on its part in the purchase of the last three notes."⁶⁶

§ 485. Notice—Corporation—Agency.—A corporation may confer upon its officers or agents larger powers than ordinarily belong to them by holding them out to the public as possessing such powers by habitually permitting them to exercise them, so contracts made by the president or other officers of the corporation may be subsequently ratified and validated.⁶⁷ A person, however, taking negotiable paper of a corporation in payment of the individual obligation of an officer is chargeable with notice and is put upon inquiry as to the authority upon which the paper was issued. But the rule applicable to notes made by officers of a corporation to their own order and used to pay their individual obligations has no application to notes made by the duly authorized officers and payable to a director. Officers of a corporation may not lawfully contract with themselves or use the credit of the corporation for their own benefit individually, but directors not infrequently have business dealings with the corporation and may legitimately do so if they do not vote or use their personal influence with the other directors for their own personal advantage at the expense of the corporation.⁶⁸ This decision reversed and remanded a case in which it was declared that a note or other obligation given by a corporation to an officer is not necessarily void on that account. It may be perfectly lawful and valid. But as it is out of the usual course of business for a corporation to issue its obligations to its officers, the fact that an obligation is so made suggests that it may be irregular, and consequently a third person taking such an obligation, and knowing that the payee is an officer of the maker corporation, is put upon his inquiry as to whether or not the obligation has been lawfully issued. There is no reason why this rule should not

⁶⁶ *Old National Bk. of Ft. Wayne Co.*, 113 App. Div. 103, 98 N. Y. v. Marcy (Ark., 1906), 95 S. W. 145. Supp. 1026; rev'g 94 N. Y. Supp.

⁶⁷ *Carrington v. Turner* (Md., 524. Substantially the language of 1905), 61 Atl. 324. Laughlin, J.

⁶⁸ *Orr v. South Amboy Terra Cotta*

apply as well to directors as to any other officer. When the note or obligation shows upon its face that it is made to an officer, the note itself conveys the notice to all persons into whose hands it may come. When, as in this case, it is made to a person without designation indicating that he is an officer, the transferee may or may not know the fact from other sources. If he does know it, as the appellants did in this case, he is put upon his inquiry; and if it afterward turns out that the obligation was subject to legal infirmity at its inception, he cannot avoid the effect of the infirmity by claiming to be a *bona fide* holder without notice.⁶⁹ Again, the question of *bona fides* has been applied to bank or cashiers' drafts which are declared to have almost acquired the characteristics of money. So long as they are drawn on behalf of a solvent bank and upon a solvent drawee and signed by one of the officers usually signing such instruments, and the fact that such a draft was drawn by a cashier directly in favor of his own creditor and sent to that creditor by him, would not naturally give rise to the suspicion that there was anything irregular, fraudulent or wrong in the conduct of the cashier. This principle was applied to a case where a county treasurer owed the state money for taxes which he had collected from the county and neglected to pay over and payment had been demanded. He was also cashier of a national bank and under his authority as such cashier he drew a draft upon blanks in his possession upon a correspondent bank in New York, payable to the order of the comptroller and sent it to him in payment of the taxes so due from him to the state. The comptroller took the draft in good faith and without knowledge of its wrongful and unauthorized issuance, indorsed the draft, and obtained the amount from the said drawee and credited it to said treasurer in discharge of taxes. It was paid by said drawee from moneys belonging to the bank of which the debtor for taxes was cashier, who drew such draft without paying therefor or without any charge against himself in favor of the bank. He thereafter absconded and the bank made a claim against the state to recover back the amount and the court held that the state was not liable to refund the amount of the draft. The court, however, said that the question whether the state was a holder of the draft for value

⁶⁹ Opinion of court, per Scott, P. J., in *Orr v. South Amboy Terra Cotta Co.*, 94 N. Y. Supp. 524, 47 Misc. 604, aff'g 92 N. Y. Supp. 521, said: "I am of the opinion that the law ought to be as MacLean, J., suggests, but that it is as Scott, P. J., decides." Case was, however, reversed, see last preceding note.

or not did not arise and that the case was not one of the diversion of commercial paper signed by one for the accommodation of another.⁷⁰

§ 486. Same subject.—A transferee of a note is held to be entitled to recover thereon, even though it was given by a corporation to its president for advancements of moneys and payments of subsisting notes indorsed by him and upon which he was liable, said advancements and payments being merged in the note given to him and constituting an actual indebtedness.⁷¹ But where the president of a bank

⁷⁰Goshen Nat. Bank v. State, 141 N. Y. 379, 57 N. Y. St. R. 597, 36 N. E. 316. Considered, quoted from and principle applied to a similar case in Hathaway v. Delaware County, 93 N. Y. Supp. 436, 103 App. Div. 179, Houghton, J., dissenting. The court in this case also cites, in its opinion, Campbell v. Upton, 73 N. Y. Supp. 1084, 66 App. Div. 434, aff'd 171 N. Y. 644, 63 N. E. 1115. But the court says, however, "I recognize the fact that a very large amount of the business of the country is done through drafts purchased from banks, and which are made payable directly to the creditor of the one who makes the purchase, and yet I would be inclined to hold that upon its face such a draft discredits the claim that the alleged purchaser has any ownership in it, were it not for the decision in the Goshen case above cited.

⁷¹First National Bank of Binghamton v. Commercial Travelers' Home Assoc., 108 N. Y. App. Div. 78; aff'd (mem.) 185 N. Y. 575. In this case, in addition to the point above decided, there was a ratification by the corporation. The court, per Houghton, J., said: "With respect to the consideration, irrespective of any presumption which arises in plaintiff's favor by reason of the negotiability of the instrument, and the taking of it without notice, there

is no question. * * * The president of a corporation, in the absence of bad faith, has the right to take obligations or security from his corporation for an actual indebtedness to himself (Duncomb v. New York, Housatonic & N. R. Co., 88 N. Y. 1).

* * * Defendant was a membership corporation without stock.

* * * If the defendant can be deemed a business corporation there can be no question but its board of managers would have power to appoint an executive committee of their own number to transact business of the corporation during the interval between meetings of the board, and that this business might involve the giving of negotiable notes for legitimate indebtedness incurred (Sheridan Electric Light Co. v. Chatham Nat. Bank, 127 N. Y. 517, 522, 40 N. Y. St. R. 31, 28 N. E. 467, aff'g 52 Hun 575, 24 N. Y. St. R. 622, 5 N. Y. Supp. 529). * * * Stockholders of a corporation may subsequently ratify the acts and validate the originally unauthorized transactions of its officers (Kent v. Quicksilver Mining Co., 78 N. Y. 159; Martin v. Niagara Falls Paper Mfg. Co., 122 N. Y. 165, 172, 33 N. Y. St. R. 318, 25 N. E. 303, aff'g 44 Hun 130, 8 N. Y. St. R. 265, 26 W. D. 251). If this be so of the stockholders of an ordinary stock corporation, it is doubly true

and payee of a note in procuring its purchase by the bank acts solely and individually in his own behalf and at arm's length to the bank his knowledge is not the knowledge of the bank so as to affect it with any constructive notice of defenses as a purchaser, even though the purchase was made by vote of the directors, the president being absent, and no actual knowledge of defenses being chargeable to the bank. The same rule also applies to a former secretary who obtained his knowledge while acting for the bank and who was absent at the directors' meeting, and also applies to the secretary elected in his place on the day the bank acted and who presented the note as agent of the president.⁷² Again, where the president of a corporation was vice-president of a bank and a stockholder therein and the secretary of said corporation was a director and stockholder of the bank and the bank discounted paper of the corporation, but in discounting the same it was represented by its president and the corporation was represented by its secretary, such facts do not militate against the *bona fide* character of the bank's holding of such paper, where there was nothing else to put the bank on inquiry, since the officers of the corporation must be held as strangers to the bank who would conceal from the bank any knowledge possessed by them as to any infirmity in the note. If an "officer of a corporation is thus dealing with them in his own interest opposed to theirs, he must not be held to represent them in the transaction, so as to charge them with the knowledge he may possess but which is not communicated to them, and which they do not otherwise possess of facts derogatory to the title he conveys."⁷³ So the facts that the president of a bank is a stockholder, and the cashier a

of a membership corporation. * * * The defendant had had Green's (president) money. It had obtained credit by his indorsements of its notes. Those notes, as well as the money advanced by him, were recognized as subsisting obligations against the corporation. Payment of the money loaned and of the notes outstanding could have been enforced. The giving of the note to him upon his paying the outstanding obligations upon which he was liable as indorser cast no additional burden upon the corporation and took away none of its property. The

board of managers had been authorized to even execute a mortgage upon the defendant's property to secure the same indebtedness. Instead of doing that, a man was found willing to take a simple promissory note, which it would appear in fairness the defendant should pay."

⁷² McDonald v. Randall, 139 Cal. 246, 72 Pac. 997, Beatty, C. J., dissenting.

⁷³ Holm v. Atlas Nat. Bk., 84 Fed. 119, aff'g Atlas Nat. Bank v. Holm, 71 Fed. 489.

stockholder and secretary, of a corporation which is the payee of a note transferred to the bank does not charge the bank with constructive notice of defenses of the maker against the corporation payee, when either the president or cashier had actual notice.⁷⁴ Where an agent is in lawful possession of checks of his principal with a clear right to indorse them in the latter's name and after indorsing them he unlawfully diverts them to his own use by delivering them to a broker to be credited to his own speculative stock account, and they are transferred to a bank in the regular course of business for collection and the bank receives them in good faith, without notice, knowledge, or suspicion tending to impeach the checks, and collects the proceeds and without notice pays them over to the broker, an action for conversion will not lie against said bank in favor of the principal; but the broker who had knowledge and notice of the agent's unlawful act is liable for the amount of the checks to the principal. In such a case the indorsements were held not forgeries under the negotiable instruments law.⁷⁵

§ 487. Corporation indorsement—Accommodation paper.—Where a corporation engaged in business has implied power to make negotiable paper for use within the scope of its business, but it has no power, express or implied, to become a party to bills or notes for the accommodation of others, such paper is valid and enforceable only in the hands of a holder taking the same before maturity, *bona fide* and without notice. The general doctrine of the law is that where a corporation has power under any circumstances to issue negotiable paper, a *bona fide* holder has the right to presume that it was issued under the circumstances which give the requisite authority, and such paper is no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. This doctrine is applied to commercial paper made by a corporation for the accommodation of a third party when in the hands of a *bona fide* holder, who has discounted it before maturity on the faith of its being business paper.⁷⁶ So when a person receives a note for the debt of another

⁷⁴ Iowa Nat. Bk. of Ottumwa v. Sherman & Bratager, 17 S. D. 396, 97 N. W. 12.

⁷⁵ Salen v. Bank of State of New York, 97 N. Y. Supp. 361; Negot. Inst. Law 1897, c. 612, § 42.

⁷⁶ National Bank of Republic v. Young, 41 N. J. Eq. 531, 535, per De-

pue, J., citing Supervisors v. Schenck, 5 Wall. (72 U. S.) 772, 784, 18 L. Ed. 556; Gelpcke v. City of Dubuque, 1 Wall. (68 U. S.) 175, 203, 17 L. Ed. 520; Monument National Bank v. Globe Works, 101 Mass. 57; Bird v. Daggett, 97 Mass. 494; Hackensack Water Co. v. De

which bears the indorsement of a third person or corporation not in the chain of title is charged with notice that the indorsement is an accommodation indorsement, and a person receiving such paper either knowing or charged with knowledge of the fact that it is accommodation paper cannot recover of a corporation in an action against it as indorser, an officer of a corporation having no power in the absence of special authority to execute accommodation paper in the corporate name.⁷⁷

§ 488. **Notice—Purchaser of bonds.**—If a person has distinct notice of the fact that the pledgor of negotiable securities is not the owner of the bonds nor entitled to pledge them for personal advances made to him and he makes advances subsequent to such notice he is not a *bona fide* holder; but it is not necessary in order to attack the *bona fides* of the holder of negotiable securities that he should have express notice of the particular individual who is the real owner of the securities. If the transferee or pledgee had notice that such bonds had been stolen or fraudulently misapplied he is chargeable with bad faith, even though he had no notice from the particular individual from whom they had been fraudulently obtained, nor need the purchaser have notice of the particular fraud, and if the proof shows that paper has been fraudulently, illegally or feloniously obtained from its owner or maker, then the burden of proving good faith is upon the party asserting title as a *bona fide* holder. The question of good faith or *bona fides* is the issue, not the nature of a third party's title to the paper, and if facts are proven which, before the actual advances had been made, would sustain a finding of bad faith or fraud as against the true owner, the person receiving the paper or securities is not a *bona fide* holder.⁷⁸ In a case in the United States Circuit Court of Appeals the following points were decided: (1) An innocent purchaser of municipal bonds, which recite that they are issued in pursuance of

Kay, 36 N. J. Eq. 548; Mechanics' Bkg. Assn. v. White Lead Co., 35 N. Y. 505; 1 Daniel Neg. Inst., §§ 382, 386; Green's Brice's Ultra Vires, 255, 272.

⁷⁷ Pelton v. Spider Lake Sawmill and Lumber Co., 117 Wis. 569, 94 N. W. 293.

⁷⁸ Perth Amboy Mut. Loan, H. & B. Assn. v. Chapman, 81 N. Y. Supp.

38, 43, 80 App. Div. 556, per Ingraham, J. (case aff'd [mem.], 173 N. Y. 558, 70 N. E. 1108), citing Canajoharie Nat. Bk. v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836, 1 Daniel Negot. Inst., § 799; 4 Am. & Eng. Ency. of Law (2d ed.) 303.

an act of the legislature, which authorized their issue for a lawful purpose, and which also recite that they are issued in pursuance of an ordinance or resolution of a given date or title, which, if read, would disclose the fact that they are issued for an unlawful purpose, is not chargeable with notice of the terms or contents of the ordinance or resolutions. (2) A recital in school district bonds, that they are issued in pursuance of a lawful refunding act and of a resolution of a proper board, designated by its date, imports that they were issued in pursuance of a lawful resolution and of just and proper action of the board; and it estops the district, as against an innocent purchaser, from defeating the bonds, on the ground that they were issued for a fictitious, invalid, or unconstitutional claim, although that fact was disclosed by the resolution, the date of which was recited in the bonds. (3) A recital in the bonds of a school district, that they are issued in pursuance of a lawful refunding act, which authorizes the issue of bonds to fund the debt of the district, conclusively estops the *quasi* municipality from defeating the bonds in the hands of an innocent purchaser, on the ground that it had no fundable debt, or that the debt refunded was unconstitutional, fictitious, or invalid. (4) Funding bonds neither create nor increase the indebtedness of a municipality, but merely change its form. (5) The certificate upon the face of municipal bonds, that they have been issued in pursuance of legislative authority, for the purpose of funding the indebtedness of the municipality, is a declaration that they have been issued for the purpose of funding a valid debt in the method prescribed by law, and that they neither create nor increase any indebtedness of the municipality, and, as against a *bona fide* purchaser, they estop the municipality from denying this declaration.⁷⁹ The court, per Sanborn, C. J., said: "Is a *bona fide* purchaser of municipal bonds, which recite that they were issued in pursuance of a statute authorizing the municipality to issue them for a lawful purpose, and in conformity with an ordinance or a resolution of a specified date, which disclosed the fact that they are issued for an unlawful purpose, charged with notice of the terms and contents of the ordinance or resolution? The question is not new, and the answer to it is to be found in the opinions of the federal courts. In the earlier decisions of this court, and in at least one of those of the circuit court of appeals of the seventh circuit, this question was answered in the affirmative.⁸⁰ But after the decision of

⁷⁹ *Fairfield v. Rural Independent School District*, 116 Fed. 838, 54 C. C. A. 342, s. c. 187 U. S. 643.

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⁸⁰ Citing *National Bank of Commerce v. Town of Granada*, 54 Fed. 100, 4 C. C. A. 212; *Hinkley v. City*

the supreme court in *Town of Evansville v. Dennett*,⁸¹ and after a careful reconsideration of the question, in view of the opinion in that case, those earlier cases were overruled, and the proposition was announced to which this court has since adhered. It is that the recital in municipal bonds that they were issued in accordance with the provisions of the enabling statute imports that they were sent forth in pursuance of a lawful and proper resolution or ordinance, and of just and proper action by the governing boards of the municipality. It relieves the innocent purchaser of all inquiry, notice, and knowledge of the actual action and record of the board or council, and estops the municipality from denying that proper action was taken and that a lawful resolution or ordinance was passed."⁸² Where the bonds of an irrigation district contained recitals showing that they were regularly issued by authority of, pursuant to, and after a full compliance with all the requirements of the statute, the holder of such bonds is protected by the recitals and had a right to purchase them from any one who could lawfully have been the owner thereof, nor would the fact that the bonds stood in the name of the president of the corporation constitute a suspicious circumstance necessitating inquiry nor impeach the *bona fide* character of the purchaser's ownership, nor in such case would the defense be available that there were irregularities in the issuance of the bonds rendering them invalid, since the rule applies that the circumstances must be such as not merely to create suspicion in the mind of an ordinarily prudent man, but facts must have come to the notice of the holder or his agent of such a nature that a neglect to further inquire would in itself constitute evidence of bad faith.⁸³ Again, a bank to which stolen coupon bonds, payable to bearer, have been pledged, as collateral security for a loan, by the thief in the ordinary course of business, without notice to the bank of any infirmity in the title, and without any circumstances to put the bank

of Arkansas City, 69 Fed. 768, 773, 16 C. C. A. 395, 400; *Port v. Pulaski Co.*, 1 C. C. A. 405, 49 Fed. 628.

⁸¹ 161 U. S. 434, 439, 443, 16 Sup. Ct. 613, 40 L. Ed. 760.

⁸² Citing *Board of Commissioners of Haskell Co. v. National Life Ins. Co.*, 32 C. C. A. 591, 594, 90 Fed. 228, 231; *Hackett v. City of Ottawa*,

99 U. S. 86, 95, 25 L. Ed. 363; *Town of Evansville v. Dennett*, 161 U. S. 434, 439, 16 Sup. Ct. 613, 40 L. Ed. 760; *Waite v. City of Santa Cruz*, 22 Sup. Ct. 327, 333, 46 L. Ed. 552; *Wesson v. Saline Co.*, 73 Fed. 917, 919, 20 C. C. A. 227, 229.

⁸³ *Perris Irrigation District v. Thompson*, 116 Fed. 832, 54 C. C. A. 336, dismissed in error 196 U. S. 637.

on inquiry, takes a good title thereto as against him from whom they were stolen.⁸⁴

§ 489. **Transferee of bona fide holder—Notice.**—The innocent holder of negotiable paper may transfer the same for value to one with notice of defenses, and the transferee, where he is not himself a party to any fraud or illegality affecting the paper, will take it free from equities and defenses to the extent that he has all the rights of and obtains as good a title as his immediate indorser possessed.⁸⁵ So, under a Louisiana decision, where a *bona fide* holder who took the note for value, in good faith, before maturity, transfers the same, and the transferee is possessed of information as to the infirmity of the origin of the note, still the latter acquires as good a title as his immediate indorser had, who, subsequently to becoming possessed of the note, learned of its infirmities, and the note is not thereby vitiated.⁸⁶ But a payee does not, by repurchasing paper from a *bona fide* holder to whom he had sold or transferred it, obtain any better title or right

⁸⁴ *Cochran v. Foxchase Bank*, 209 Pa. 34, 58 Atl. 117.

⁸⁵ *United States*.—*Gunnison County v. E. H. Rollins & Sons*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689, rev'g 80 Fed. 692, 49 U. S. App. 399.

Georgia.—*Weil v. Carswell*, 119 Ga. 873, 47 S. E. 217, under Civ. Code 1895, § 3938. See this case also as to when rule not applicable.

Illinois.—*Central School Supply House v. Donovan*, 70 Ill. App. 208.

Indiana.—*Thomas v. Ruddell*, 66 Ind. 326.

Iowa.—*Riegel v. Ormsby*, 111 Iowa 10, 82 N. W. 432.

Kansas.—*McFarland v. State Bk.*, 7 Kan. App. 722, 52 Pac. 110.

Louisiana.—*Hillard v. Taylor*, 114 La. 883, 38 So. 594.

Maryland.—*Black v. First Nat. Bank*, 96 Md. 399, 54 Atl. 88.

Massachusetts.—*Symonds v. Riley*, 188 Mass. 470, 74 N. E. 926.

Missouri.—*Griswold v. Bueckle*,

72 Mo. App. 53; *Longford v. Varner*, 65 Mo. App. 370.

Nebraska.—*Jones v. Wiesen*, 50 Neb. 243, 69 N. W. 762.

New York.—*Jennings v. Carlucci*, 87 N. Y. Supp. 475.

Pennsylvania.—*Liebig Mfg. Co. v. Hill*, 9 Pa. Super. Ct. 469, 16 Lanc. L. Rev. 121, 43 W. N. C. 497.

Texas.—*Hollimon v. Karger*, 30 Tex. Civ. App. 558, 71 S. W. 299.

Virginia.—*Aragon Coffee Co. v. Rogers (Va.)*, 52 S. E. 843. See this case also (noted in this section) as to when rule does not apply.

Washington.—*Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254.

Wisconsin.—*Prentiss v. Strand*, 116 Wis. 647, 93 N. W. 816.

Canada.—*Bellemare v. Gray*, 16 Rap. Jud. Que. C. S. 581.

⁸⁶ *Hillard v. Taylor*, 114 La. 883, 38 So. 594.

than he originally possessed.⁸⁷ Nor does an agent of the payee, by becoming the transferee of a holder in due course, take free from equities.⁸⁸

⁸⁷ Hoyer v. Kalashian, (R. I.), 46 Atl. 271; Aragon Coffee Co. v. Rogers (Va.), 52 S. E. 843; Andrews v. Robertson, 111 Wis. 334, 87 N. W. 190, 54 L. R. A. 673.

⁸⁸ Battersbee v. Calkins, 128 Mich. 569, 87 N. W. 760, 8 Det. Leg. N. 778.

CHAPTER XXII.

WANT OF PRESENTMENT; PRESENTMENT FOR ACCEPTANCE.

Sec.	Sec.
490. When presentment must be made—Fixing maturity of instrument.	495. Effect of presentment made unnecessarily — Presentment before due.
491. Agreement as to acceptance or presentment—Want of funds — Promise to accept.	496. Release of drawer and indorser — Presentment or negotiation in reasonable time.
492. Acceptance not refused—Time desired—Want of funds.	497. Presentment how made—By whom.
493. Presentment after refusal to accept.	498. Same subject—Time and place.
494. When presentment unnecessary.	499. Same subject—To whom.
	500. Acceptance of order on committee.
	501. Where presentment is excused.

§ 490. When presentment must be made—Fixing maturity of instrument.—Presentment for acceptance must be made: where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or where the bill expressly stipulates that it shall be presented for acceptance; or where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable.¹ No debt accrues upon a bill payable after sight until a presentment for payment.² And where a bill is payable at a certain

¹ Negot. Inst. Law, § 240; Bills of Exch. Act, § 39, Appendix herein.

² Holmes v. Kerrison, 2 Taunt. 323.

It is necessary to have bills payable after sight presented for acceptance to give them a date. Crosby v. Morton, 7 La. 227, 13 La. (O. S.) 357.

A promissory note made in the following form: "I promise to pay

to M. A. D. or bearer on demand the sum of £16 at sight," necessitates presentment for sight before an action is maintainable. Dixon v. Nuttall, 1 Crompt. Mees. & Ros. 306, 4 Tyrwh. 1013.

Before a bill payable one day after sight can be legally protested for non-payment it must be presented for acceptance, then one day

time after date, it is not absolutely necessary to have it accepted, an acceptance being only necessary to fix the period of payment where a bill is payable at sight, or at so many days after sight or demand, or after a certain event. It will suffice that a demand be made of the drawees at maturity, and notice given to the drawer in case of their default.³ A post-dated draft, purporting to be payable at sight, is for all the legal purposes of presentment, demand, protest and payment, a draft payable a certain time after date. But a post-dated bill differs also from a bill payable a corresponding number of days after it is drawn, and although the question of the right to days of grace might be settled by the terms of the bill itself, an important difference would exist in this that the time bill would be subject to be forwarded for acceptance while the post-dated bill would not. The latter must rest upon the drawer's responsibility until the time of date arrives. It could not be dishonored by refusal to accept it before its date, because the drawer does not undertake to have funds in the drawee's hands to meet it before that day arrives; and the drawee, if he were in funds to meet it, could not retain them for the purpose as against other bills drawn and payable before the date arrived.⁴ Again, if in pursuance of an agreement that insurance premiums are to be paid by sight drafts, a draft is put in the form of a sight draft, and the paper is to every legal intent a draft for acceptance, it is not due until the expiration of days of grace which are to be allowed after presentment and acceptance, as the time of payment cannot be known until acceptance, so that presentment for acceptance is due before default in payment will be incurred.⁵

§ 491. Agreement as to acceptance or presentment—Want of funds—Promise to accept.—If the holder of a bill of exchange, at the time of taking the bill, knew that the drawee had not funds in his hands belonging to the drawer, and took the bill on the promise of the drawee to accept it, expecting to receive funds from the drawer; the promise of the drawee to accept the bill constitutes a valid con-

allowed for the bill to mature, after it was shown to the drawee, and three days of grace. *Craig v. Price*, 23 Ark. 633.

³ *Commercial Bank of Natchez v. Perry*, 10 Rob. (La.) 61, 43 Am. Dec. 168.

⁴ *New York Iron Mine v. Citizens'*

Bank, 44 Mich. 344, 357, 358, per Cooley, J., citing *Godin v. Bank of Commonwealth*, 6 Duer (N. Y.) 76, 70 Pa. St. 474, 476.

⁵ *Burrus v. Life Insurance Company of Virginia*, 124 N. C. 9, 32 S. E. 323.

tract between the parties, notwithstanding the failure of the drawer to place funds in his hands. The acceptance of the drawee of a bill, binds him, although it is known to the holder that he has no funds in his hands. It is sufficient that the holder trusts to such acceptance.⁶ And where sight drafts were purchased under an agreement that if not used for a specified purpose they could be returned to the bank drawing the same and credit given, the drafts being drawn in April, the drawee being solvent until July of that year, but no presentment was made at any time, nor any offer to return the drafts to the bank until the succeeding December, it was held that as the drafts had neither been presented nor returned to the bank in a reasonable time the holder must bear the loss.⁷ A letter written to the drawer within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who takes the bill on the credit of the letter, a virtual acceptance, and binds the person who makes the promise, even though there are no funds in his hands belonging to the drawer, if the bill be drawn payable at a fixed time, and not at or after sight. If in such case the bill be drawn payable at or after sight, and is for the entire amount named in the letter, the payee can maintain an action against the drawee as the equitable assignee of the fund; as it seems in such case the drawee would not be liable as acceptor, unless the draft was drawn in precise accordance with the terms of the letter.⁸ But where one indorsed a bill of exchange, for

⁶ *Townsley v. Sumrall*, 2 Pet. (U. S.) 170.

⁷ *Collingwood v. The Merchants' Bank*, 15 Neb. 118.

Agreement to accept—Payment of debt of another.—If a person undertake to accept a bill, in consideration that another will purchase one already drawn, or to be thereafter drawn, and as an inducement to the purchaser to take it; and the bill is purchased upon the credit of such promise for a sufficient consideration, such promise to accept is binding upon the party. It is an original promise to the purchaser, not merely a promise for the debt of another; and having a sufficient consideration to support it, in rea-

son and justice as well as in law, it ought to bind him. *Townsley v. Sumrall*, 2 Pet. (U. S.) 170.

⁸ *Nimocks v. Woody*, 97 N. C. 1, 2 S. E. 249, 2 Am. St. Rep. 268.

Letter promising to accept draft to be drawn—Acceptance to fix maturity—Necessity of presentment.—“It must be admitted that there is some diversity in the rulings in England and in this country as to whether a promise made in writing to accept and pay a draft for a specified amount, yet to be drawn, and communicated to one who, upon the faith of such promise, becomes the payee of it, when drawn for value, is an acceptance in law, so that an action upon it can be main-

the accommodation of the drawer, who negotiated it on an agreement, not assented to nor known by the indorser, that it should not be presented to the drawee for acceptance, until maturity, and it was ac-

tained by the latter. In the case of *The Bank of Ireland v. Archer*, 11 M. & W. (Ex.) 383, it is decided that such a result does not follow, and there are decisions in some of the state courts to the same effect. But in the well-considered and elaborate opinion of Chief Justice Marshall in *Coolidge v. Payson*, 2 Wheat. 63-75, speaking in reference to the distinction between the cases of a bill drawn upon, and a bill drawn after such promise, it is said: 'The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept as an acceptance is that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill as by one written afterwards.' The general rule is then declared in these words: 'Upon a review of the cases which are reported, the court is of opinion, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise.' The same doctrine is laid down in *Townslley v. Sumrall*, 2 Peters 170-185, by Justice Story, and it is said to prevail when there are no funds of the drawer in the drawee's hands, and the action may be brought, says Wilson, J., in *Cassell v. Davis*, 1 Black's C. C. Reports, by any one who makes advances on the bill

upon such assurance of payment. To the same effect is 1 Daniel Neg. Instruments, §§ 559, 560, 561; and 1 Edw. on Bills, Notes, etc., § 567, and following; *Plummer v. Leyman*, 49 Me. 229; *Stiman v. Harrison*, 42 Penn. St. 49. We are referred, however, to § 562, in Mr. Daniel's first volume, who says: 'It seems applicable (the rule) to the cases of bills payable on demand, or at a fixed time after date, and not to bills payable at or after sight, for in order to constitute acceptance in the latter, a presentment is indispensable, since the time the bill is to run cannot otherwise be ascertained.' This may be true in a strict sense, an actual presentment and acceptance being necessary to determine the time of payment, as in a single draft, days of grace are allowed; but the presentation in this case has been made, and not only acceptance refused, but liability denied altogether. The present draft is in precise accord with the direction in the letter, and the plaintiff has advanced his money upon the assurance of its being met, and the governing general rule is, that the drawee thereby undertakes the obligations of the acceptor, and we see no reason why it should not be so in any form of a draft, made in pursuance of the terms of the promise, though in the exceptional cases an actual presentation may be necessary to fix the time of payment and authorize the action upon it as an acceptance." *Nimocks v. Woody*, 97 N. C. 5, 6, 2 S. E. 249, 2 Am. St. Rep. 269, per Smith, C. J.

cordingly first presented to the drawee at maturity, and there dishonored; it was held that the indorser was not thereby discharged.⁹

§ 492. Acceptance not refused—Time desired—Want of funds.—

If a drawee of a bill of exchange does not refuse acceptance, but desires time to examine into the state of his accounts before deciding, he is held entitled to twenty-four hours for that purpose.¹⁰ And where the drawee, on being applied to by the holder of a bill on the day before it became due, informed such holder that he had no effects of the drawer's in his hands, but that they would probably be supplied before the next day, and on the next day the drawer informs the holder that he will endeavor to provide effects and will call upon him again, such facts do not supersede the necessity of a presentment on that day.¹¹

§ 493. Presentment after refusal to accept.—An acceptance being

once refused, the holder need not present the bill for payment at the time appointed on its face for its maturity; the liability of the parties is already fixed by the non-acceptance and notice.¹² And if a bill of exchange, payable in a specified length of time after date or on a day certain, be presented for acceptance on the day it is due, and if acceptance is then refused, no further demand of payment is necessary to charge the drawer or indorser.¹³

§ 494. When presentment unnecessary.—Presentment for acceptance is unnecessary in case of a bill of exchange payable at a future

time on a day certain or at a certain period or given time after date, but payment may be at once demanded at its maturity.¹⁴ In a Mary-

⁹ Fall River Union Bank v. Willard, 5 Metc. (Mass.) 216.

¹⁰ Case v. Burt, 15 Mich. 82.

¹¹ Prideaux v. Collier, 2 Stark. 57.

¹² Evans v. Bridges, 4 Port. (Ala.) 351.

¹³ Plato v. Reynolds, 27 N. Y. 586.

¹⁴ United States.—Townslley v. Sumrall, 2 Pet. (U. S.) 170. (Bills of exchange, payable at a given time after date, need not be presented for acceptance at all; and payment may at once be demanded at their maturity.)

Georgia.—Davies v. Byrne, 10 Ga. 329. (It is not necessary to present a foreign bill for acceptance, when it is payable at a time certain.)

Illinois.—Taylor v. Bank of Illinois, 7 T. B. Mon. (Ky.) 576. (A bill payable so many days after date, need not be presented till due; but if presented for acceptance before, and dishonored, there must be immediate notice.)

Missouri.—Harrison v. Copeland, 8 Mo. 268.

Pennsylvania.—House v. Adams

land case the defendants drew a bill of exchange, payable in London, dated the 22d of May, 1868, at sixty days' sight, on Joseph and Charles Sturge, Birmingham; the bill, on its face, was drawn against a cargo of wheat per the "Ocean Belle;" on the day of the date of the bill the drawers sold and indorsed it to the plaintiffs, and on the same day, by letter of hypothecation, lodged the bill of lading for the cargo with them, as collateral security for the acceptance and payment of the bill, and authorized them, in case they thought it necessary, to place said wheat on its arrival in the hands of their brokers for immediate sale, and to apply the proceeds toward the payment of the bill. The drawees declined to accept the bill, unless they were put in possession of the bill of lading of the cargo against which it was drawn. On the non-acceptance of the bill, the cargo was sold by the London agents of the plaintiffs, and the net proceeds were applied toward the payment of the bill, but being insufficient, suit was brought against the defendants to recover the deficiency and statutory damages, after notice to them of all the facts, and demand of payment. It was held that the drawees were not bound to accept the bill of exchange, without the delivery to them of the bill of lading; that the defendants gave the plaintiffs the legal right to retain the bill of lading until the maturity of the bill of exchange; and the defendants were not entitled to require formal presentment of the bill of exchange for acceptance, and notice of its non-acceptance.¹⁵

§ 495. Effect of presentment made unnecessarily—Presentment before due.—Although it is not necessary to present a bill made payable at a given time after date before its maturity, yet if presentment is made and acceptance refused, the bill must be protested and notice given to all parties.¹⁶ The undertaking of the parties drawing

& Co., 48 Pa. St. 261, 266. (Presentment for acceptance is not necessary in the case of a bill of exchange payable at a certain period after date, and in Pennsylvania the drawer is not discharged for want of notice of non-acceptance provided he receives notice of non-payment. Per Read, J.)

Vermont.—Bank of Bennington v. Raymond, 12 Vt. 401. (The holder of a bill of exchange, payable at a future time, and on a day certain,

is not bound to present it to the drawee for acceptance until it becomes due.)

Bills of exchange payable after date are not required to be presented for acceptance as between the holders and indorsers. *Crosby v. Morton*, 7 La. 227, 13 La. (O. S.) 357.

¹⁵ *Schuchardt v. Hall & Leoney*, 36 Md. 590, 591.

¹⁶ *Carmichael v. Bank of Pennsylvania*, 4 How. (Miss.) 567.

and indorsing a bill of exchange, when it is thrown into circulation, is that the drawee shall both accept and pay it. This engagement of the drawer and indorsers does not oblige the holder to present it for acceptance. If, however, he does present it, and acceptance is refused, it is considered as dishonored, and due notice must be given to all prior parties whom it is desired to charge.¹⁷ Though the holder of a bill of exchange, payable at any number of days after date, is not bound to present the bill for acceptance, but may wait until it becomes due, and then present it for payment, yet if he does present the bill for acceptance, and acceptance is refused, he must give notice to those parties to whom he means to resort for payment, or they will be discharged from all liability.¹⁸

§ 496. Release of drawer and indorser—Presentment or negotiation in reasonable time.—Under the negotiable instruments law, subject to the exceptions therein, it is provided that the holder of a bill which is required by it to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time; and if he fails to do so the drawer and all indorsers are discharged.¹⁹ A bill of exchange payable at sight, or a certain number of days after sight, must, in order to charge the drawer, be presented for acceptance within a reasonable time or the bill should be negotiated or put in circulation. What constitutes a reasonable time depends upon the circumstances of each particular case, such as the nature of the bill, the places where drawn and to be presented, the accessibility of the parties or place, as where the parties are when the bill was drawn, and the distance between the place of drawing the bill and the payee; whether the payee is to be himself the bearer; delay arising from the sickness of the payee; the political condition of the country; or other accident not arising from his own misconduct, and various other circumstances difficult to enumerate. But the consideration upon which the bill arose can have no influence upon the question of diligence.²⁰

¹⁷ *Evans v. Bridges*, 4 Port. (Ala.) 350.

¹⁸ *Harrison v. Copeland*, 8 Mo. 268.

¹⁹ *Negot. Inst. Law*, § 241; *Bills of Exch. Act*, § 40, Appendix herein.

²⁰ *Aymar v. Beers*, 17 Cow. (N. Y.) 705; *Hart v. Smith*, 15 Ala. 807, 50 Am. Dec. 161 (holding that a bill of exchange, payable at sight, is

entitled to days of grace, and a demand of payment, and notice to the drawer, without a previous presentation for acceptance, are insufficient to charge him); *Dumont v. Pope*, 7 Blackf. (Ind.) 367 (holding that to authorize the payee to recover against the drawer of a bill of exchange in which no time for pay-

Where a bill was drawn by a banker in the country on a banker in the town in favor of a certain person, payable after sight, and he indorsed

ment is specified, he must present the bill to the drawee for acceptance or payment within a reasonable time after it is received.)

See *Allen v. Luydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 655, (holding that an agent receiving for collection before maturity, a bill payable on a particular day after date, is held to strict vigilance in making presentment for acceptance; and if chargeable with negligence, is subject to the payment of all damages sustained by the owner.)

In the *United States* it is declared that no absolute rule can be laid down as to the time within which a bill payable a certain number of days after sight must be presented for acceptance, the only rule is that it must be presented within a reasonable time dependent upon the circumstances of the particular case. There is a difference between the case of a bill of exchange, drawn payable at so many days after date, and one drawn payable at so many days after sight, as in the former case it must be presented by the period of its maturity; in the latter it is sufficient if it be presented in a reasonable time. "There is one other limitation or rather illustration of the principle, which is very material. It is thus that the holder is not at liberty to lock up the bill for any length of time in his own possession; but he may put it into circulation, and though it may remain a considerable time in circulation, if there be no unreasonable delay in any of the successive holders of presentment for acceptance is not fatal to the party in case of dishonor." *Wallace v. Agry*, 4

Mason (U. S. C. C.) 336, 345; Fed. Cas. No. 17,096, per Story, J., citing *Muilman v. D'Eguino*, 2 H. Bl. 565; *Goupy v. Harden*, 7 Taunt. 159; *Field v. Nickerson*, 13 Mass. 131; *Kyd on Bills* 117; *Bayley on Bills* (2d ed.) 60; *Chitty on Bills* (5th ed.) 208. In *Alabama* a bill of exchange, whether foreign or inland, payable at sight, must be presented for acceptance within a reasonable time before payment thereof can be demanded, and what is a reasonable time depends upon the circumstances of each particular case. *Knott v. Venable*, 42 Ala. 186, 194. In *Illinois* it has been declared to be a general rule that the holder of a sight draft must put it in circulation or present it for payment at furthest the next business day after its reception, if within the reach of the person on whom it is drawn. *Montelius v. Charles*, 76 Ill. 303, 306. In this case the court quotes as follows from *Muilman v. D'Eguino*, 2 H. Black. 565, *Eyre, C. J.*, said: "Courts have been very cautious in fixing any time for an inland bill, payable at a certain period after sight, to be presented for acceptance, and it seems to me more necessary to be cautious in respect to foreign bills payable in that manner. If, instead of drawing their foreign bills, payable at usances in the old way, merchants choose, for their own convenience, to draw them in this manner, and make the time commence when the holder pleases, I do not see how the courts can lay down any precise rule on the subject. I think, indeed, the holder is bound to present the bill in a reasonable time, in order that

it to the defendants, who indorsed it to the plaintiffs seven days after the date of the bill, and the plaintiffs delayed presentment for four

the period may commence from which the payment is to take place. The question, what is a reasonable time, must depend on the peculiar circumstances of the case, and it must always be for the jury to determine whether laches is imputable to the plaintiff." In *Louisiana* a bill must be presented in a reasonable time; what constitutes such time depends upon the circumstances of each particular case. The holder of a sight draft should not put it in his pocket and delay presentment unnecessarily, confiding in the solvency of the drawee; if he do so, and there is a loss in consequence thereof, he must bear it, and the drawer will be discharged. But the bill may be put in circulation, and in that case much time may elapse whilst it is passing from hand to hand, before presentment, without releasing the drawer. *Richardson v. Fenner*, 10 La. Ann. 600. In *Massachusetts* it is declared that "The draft being payable at sight, it was necessary to present it within a reasonable time after it was received from the indorser by the plaintiffs. They were not bound to forward it immediately, but only to use reasonable diligence in transmitting it. If guilty of no unreasonable or improper delay in its presentation, then, upon its non-payment by the drawees, they had a right to have recourse to the defendant as indorser. *Bytes on Bills* 139; *Mellish v. Rawdon*, 9 Bing. 416, and 2 Moore & Scott 570; *Mullick v. Radakissen*, 9 Moore P. C. 66; *Bridgeport Bank v. Dyer*, 19 Conn. 136. Ordinarily the question whether a presentment was within a reasonable time is a mixed question of

law and fact, to be decided by the jury under proper instructions from the court. And it may vary very much, according to the particular circumstances of each case. If the facts are doubtful, or in dispute, it is the clear duty of the court to submit them to the jury. But when they are clear and uncontradicted, then it is competent for the court to determine whether the reasonable time required by law for the presentment has been exceeded or not. *Gilmore v. Wilbur*, 12 Pick. 124; *Holbrook v. Burt*, 22 Pick. 555; *Spoor v. Spooner*, 12 Met. 285." *Prescott Bank v. Caverly*, 7 Gray (73 Mass.) 221. In *Michigan* a draft payable at sight should be presented for payment within a reasonable time, and a court cannot, as matter of law, say that any delay is reasonable beyond that which is required in the ordinary course of business without special inconvenience to the holder; or by the special circumstances of the particular case. *The Phoenix Ins. Co. v. Allen*, 7 Cooley (11 Mich.) 501. In *Nebraska* it is said that: "A bill must be presented to the drawee for acceptance within a reasonable time, even though the drawer or indorser has sustained no actual loss by the delay, and has continued solvent up to the time of presentment." *Collingwood v. The Merchants' Bank*, 15 Neb. 118, 122, per Maxwell, J. In *New York* it is also declared that: "Though it does not clearly appear whether the drawer had funds of the defendant, at the time of the drawing of the bill, yet he had a right to expect that his bill would be accepted and paid; and it is in

days, the question of unreasonable delay was left to the jury, Lord Tenterden saying in summing up that it might be reasonably inferred

evidence, that it would have been paid, on sight, if it had been presented. Under these circumstances it was necessary for the holders of the bill to present it for acceptance within a reasonable time, and to give due notice of its dishonor to the drawer." *Elting & Shook v. Brinkerhoff*, 2 Hall (N. Y.) 459, per Oakley, J. In *South Carolina* when a bill is drawn, payable within a specified time after sight, it is necessary, in order to fix the period when the bill is to be paid, to present it to the drawee for acceptance. In other cases, it is not incumbent on the holder to present it before it is due. (*Chitty on Bills* 67.) The rule in relation to bills, whether payable at sight or so many days after sight, or in any other manner, is, that due diligence must be used. The holder has no privilege to retain the bill in his possession for such a length of time as may occasion a loss to the drawer, but ought to present the bill as soon as possible, and it must be done within a reasonable time. What is reasonable time depends upon the particular circumstances of the case; and it is for the jury to determine whether any laches is imputable to the holder. As it was incumbent upon the holder of this bill to have presented it for acceptance within a reasonable time; so on refusal to accept, notice must be given as soon as possible to the persons on whom the holder means to resort for payment, or they will, in general, be totally discharged from responsibility. *Fernandez v. Lewis*, 1 McCord (S. C.) 323. In *Texas* it is said that: "It is well settled that in case of a

draft drawn at sight, or so many days after sight, the holder must present it for payment within a reasonable time. And in determining the question of reasonable time, the courts will consider all the circumstances by which the question of diligence can be affected, as, for instance, the distance between the place of residence of the drawer and the place of residence of the drawee, the mail facilities of the country, etc. The general usage of the country in respect to such paper will, also, enter into the consideration of the question. It is also to be remarked that the idea of reasonable time is opposed to the idea of great diligence or promptitude. The question is one of a large class which frequently produce great embarrassment, from the extreme difficulty in many cases of drawing a line by which reasonable time can be separated from laches. One period of time is pronounced, without any hesitation, as reasonable time within which to make presentation of this description of paper; with as little hesitation, a delay to make presentation for another period of time, will be pronounced laches; and, between the two periods, there must necessarily be a tract of time which will fall within the idea of reasonable diligence or laches, according to circumstances, and as to which the law must sometimes pronounce its decisions somewhat arbitrarily." *Nichols v. Blackmore*, 27 Tex. 587, per Bell, J. In *West Virginia* it is the duty of the holder of a bill of exchange payable at sight and entitled to days of grace to put the same into circula-

that it was neither expected or considered necessary to present such a bill as speedily as if it were a bill of any private party; that bills of

tion within a reasonable time or present it to the drawee for acceptance and payment, otherwise the drawer will be discharged from liability. *Thornburg & Sons v. Emmons*, 23 W. Va. 325. The court said in this case: "The courts have, in cases of bills payable at sight, or at any given time after sight, declined to lay down any rule prescribing what is a reasonable time in which they must be presented for acceptance, leaving the question in every case as it arises, to be determined by its own peculiar circumstances, and if the bill be not presented within a reasonable time, the drawer is discharged, although the parties continue solvent, and there is no damage caused by the delay. *Daniel's Neg. Instruments*, § 465; 1 *Wait's Actions and Defenses*, p. 619; *Chitty on Bills* 274; 1 *Parsons' Notes and Bills*, pp. 263, 338, 383. But one of the circumstances affecting the question of what is reasonable time in such case is, whether the bill has been put in, and kept in circulation, for if it has been kept in circulation, the delay of a year or even more would not necessarily amount to negligence. But if the holder retains possession of the bill for an unreasonable time, and thus locks it up from circulation, he makes it his own, and will have no remedy against antecedent parties from or through whom he derived title. *Chitty on Bills* 275; *Robinson v. Ames*, 20 Johns. 146; *Daniel on Negot. Inst.* 434. And it has been held that a sight draft on New York, indorsed to the plaintiff in Wisconsin, and not mailed to New York for presentment for fourteen

days, was prima facie evidence of laches, but might be rebutted. *Walsh v. Dart*, 23 Wis. 334." *Thornburg v. Emmons*, 23 W. Va. 325, 333, per Woods, J. In *Wisconsin* unreasonable delay of the payee of a draft to present it to the drawee, or to notify the drawer of its non-acceptance or non-payment, or to return it to the drawer as refused by the payee, makes the paper the payee's own, and discharges the drawer. *Allan v. Eldred*, 50 Wis. 132. In *England* "The purchaser of a foreign bill of exchange, payable at a certain time after sight, which is publicly offered for negotiation, is not bound to send it by the earliest opportunity to the place of its destination. There is no fixed time when a bill drawn payable at sight or a certain time after, shall be presented to the drawee. But it must be presented within a reasonable time. What is a reasonable time is a question for the jury to decide, from the circumstances of the case. But if the holder of a bill so payable, neither presents it nor puts it in circulation, he is guilty of laches, and cannot recover upon it. It is sufficient, if notice of a bill drawn in England on a person in the East Indies, being dishonored, is sent to England by the first direct and regular mode of conveyance, whether it be by an English or a foreign ship; the holder is not bound to send such notice by the accidental, though earlier conveyance of a foreign ship not destined to this country." *Muilman v. D'Eguino*, 2 H. Bl. 565. A foreign bill of exchange, payable after sight, must be presented for acceptance

this kind were considered a part of the circulation of the country, and that the nature of the bill itself as well as the time the defendants themselves had kept it unaccepted were to be considered upon the question of laches or unreasonable delay.²¹

§ 497. Presentment, how made—By whom.—Presentment for acceptance must be made by or on behalf of the holder.²² Where the holder of an indorsed bill of exchange, which is not accepted by the drawee, merely informs the drawee that he has the bill, but does not actually present it to him for acceptance, and the drawee thereupon tells him that the bill will not be accepted nor paid, the indorser is not thereby discharged, though no notice is given to him of the drawee's declarations.²³ If the holder of a bill of exchange transmits it to his agent for presentment to the drawee, such agent has no right to receive anything short of an explicit and unequivocal acceptance, without giving notice to the holder, as in case of non-acceptance; and he will be liable for any loss the holder may sustain in consequence of his neglect so to do.²⁴

§ 498. Same subject—Time and place.—Presentment for acceptance must be made on a business day and before the bill is overdue.²⁵ A bill of exchange payable in a fixed period from the date,

and even though there is no limited time defined by statute for presentment and no usage of trade to fix the time, still such bill must be presented within a reasonable time. This rule has been adopted for want of a better law not defining the time precisely. How, otherwise than by presentment, can the time a bill has to run be fixed, where it is payable after sight. "The court assumed that the correct principle was laid down fully in the cases of *Mellish v. Rawdon*, 9 Bing. 416, which is in accordance with the prior case of *Muilman v. D'Eguino*, 2 H. Bla. 565, and *Fry v. Hill*, 7 Taunt. 397, that in determining the question of 'reasonable time' for presentment, not the interests of the drawer only, but those of the holder must be taken into account; that the reasonable

time expended in putting the bill into circulation, which is for the interest of the holder, is to be allowed; and that the bill need not be sent for acceptance at the very earliest opportunity, though it must be sent without improper delay." *Mulick v. Radakissen*, 9 Moore P. C. 46, 66, 67, per Baron Parke.

²¹ *Shute v. Robins*, 3 Carr & P. 80.

²² *Negot. Inst. Law*, § 242; *Bills of Exch. Act*, § 41, Appendix herein.

²³ *Fall River Union Bank v. Willard*, 5 Metc. (Mass.) 216.

²⁴ *Walker v. Bank of State of New York*, 9 N. Y. 582.

²⁵ *Negot. Inst. Law*, § 242; *Bills of Exch. Act*, § 41, Appendix herein.

On what days presentment may be made, see *Negot. Inst. Law*, § 243, Appendix herein.

Presentment where time insuffi-

may be presented for acceptance at any time before it becomes due.²⁶ And where bills payable at a particular time were enclosed by letter to the drawee, before they were due, and he advised his correspondent that they were not accepted, it was held a sufficient presentment and refusal to accept.²⁷ But it is held that unless it is shown that the drawer of an order or inland bill sustained injury by the delay, it is sufficient to show presentment or demand at any time.²⁸ If a draft is payable at no particular place in a city or town it must be presented at the maker's residence or place of business, if he has such, and if he has not, then the presence of the instrument in the place is a sufficient presentation.²⁹ Where a draft was drawn on a party having a place of business in a town, but was not made payable at any particular place, and the holder protested it and notified the drawer without having presented it to the acceptor, who had funds in his hands of the drawer sufficient to have paid the draft, it was held that the drawer was discharged from liability by the failure of the holder to present the draft to the acceptor.³⁰

§ 499. Same subject—To whom.—Presentment for acceptance must be made to the drawee or some person authorized to accept or refuse acceptance on his behalf.³¹ The presentment of a bill for acceptance should be to the drawee himself, if he can be found. If to an agent or other person authorized to accept, the fact should appear.³² "The presentment of a bill of exchange or draft must be made to the drawee or acceptor, or to an authorized agent. A personal demand is not always necessary, and it is sufficient to make the demand at the residence or usual place of business of the drawee, where the presentment is for payment. This draft had not been accepted, and therefore the presentment first to be made by the bank was

cient, see *Negot. Inst. Law*, § 244, Appendix herein.

As to reasonable time, see §§ 496, 505–508 herein.

²⁶ *Bachelor v. Priest*, 12 Pick. (29 Mass.) 399.

²⁷ *Carmichael v. Bank of Pennsylvania*, 4 How. (Miss.) 567.

²⁸ *Tryon v. Oxley*, 3 G. Greene (Iowa) 289.

²⁹ *People's Nat. Bank v. Lutterloh*, 95 N. C. 495.

³⁰ *People's Nat. Bank v. Lutterloh*, 95 N. C. 495.

³¹ *Negot. Inst. Law*, § 242; *Bills of Exch. Act*, § 41, Appendix herein.

Presentment to two or more drawees who are not partners, see *Negot. Inst. Law*, § 242; *Bills of Exch. Act*, § 41, Appendix herein.

Presentment where drawee dead, or bankrupt or insolvent, see *Negot. Inst. Law*, § 242; *Bills of Exch. Act*, § 41, Appendix herein.

³² *Sharpe v. Drew*, 9 Ind. 281.

a presentment for acceptance. It was the duty of the bank collector to be careful, not only to present the draft at the usual place of business, but, if the plaintiff was not in, to assure himself that the person to whom he presented the draft for acceptance was the authorized agent of the plaintiff."³³

§ 500. Acceptance of order on committee.—An order drawn upon a committee composed of several persons may be accepted by such persons individually.³⁴

§ 501. Where presentment is excused.—Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases: (1) Where the drawee is dead or has absconded, or is a fictitious person or a person not having capacity to contract by bill; (2) where, after the exercise of reasonable diligence, presentment cannot be made; (3) where, although presentment has been irregular, acceptance has been refused on some other ground.³⁵ A delay in the mail constitutes a sufficient excuse for not presenting for acceptance immediately.³⁶ If, however, there is a delay of fourteen days in mailing a sight draft for presentment for acceptance and payment, and it miscarries, such delay, without sufficient excuse, constitutes laches, as ordinary diligence must be exercised in such cases.³⁷

³³ *Burrus v. Life Insurance Co. of Virginia*, 124 N. C. 9, 32 S. E. 323.

³⁴ *Smith v. Milton*, 133 Mass. 369, C. Allen, J., said: "But it does not appear that the committee differs from any association of individuals; and an order drawn upon it is drawn upon a number of individuals associated together, but not incorporated or co-partners. In such case, although a bill may be treated as dishonored if not accepted by all the drawees, if accepted by a part

it will be a good acceptance as to them. *Byles on Bills* (7th Am. Ed.) 188; *Bayley on Bills* (6th Ed.) 58, 181; *Owen v. Van Uster*, 10 C. B. 318; *Tombeckbee Bank v. Dumell*, 5 *Mason* (U. S. C. C.) 56."

³⁵ *Negot. Inst. Law*, § 245; *Bills of Exch. Act*, § 41, Appendix herein. See §§ 521, 522 herein.

³⁶ *Walsh v. Blatchley*, 6 Wis. 422.

³⁷ *Walsh v. Dart*, 23 Wis. 334, 99 Am. Dec. 177.

CHAPTER XXIII.

WANT OF PRESENTMENT CONTINUED—PRESENTMENT FOR PAYMENT.

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| <p>Sec.</p> <p>502. Want of demand on principal debtor—When presentment necessary to charge drawer and indorsers.</p> <p>503. Same subject continued—Agent—Acceptor—Instances.</p> <p>504. Sureties and guarantors—Parties primarily liable—Demand.</p> <p>505. Time of presentment where note is not and is payable on demand—Reasonable time.</p> <p>506. Same subject, continued.</p> <p>507. Same subject—Notes payable with or without interest.</p> <p>508. Demand note and demand note bearing interest, distinctions abrogated by statute—Presentment—Reasonable time—Question of law or fact—Pleading—Burden of proof.</p> <p>509. Time of maturity—Sunday or holiday—Saturday.</p> <p>510. Same subject, continued.</p> <p>511. Sufficiency of presentment—By whom made—Time when made.</p> | <p>Sec.</p> <p>512. Sufficiency of demand—Bringing suit.</p> <p>513. Sufficiency of presentment—Exhibition and delivery up of instrument.</p> <p>514. Place of presentment.</p> <p>515. Place of presentment, continued.</p> <p>516. Presentment—Instrument payable at bank.</p> <p>517. Same subject, continued.</p> <p>518. Same subject, continued—Insolvency or suspension of bank.</p> <p>519. Presentment to whom—Person primarily liable dead.</p> <p>520. Presentment to whom—Persons primarily liable—Partners—Joint debtors.</p> <p>521. Excuses for delay in presentment.</p> <p>522. Excuses—When presentment dispensed with—Drawer—Indorser.</p> <p>523. Same subject, continued.</p> <p>524. Waiver of presentment and demand.</p> <p>525. Same subject, continued.</p> |
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§ 502. Want of demand on principal debtor—When presentment necessary to charge drawer and indorsers.—The negotiable instruments statute of Washington,¹ which is the same as that of New York,² specifically declares that presentment for payment is not necessary in order to charge persons primarily liable. This is, however, a

¹ Sess. Laws, Wash. 1899, p. 353, § 70.

² Negot. Inst. Law, § 130, see Appendix herein.

mere declaration of the law.³ No demand on co-makers is necessary;⁴ nor upon one who becomes a maker or original promisor by signing his name upon the back of a note before its delivery to the payee;⁵ nor upon a third person who signs his name on the face of the note.⁶ The statute provides, however, that "If the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity and has funds there available for that purpose, such ability and willingness are equivalent to a tender upon his part."⁷ It is further as specifically declared by the statute that pre-

³ *Galbraith v. Shepard* (Wash. 1906), 86 Pac. 1114.

Alabama.—*Clark v. Moses*, 50 Ala. 326; *Montgomery v. Elliott*, 6 Ala.

See also as to maker and acceptor the following cases:

701.

Alabama.—*Hunt v. Johnson*, 96 Ala. 130, 11 So. 387.

Arkansas.—*Pryor v. Wright*, 14 Ark. 189.

California.—*Jones v. Nicholl*, 82 Cal. 32, 22 Pac. 878.

Florida.—*Greeley v. Whitehead*, 35 Fla. 523, 28 L. R. A. 286, 17 So. 643, 48 Am. St. Rep. 258.

Connecticut.—*Jackson v. Packer*, 13 Conn. 342.

Indiana.—*Hartwell v. Chandler*, 5 Blackf. (Ind.) 215.

Illinois.—*Oxman v. Garwood*, 80 Ill. App. 658; *Yeaton v. Burney*, 62 Ill. 61.

Louisiana.—*Thiel v. Conrad*, 21 La. Ann. 214.

Indiana.—*McCullough v. Cook*, 34 Ind. 290.

Maine.—*Lyon v. Williamson*, 27 Me. 149. See *Heslan v. Bergerson*, 94 Me. 395, 47 Atl. 896.

Kentucky.—*Rice v. Hogan*, 8 Dana (Ky.) 134.

Michigan.—*Reeve v. Pack*, 6 Mich. 240.

New York.—*Bush v. Gilmore*, 61 N. Y. Supp. 682, 45 App. Div. 89; *Wolcott v. Van Santvoord*, 17 Johns. (N. Y.) 248.

New Hampshire.—*Otis v. Barton*, 10 N. H. 433.

South Carolina.—See *McNair v. Moore*, 55 S. C. 435, 33 S. E. 491.

New York.—*Hills v. Place*, 48 N. Y. 520.

England.—*Rhodes v. Gent*, 5 Barn. & Ald. 244.

England.—*Dickinson v. Bowes*, 16 East. 110; *Spindler v. Grellett*, 1 Exch. 384.

⁴ *Legg v. Vinal*, 165 Mass. 555, 43 N. E. 518.

"When a note or bill is payable at a particular bank, * * * it is well known that according to the usual course of business the note or bill is usually lodged in the bank for collection; and if the maker calls to take it up when it falls due, and it is delivered to him, and he pays the amount the business is closed; but if he does not find the note or bill at the bank, he can deposit the money to meet the same when it shall be presented, and the

⁵ *Cherry v. Sprague*, 187 Mass. 113, 72 N. E. 456, 67 L. R. A. 33.

⁶ *Herrick v. Edwards*, 106 Mo. App. 633, 81 S. W. 466.

⁷ *Negot. Inst. Law*, § 130, see Appendix herein.

Examine further as to maker and acceptor the following cases:

United States.—*Wallace v. McConnell*, 13 Pet. (U. S.) 136.

sentment for payment is necessary in order to charge the drawer and indorsers.⁸ This is, however, a well-settled rule.⁹

proof of such tender and deposit, in case of a subsequent suit will exonerate him from all costs and damages. Or should the note or bill be made payable at some other place than a bank, and no deposit should be made, or he should choose to retain the money in his own possession, an offer to pay at the time and place would protect him against interest and costs on bringing the money into court. Rules of a different character have sometimes prevailed in other jurisdictions, but the principles to be applied in such a case are settled by this court, nor is it necessary, where the note or bill is payable at a specified time and place, to aver in the declaration or prove at the trial that a demand was made at that place in order to maintain the action, the established rule being that if the maker or acceptor was at the place at the time designated and was ready and offered to pay the money it is a matter of defense to be pleaded and proved." *Cox v. National Bank*, 100 U. S. 704, 714, per Clifford, J., citing *Wallace v. McConnell*, 13 Pet. (U. S.) 136, 150; 1 *Daniel Negot. Securities* (2d Ed.), § 643; *Edwards Bills* (2d Ed.) 150; *Rowe v. Young*, 2 Bli. 391, 395.

⁸ *Galbraith v. Shepard* (Wash. 1906), 86 Pac. 1114; Sess. Laws Wash. 1899, p. 353, § 70; *Negot. Inst. Law*, § 130, see Appendix herein. *English Bills of Exch. Act*, § 45, see Appendix herein.

⁹ *United States*.—*Magruder v. Union Bank*, 3 Pet. (U. S.) 87, 7 L. Ed. 612.

Arkansas.—*Winston v. Richardson*, 27 Ark. 34; *Jones v. Robinson*,

11 Ark. 504; *Ruddell v. Walker*, 7 Ark. 457.

Illinois.—*Kimmel v. Wiel*, 95 Ill. App. 15 (Laws 1895, p. 262, adopts the law merchant as to negotiable instruments and notes payable in money).

Kansas.—*Selover v. Snively*, 24 Kan. 672.

Louisiana.—*Otto v. Belden*, 28 La. Ann. 302.

Maryland.—*Brandt v. Mickle*, 28 Md. 436.

Massachusetts.—*Browning v. Carson*, 163 Mass. 255, 39 N. E. 1037.

Missouri.—*Westbay v. Stone*, 112 Mo. App. 411, 87 S. W. 34.

New Hampshire.—*Piscataqua Exchange Bank v. Carter*, 20 N. H. 246, 51 Am. Dec. 217.

New York.—*Parker v. Stroud*, 98 N. Y. 379; *Pardee v. Fish*, 60 N. Y. 265; *Merritt v. Todd*, 23 N. Y. 28; *Cayuga County Bank v. Warden*, 1 N. Y. 413; *Kelly v. Thiess*, 72 N. Y. Supp. 467, 65 App. Div. 146; *Filler v. Gallautcheck*, 66 N. Y. Supp. 509; *Smith v. Unangst*, 46 N. Y. Supp. 340, 29 Misc. 564, aff'g 43 N. Y. Supp. 1164, 19 Misc. 711; *Berry v. Robinson*, 9 Johns. (N. Y.) 121, 6 Am. Rep. 267; *Meise v. Newman*, 76 Hun (N. Y.) 341; *Walcott v. Van Santvoord*, 17 Johns. (N. Y.) 248; *Johnson v. Haight*, 13 Johns. (N. Y.) 470; *Ferner v. Williams*, 37 Barb. (N. Y.) 10.

Ohio.—*House v. Vinton Nat. Bk.*, 43 Ohio St. 343, 54 Am. Rep. 813, 1 N. E. 129; *Hudson v. Walcott*, 4 Ohio Dec. 459, 2 Cleve. L. Rep. 194.

Pennsylvania.—*Duncan v. McCullough*, 4 Serg. & R. (Pa.) 180.

Vermont.—*Landon v. Bryant*, 69 Vt. 303, 37 Atl. 297.

§ 503. Same subject continued—Agent—Acceptor—Instances.—

Due demand is not dispensed with by the fact that the indorser is made administrator of the maker's estate.¹⁰ And demand is not excused, although the note was paid before its purchase by the indorsee.¹¹ So where a party, who procures the note to be discounted and voluntarily takes it up at maturity, fails to make proper demand, the indorser is released.¹² Demand is also necessary to fix the liability of an indorser who indorses an insolvent's note at maturity,¹³ as demand is necessary to charge an indorser of an overdue note.¹⁴ But if presentment is made in a reasonable time and notice of dishonor given, an indorser of an overdue note transferred for indorsement will be liable.¹⁵ Again, a demand must be made within a reasonable time after indorsement, in order to fix liability under an agreement to indorse a note after maturity.¹⁶ And in case of an order upon a drainage district the indorser is not liable thereon in the absence of requisite diligence shown to collect such order, there being treasury assets sufficient to meet the demand.¹⁷ So it is a prerequisite for recourse to the drawer of an order on another for a sum due that it should be duly presented for payment.¹⁸ It is also held that all drafts, whether foreign or inland bills, must be presented to the drawee

¹⁰ *Magruder v. Union Bank*, 3 Pet. (U. S.) 87, 7 L. Ed. 612.

¹¹ *Moore v. Steigel*, 50 Mo. App. 308.

¹² *Martin v. Perqua*, 20 N. Y. Supp. 285, 47 N. Y. St. R. 518, 66 Hun 225.

¹³ *Hudson v. Walcott*, 4 Ohio Dec. 459, 2 Cleve. L. Rep. 194.

¹⁴ *Landon v. Bryant*, 69 Vt. 203, 37 Atl. 397. See, also:

California.—*Beer v. Clifton*, 98 Cal. 323, 33 Pac. 204, 35 Am. St. Rep. 172, 20 L. R. A. 580.

Connecticut.—*Bishop v. Dexter*, 2 Conn. 419.

Indiana.—*Novel v. Hittle*, 23 Ind. 346.

Iowa.—*Graul v. Strutzel*, 53 Iowa 712, 6 N. W. 119, 36 Am. Rep. 250.

Maryland.—*Dixon v. Clayville*, 44 Md. 573.

New York.—*Berry v. Robinson*, 9 Johns. (N. Y.) 121.

Tennessee.—*Rosson v. Carroll*, 90 Tenn. 90, 16 S. W. 66.

See *Hampton v. Miller*, 78 Conn. 267, 61 Atl. 952, noted in § 506 herein.

¹⁵ *Bassenhorst v. Wilby*, 45 Ohio 333, 13 N. E. 75, 11 West. Rep. 270.

¹⁶ *Sachs v. Fuller Bros. Toll. Lumber & Box Co.*, 69 Ark. 270, 62 S. W. 902.

¹⁷ *First National Bank v. Drew*, 93 Ill. App. 630, aff'd 60 N. E. 856. Examine *Dennis v. Water Co.*, 10 Cal. 369; *Pease v. Cornish*, 19 Me. 191.

¹⁸ *Knott v. Whitfield*, 99 N. C. 76, 5 S. E. 664. See *Agee v. Smith*, 7 Wash. 471, 35 Pac. 370. Compare *Sinclair v. Johnson*, 85 Ind. 527; *Sweet v. Swift*, 65 Mich. 90, 31 N. W. 767; *Brown v. Teague*, 52 N. C. 573. See § 522 herein.

within a reasonable time and in case of non-payment notice must be promptly given to the drawer to charge him. What is a reasonable time depends upon the peculiar facts of each case.¹⁹ And a draft on a third person given to settle an antecedent debt must be presented by the holder to preserve the debt.²⁰ And although one who indorses as collateral security is held entitled to demand,²¹ still it is also decided that a damage, injury, prejudice or loss must be sustained by the pledgor to render one liable who holds the note as such collateral in case of non-presentment, and even then the liability is limited to the extent of the loss.²² It is further determined that holders of a note of a third person as collateral are not liable for delay which does not amount to gross negligence and that they need to exercise only reasonable diligence in collection.²³ And where a note is given for the purpose of securing an antecedent debt of the maker and to enable it to be discounted by the payee, indorsers before delivery are held liable as joint makers without any demand being made.²⁴ In case of non-negotiable notes demand is not necessary to charge the indorser.²⁵ Although if the immediate indorsee writes over a blank indorsement of a non-negotiable note words which evidence an intent to consider the signature as an indorsement on negotiable paper the indorser will be entitled to demand.²⁶ Presentment and demand is not required in order to charge the acceptor of a draft.²⁷ And where one indorses as agent and the principal is not disclosed, demand on the principal will not be sufficient to charge the indorser, but demand must be made upon the agent.²⁸

¹⁹ *Montelius v. Charles*, 76 Ill. 303, 306. Presentment of draft to the drawee must be made in a reasonable time. *Fugitt v. Nixon*, 44 Mo. 295. See § 496 herein.

²⁰ *Mauney v. Coit*, 80 N. C. 300, 30 Am. Rep. 80. See *Dayton v. Trull*, 23 Wend. (N. Y.) 345.

²¹ *Nicholson v. Gouthit*, 24 Bl. 609. See *Blanchard v. Boom*, 40 Mich. 566; *Dayton v. Trull*, 23 Wend. (N. Y.) 345.

²² *Kennedy v. Rosier*, 71 Iowa 671, 33 N. W. 226.

²³ *Johnson, Berger & Co. v. Downing* (Ark.), 88 S. W. 825.

²⁴ *Bank of Jamaica v. Jefferson*, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100. See *Williams v. Baltimore National Bank*, 70 Md. 343, 17 Atl. 382.

²⁵ *San Diego First National Bank v. Babcock*, 94 Cal. 96, 29 Pac. 415; *Smith v. Cromer*, 66 Miss. 157, 5 So. 619.

²⁶ *Haber v. Brown*, 101 Cal. 445, 35 Pac. 1035.

²⁷ *Hunt v. Johnson*, 96 Ala. 130, 11 So. 387.

²⁸ *Stinson v. Lee*, 68 Miss. 113, 9 L. R. A. 830, 8 So. 272, 4 Bkg. L. J. 15.

§ 504. Sureties and guarantors—Parties primarily liable—Demand.—It is held that where a note is indorsed, before its delivery to the payee, by one as surety he is an original promisor,²⁹ and that he is primarily liable.³⁰ And he has not the rights of an indorser as to presentment and demand upon the principal where, although apparently one of the co-makers, he is in fact a surety and the payee knows him to be a surety.³¹ So sureties are nevertheless liable, even though the note is not presented to the principal maker, there being no extension of time without their consent.³² And where there is an absolute guaranty and contract to pay if the maker does not, the guarantors should pay without demand being made.³³

§ 505. Time of presentment where note is not and is payable on demand—Reasonable time.—The negotiable instruments law provides that where the instrument is not payable on demand, presentment must be made on the day it falls due.³⁴ But it is held that this

²⁹ *Treadway v. Antisdel*, 86 Mich. 82, 48 N. W. 956.

³⁰ *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430; *Negot. Inst. Law* (Chap. 54 Revisal), §§ 2213, 2219, 2239, 3342 considered. See *Beissner v. Weekes*, 21 Tex. Civ. App. 14, 50 S. W. 138.

³¹ *Chafoin v. Rich*, 77 Cal. 476, 19 Pac. 882. See, also, *Sibley v. American Exch. National Bank*, 97 Ga. 126, 25 S. E. 470; *Marion National Bank v. Phillips*, 16 Ky. L. Rep. 159, 35 S. W. 910. *Examine First National Bank v. Eureka Lumber Co.*, 123 N. C. 24, 31 S. E. 348, 13 Am. & Eng. Corp. Cas. N. S. 727, 15 Bkg. L. J. 708.

³² *Wallace v. Richards*, 16 Utah 52, 50 Pac. 804. See *Eppens v. Forbes*, 82 Ga. 748, 9 S. E. 723; *Newman v. Kaufman*, 28 La. Ann. 865, 26 Am. Rep. 114; *First National Bank v. Adamson*, 25 R. I. 73, 54 Atl. 930.

³³ *City Savings Bank v. Hopson*, 53 Conn. 453, 5 Atl. 601.

See further as to sureties and guarantors:

Alabama.—*Donley v. Camp*, 22 Ala. 695, 58 Am. Dec. 274.

Connecticut.—*Tyler v. Waddingham*, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; *Bond v. Storrs*, 13 Conn. 412.

Georgia.—*Hunnicut v. Perot*, 100 Ga. 312, 27 S. E. 787.

Illinois.—*Guge v. Mechanics' National Bank*, 79 Ill. 62.

Kansas.—*Farrer v. People's Trust Co.*, 63 Kan. 881, 64 Pac. 1031.

Louisiana.—*Newman v. Kaufman*, 28 La. Ann. 865, 26 Am. Rep. 114.

Maine.—*Cooper v. Page*, 24 Me. 73.

Minnesota.—*Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161.

New York.—*Allen v. Rightmere*, 20 Johns. (N. Y.) 365, 11 Am. Dec. 288.

Ohio.—*Castle v. Rickly*, 44 Ohio St. 490, 9 N. E. 136, 58 Am. Rep. 839.

West Virginia.—*Miller v. Clendenin*, 42 W. Va. 416, 26 S. E. 512.

³⁴ *Negot. Inst. Law*, § 131; *Bills of Exch. Act*, § 45, Appendix herein. See *Pendleton v. Insurance Co.*, 5

section does not apply so as to prevent recovery on subsequent notes of a series although there is a failure to present the same after dishonor of the first, and even though it is stipulated that upon failure to pay any of the notes the subsequent ones shall become due and payable immediately.³⁵ And a bank certificate of deposit is due immediately, as it is in effect a promissory note. And actual demand need not be made in order to enable the statute of limitations to commence running.³⁶ But a note not on demand, which is payable at a place certain, is not within a statute precluding recovery on a demand note, payable at a certain place, unless a demand at that place, prior to suit brought, is proven to have been made.³⁷ Where a note is payable on demand presentment must be made within a reasonable time after its issue, except that in case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.³⁸ The time for presentment of a demand note is the same under the Massachusetts statute, which also provides that in determining what is a reasonable time regard is to be had to the nature of the instrument, the usage of trade with respect to such instruments and the facts of the particular case, and within this enactment it is held that a demand made seventy-four days after the date of the note is not sufficient.³⁹

§ 506. **Same subject continued.**—Within the above rule there must be a presentment within a reasonable time after date of a note pay-

Fed. 238, 7 Fed. 169; Groatman v. Delheim, 6 Me. 476; Garland v. West, 68 Tenn. 315; Wilson v. Senior, 14 Wis. 380.

³⁵ Creteau v. Foote & T. Glass Co., 57 N. Y. Supp. 1103, 40 App. Div. 215.

³⁶ Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910.

³⁷ Heslan v. Bergeron, 94 Me. 395, 47 Atl. 896; Rev. Stat. Ch. 32, § 10.

³⁸ Negot. Inst. Law, § 131; Bills of Exch. Act, § 45, Appendix herein. See, also:

Connecticut.—Hampton v. Miller, 78 Conn. 267, 61 Atl. 952.

Michigan.—Home Savings Bank v. Hosie, 119 Mich. 116, 5 Det. L. N. 730, 77 N. W. 625, 16 Bkg. L. J. 104.

New York.—Schlesinger v. Schultz, 96 N. Y. Supp. 383, 110 App. Div. 356.

Pennsylvania.—Harrisburg Nat. Bank v. Moffitt, 3 Dauphin Co. Rep. 69, 10 Pa. Dist. R. 22.

Virginia.—Bacon v. Bacon, 94 Va. 686, 27 S. E. 576, 14 Bkg. L. J. 495.

Canada.—Banque du Peuple v. Denincourt, Rap. Jud. Quebec, 10 C. S. 428.

Examine Weland v. Hibbard, 65 N. Y. Supp. 790, 32 Misc. 749.

³⁹ Merritt v. Jackson, 181 Mass. 69, 62 N. E. 987, Stat. 1898, Ch. 533, §§ 71, 193. Same provision, see Negot. Inst. Law, § 4; Bills of Exch. Act, § 45 (2), Appendix herein.

able on demand after date; and in such case the controlling circumstances upon the question of what constitutes a reasonable time are held to be limited to that of the holder's ability, irrespective of credit or indulgence to the maker.⁴⁰ And, notwithstanding a statute making a demand note overdue and dishonored where it remains unpaid four months, yet if the indorser understood from the circumstances that such a note was not intended to be paid until after that period had expired he is not within the terms of the statute so far as demand is concerned, but is entitled thereto within a reasonable time in accordance with the common-law rule.⁴¹ If a note is indorsed after maturity it is also held to be within the rule as to demand notes and to require presentment within a reasonable time after due in order to charge the indorser.^{41*} And the insolvency of the maker of a demand note constitutes no excuse for non-presentment within such reasonable time, although the question whether an injury or loss was sustained by want of demand is held to be a proper one for consideration in such a case.⁴² Demand for payment delayed for two and one-half years where the parties reside within the same city is such an unreasonable delay as to discharge the indorsers of a demand note.⁴³ So a delay of nearly three years is unreasonable where the maker is the holder's employe.⁴⁴ And a delay of thirty-three months operates to discharge the indorser.⁴⁵ And ten months' delay is unreasonable.⁴⁶

§ 507. Same subject.—Notes payable with or without interest.—

Under a California decision the fact that the payee fails to make pre-

⁴⁰ State, Emerald & P. Brewing Co. v. Foley, 61 N. J. L. 428, 39 Atl. 650, 15 Bkg. L. J. 216.

Examine *Hitchings v. Edmands*, 132 Mass. 338; *Crim v. Starkweather*, 88 N. Y. 340, 42 Am. Rep. 250; *Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243.

⁴¹ *Hampton v. Miller*, 78 Conn. 267, 61 Atl. 952.

^{41*} *Kimmel v. Wiel*, 95 Ill. App. 15.

⁴² *O'Neill v. Meighan*, 66 N. Y. Supp. 313, 32 Misc. 516.

⁴³ *Home Savings Bank v. Hosie*, 119 Mich. 116, 5 Det. L. N. 730, 77 N. W. 625, 16 Bkg. L. J. 104.

Examine *Iowa*.—*Leonard v. Olson*, 99 Iowa 162, 35 L. R. A. 381.

Louisiana.—*Thielman v. Gueble*, 32 La. Ann. 260, 36 Am. Rep. 267.

Massachusetts.—*Field v. Nickerson*, 13 Mass. 131.

New Jersey.—*Perry v. Green*, 19 N. J. L. 61, 38 Am. Dec. 536.

New York.—*Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243.

Wisconsin.—*Turner v. Iron Chief Min. Co.*, 74 Wis. 355, 5 L. R. A. 533, 43 N. W. 149.

⁴⁴ *Banque du Peuple v. Denincourt* Rap. Jud. Quebec, 10 C. S. 428.

⁴⁵ *Harrisburg National Bk. v. Mofitt*, 3 Dauphin Co. Rep. 69, 10 Pa. Dist. R. 22.

⁴⁶ *Turner v. Iron Chief Min. Co.*, 74 Wis. 355, 43 N. W. 149, 5 L. R. A. 533.

sentment for payment after apparent maturity of a note payable at sight or on demand with interest does not release the indorser from liability.⁴⁷ In Iowa demand must be made within a reasonable time to render the indorser liable, whether a demand note does or does not bear interest, and a demand not made until after the lapse of nearly ten years is not a reasonable time, and if the makers have removed from the state, notice of that fact and of non-payment must be given the indorser within a reasonable time.⁴⁸ Under a Louisiana decision the fact that the note bears interest does not affect the indorser's right to notice within a reasonable time.⁴⁹ And presentation in ten days of a note payable to order on demand is held a sufficient presentment.^{49*} Again, although a note payable on demand bears annual interest, demand should not be unreasonably delayed.⁵⁰ So where a demand note contains no stipulation for interest and it is given partly for money due and partly for advances to be made, the indorser cannot be held where demand is not made for fourteen months after the last advancement.⁵¹ If annual interest is provided for and the note is payable one day after date but the principal is to be paid only on thirty days' notice, no action can be maintained on the principal until demand after thirty days.⁵² And a certificate of deposit is not payable on demand but six months after date where it is to "be left six months, no interest after maturity." In such a case demand must be made at the expiration of six months and on the last day of grace.⁵³ If a note is intended as a continuing security, as where it is given for an indebtedness with less than statutory interest, it is neither necessary nor unreasonable to fail to immediately demand payment.⁵⁴

⁴⁷ *Machado v. Fernandez*, 74 Cal. 362, 16 Pac. 19.

⁴⁸ *Leonard v. Olson*, 99 Iowa 162, 35 L. R. A. 381, 61 Am. St. Rep. 230, 68 N. W. 677.

⁴⁹ *Thielman v. Gueble*, 32 La. Ann. 260, 36 Am. Rep. 267.

^{49*} *Schlesinger v. Schultz*, 96 N. Y. Supp. 383, 110 App. Div. 356.

⁵⁰ *Verder v. Verder*, 63 Vt. 38, 21 Atl. 611, 4 Bkg. & L. J. 362, under Vt. R. L., § 2013.

⁵¹ *Wyllie v. Cotter*, 170 Mass. 356, 49 N. E. 746. *Examine Parker v. Stroud*, 98 N. Y. 379, 50 Am. Rep. 685; *Crim v. Starkweather*, 88 N. Y. 339, 42 Am. Rep. 250; *Pardee v.*

Fish, 60 N. Y. 265, 19 Am. Rep. 176; *Herrick v. Woolverton*, 41 N. Y. 581, 1 Am. Rep. 461; *Salmon v. Grosvenor*, 66 Barb. (N. Y.) 160; *Wethey v. Andrews*, 3 Hill (N. Y.) 582; *Sice v. Cunningham*, 1 Cow. (N. Y.) 397; *Alexander v. Parsons*, 3 Lans. (N. Y.) 333, dist'g *Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243.

⁵² *Massie v. Byrd*, 87 Ala. 672, 6 So. 145.

⁵³ *Towle v. Starz*, 67 Minn. 370, 69 N. W. 1098, 36 L. R. A. 463, 14 Bkg. L. J. 141. Case not within Gen. Stat. 1894, § 2231.

⁵⁴ *Yates v. Goodwin*, 96 Me. 90, 51 Atl. 804.

§ 508. Demand note and demand note bearing interest, distinctions abrogated by statute—Presentment—Reasonable time—Question of law or fact—Pleading—Burden of proof.—The negotiable instruments law in effect abrogates the distinction between bills and notes, payable on demand and bearing interest, and those payable on demand merely, and that law established one rule applicable to all cases, that where an instrument is payable on demand presentment must be made in a reasonable time after issue and no distinction is made when the instrument is an interest-bearing obligation, but in determining the question of reasonable time consideration is to be given to the nature of the instrument and any usage of trade as well also to the particular circumstances of each case. If a note is payable on demand it may be demanded at any time, as it is always mature. What constitutes reasonable time cannot, however, rest upon any fixed rules, since the circumstances may evince an intention as to its continuance. The question, therefore, whether a note or bill has been presented in a reasonable time, under the statute, and after its issue is, where the facts are ascertained and not in dispute, a question of law for the court, but the question, where the facts are in dispute, unsettled and the testimony conflicting, might be a mixed one of law and fact resting upon the decision of the jury under proper instructions as to the law by the court. And where the facts were not in dispute and it appeared therefrom in an action upon a demand note bearing interest that the indorsement was made without consideration and for the maker's accommodation; that its payment was secured by the deposit of certain securities; that notwithstanding that some two years after the note was made the plaintiff had made complaint to the indorser as to its non-payment, and twice a year later had written that the maker was in default as to the interest but no steps were taken to charge the indorser, by presentment of the note for payment and by protest for non-payment, until after the lapse of more than three years and a half and until the indorser had died intestate and after the appointment of an administratrix on his estate, the question of reasonable time as to presentment constitutes one of law for the court upon such ascertained facts, and a decision of the trial court, in such case, that the note was not presented in a reasonable time for payment, no notice of dishonor given in a reasonable time will be sustained. And the defense that a demand interest-bearing note was not presented in a reasonable time need not be specially pleaded to be available as against an indorser, as the question of presentment of a demand note within a reasonable time rests upon the statute, and

the liability of an indorser to make good the maker's contract, unlike that of a guarantor, is conditional and depends upon the holder's having made a case under the statute of an obligation, which he has caused to mature and, by appropriate legal steps, to become an indebtedness of the parties. The burden is on the holder of a note, when seeking to charge an indorser, to prove due and timely presentment and the giving of notice of its dishonor to the indorser.⁵⁵

§ 509. Time of maturity—Sunday or holiday—Saturday.—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.⁵⁶ If, having in view the days of grace, the presentation for payment, protest, and notice of dishonor of a note are premature no action lies thereon against an indorser.⁵⁷ And where a note was given while a statute was in force which allowed days of grace, a presentation is premature which does not make allowance therefor, even though prior to presentment days of grace are abolished.⁵⁸ A note may be presented on the last day of

⁵⁵ Commercial Nat. Bk. of Syracuse v. Zimmerman, 185 N. Y. 210.

⁵⁶ Negot. Inst. Law, § 145; Bills of Exch. Act, § 14, Appendix herein.

⁵⁷ Demelman v. Brazier (Mass. 1907), 79 N. E. 812. See Estes v. Tower, 102 Mass. 65, 3 Am. Rep. 439.

Days of grace. "By the law merchant, which is part of our common law, each note was entitled to days of grace. * * * Grace has been abolished by St. 1896, c. 496, now Rev. Laws, c. 73, § 103, and negotiable paper is deemed to be payable at the time named therein, unless there is a stipulation for delay, and when falling due upon Saturday may be legally presented

for payment on the following Monday." Demelman v. Brazier (Mass. 1907), 79 N. E. 812, per Braley, J.

Grace abolished, by act of August 7, 1903, in Georgia. Patton v. Bank of Lafayette, 124 Ga. 965, 53 S. E. 664. A question in this case, however, of computation of interest and usury.

Days of grace constitutes part of contract. Usage regulates. See Bank of Washington v. Triplett, 1 Pet. (U. S.) 25; Mills v. United States Bank, 11 Wheat. (U. S.) 431; Renner v. Bank of Columbia, 9 Wheat. (U. S.) 581.

⁵⁸ Wood v. Rosendale, 18 Ohio Cir. Ct. R. 247, 10 O. C. D. 66 abolished March 12, 1896.

grace.⁵⁹ Days of grace have, however, been abolished in many states while they are allowed in others.

§ 510. **Same subject continued.**—Under an Alabama decision, if a note falls due on Sunday the demand for payment and protest should be made on the succeeding business day.⁶⁰ And this is so, where the next day is not a legal holiday, under the Michigan laws of 1893, under which certain holidays and Saturdays after twelve o'clock at noon until twelve at night are to be considered as Sundays, public holidays and half-holidays and making bills and checks and notes payable on such days presentable for acceptance or payment on the business day next succeeding and such rule obtains even though a bank may keep open on Saturday after twelve o'clock if it so votes by its directors.⁶¹ In Nebraska it is held that where a bill or note, including days of grace, matures on Sunday it may be presented on the Monday following, and that if any of the public holidays occur on Monday, then bills or notes due on that day shall be payable the succeeding day.⁶² In New York, under the provisions of a statute making Saturday at noon a legal holiday,⁶³ the holder of a bill due or presentable on Saturday may, at his election, rest upon a demand and presentment made before noon on that day, and if he does, notice of demand and protest given on that day or on the next secular day is good; or he may elect to make a demand on Monday, and if payment is not then made, in order to hold the parties entitled to notice, he is required to give notice of dishonor on that day, and so, if there was a failure to present for payment on Saturday, as the draft was presented and demand made, and notice of protest mailed on Monday, plaintiffs were not chargeable with negligence or omission of duty, and were entitled to recover.⁶⁴ So in Texas the following Monday, or if that is a legal holiday, the next business day is the day on which a note, without days of grace, falling due on Saturday becomes payable.⁶⁵ In the absence, however, of statutory provisions to

⁵⁹ *Guignon v. Union Trust Co.*, 156 Ill. 135, 40 N. E. 556, aff'g 53 Ill. App. 581.

⁶⁰ *Brennan v. Vogt*, 97 Ala. 647, 11 So. 893.

⁶¹ *Hitchcock v. Hogan*, 99 Mich. 124, 57 N. W. 1095; Mich. Laws 1893, Act 185.

⁶² *Hastings First National Bank v.*

McAllester, 33 Neb. 646, 50 N. W. 1040, 6 Bkg. L. J. 217; Neb. Comp. Stat., Ch. 41, § 8.

⁶³ Laws 1887, chap. 289.

⁶⁴ *Sylvester v. Crohan*, 138 N. Y. 494, 53 N. Y. St. R. 113, 34 N. E. 273, aff'g 63 Hun 509, 45 N. Y. St. R. 320, 18 N. Y. Supp. 546.

⁶⁵ *Hirshfield v. Ft. Worth National*

the contrary presentment was required by the law merchant to be made on the preceding day of a bill or note which matured on Sunday or a holiday.⁶⁶

§ 511. Sufficiency of presentment—By whom made—Time when made.—Presentment for payment to be sufficient must be made by the holder or by some person authorized to receive payment on his behalf,⁶⁷ or on behalf of his estate.⁶⁸ And one is a holder who is in possession of a note indorsed to himself or has a blank indorsement, and may make presentment.⁶⁹ So a presentment by any person in possession of a bill *bona fide* is sufficient to charge the parties to the bill. Thus where a bill of exchange indorsed in blank by the payees but made payable to a particular person by the last indorsement, was pre-

Bank, 83 Tex. 452, 34 Cent. L. J. 350, 15 L. R. A. 639, 18 S. W. 743, 29 Am. St. Rep. 660, 6 Bkg. L. J. 345. See Carey-Lombard Lumber Co. v. Ballinger First National Bank, 86 Tex. 299, 24 S. W. 260, 10 Bkg. L. J. 122.

⁶⁶ *United States*.—Bussard v. Levering, 6 Wheat. (U. S.) 102.

Kentucky.—Offutt v. Stout, 4 J. J. Marsh. (Ky.) 332.

Maine.—Homes v. Smith, 20 Me. 264.

Massachusetts.—Farnum v. Fowle, 12 Mass. 89, 7 Am. Dec. 35.

New Jersey.—Reed v. Wilson, 41 N. J. L. 29.

New York.—Jackson v. Richards, 2 Caines (N. Y.) 343.

⁶⁷ Negot. Inst. Law, § 132; Bills of Exch. Act, § 45 (3), Appendix herein. See, also:

United States.—United States v. Barker, 12 Wheat. (U. S.) 559.

Illinois.—Ewen v. Wilbor, 99 Ill. App. 132.

Iowa.—Mt. Pleasant Branch of State Bank v. McLeran, 26 Iowa 306.

Massachusetts.—Hartford Bank v. Barry, 17 Mass. 94.

Wisconsin.—Blakeslee v. Hewett, 76 Wis. 341, 44 N. W. 1105.

England.—Coove v. Callaway, 1 Esp. 115.

As to presentment by notary, see *United States*.—Nicholls v. Webb, 8 Wheat. (U. S.) 326; Wiseman v. Chiapella, 23 How. (U. S.) 368.

Alabama.—Donegan v. Wood, 49 Ala. 242.

Louisiana.—Buckley v. Seymour, 30 La. Ann. 1341.

Massachusetts.—Ocean National Bank v. Williams, 102 Mass. 141.

Missouri.—Clough v. Holden, 115 Mo. 336, 37 Am. St. Rep. 393, 31 S. W. 1071, rev'g 20 S. W. 695.

New York.—Crim v. Starkweather, 88 N. Y. 339. See sections herein as to protest.

⁶⁸ *White v. Stoddard*, 11 Gray (Mass.) 258. See *Yates v. Goodwin*, 96 Me. 90, 51 Atl. 804.

⁶⁹ *Ewen v. Wilbor*, 99 Ill. App. 132. *Examine Agnew v. Bank*, 2 Har. & G. (Md.) 478; *Bachellor v. Priest*, 12 Pick. (Mass.) 399; *Shed v. Brett*, 1 Pick. (Mass.) 413, 11 Am. Dec. 209; *Sussex Bank v. Baldwin*, 17 N. J. L. 487; *Porter v. Thom*, 57 N. Y. Supp. 479, 40 App. Div. 34; *Bank of Utica v. Smith*, 18 Johns. (N. Y.) 230.

sented to the drawee for payment, by the last indorser, who was in possession of the bill *bona fide*, the presentment was held sufficient to charge the preceding indorsers.⁷⁰ But if a person is wrongfully in possession and is not the lawfully authorized holder of the instrument, presentment by him will be ineffectual to charge the indorser.⁷¹ And sub-contractors, to whom checks have been indorsed, should present the same, and where they fail to do so within a reasonable time, there being funds in the bank to meet the obligation, and the maker becomes insolvent during such delay the indorsers are discharged.⁷² Presentment should also be made at a reasonable hour on a business day.⁷³ When a bill or note is not payable at a place where there are established business hours, a presentment for payment may be made at any reasonable hour of the day. A presentment of a bill or note in such case, however, for payment, a few minutes before twelve at night, is insufficient and unavailing, unless it should appear from an answer made to the demand that there was a waiver of any objection as to the time, or that payment would not have been made upon a demand at a reasonable hour.⁷⁴ If a draft is to be considered as an inland bill of exchange, the drawer is discharged by the laches of the holder; but if it is treated as a mere banker's check, then a presentation for payment, at any time before suit brought, will be sufficient unless the drawer can show injury from the delay.⁷⁵

§ 512. **Sufficiency of demand—Bringing suit.**—The bringing of a suit constitutes a sufficient demand in order to hold the maker or his estate;⁷⁶ nor need a presentment be made at a bank, of a note payable

⁷⁰ *Bachelor v. Priest*, 12 Pick. (29 Mass.) 399.

⁷¹ *Hofrichter v. Enyeart* (Neb.), 99 N. W. 658.

⁷² *Brown v. Schintz*, 202 Ill. 509, 67 N. E. 172, aff'g 98 Ill. App. 452, 459.

⁷³ *Negot. Inst. Law*, § 132; *Bills of Exch. Act*, § 45 (3), Appendix herein.

Examine the following cases:

Kentucky.—*Stivers v. Prentice*, 3 B. Mon. (Ky.) 461.

Louisiana.—*Bank of Louisiana v. Satterfield*, 14 La. Ann. 80.

Maine.—*Dana v. Sawyer*, 22 Me. 244.

Massachusetts.—*Estes v. Tower*, 102 Mass. 65.

Missouri.—*Clough v. Holden*, 115 Mo. 336, 37 Am. St. Rep. 393, 21 S. W. 1071, noted in § 514 herein.

New York.—*Salt Springs Bank v. Burton*, 58 N. Y. 430.

Tennessee.—*Union Bank v. Fowlkes*, 2 Sneed (Tenn.) 555.

⁷⁴ *Dana v. Sawyer*, 22 Me. 244, 39 Am. Dec. 574.

⁷⁵ *Elting & Shook v. Brinckerhoff*, 2 Hall (N. Y.) 459.

⁷⁶ *Stevenson v. Scofield*, 70 Ill. App. 299; *Lamson Consol. Store Service Co. v. Conyngham*, 32 N. Y. Supp. 129, 65 N. Y. St. R. 271, 11

there, before instituting an action thereon;⁷⁷ nor is demand necessary in order to maintain an action on a note payable on call;⁷⁸ or upon a due-bill;⁷⁹ or upon a promissory note extended for an indefinite time;⁸⁰ or upon a demand note.⁸¹ Again, demand at a specified place of payment in a demand note is not a prerequisite to a suit by the payee against the maker.⁸² But in case of a certificate of deposit it is held that demand is necessary before action lies, where such paper matures on a certain date.⁸³

§ 513. Sufficiency of presentment—Exhibition and delivery up of instrument.—The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.⁸⁴ By the law merchant it was necessary to exhibit a foreign bill when demand was made thereon.⁸⁵ Although it is held not necessary that the drawee or his agent should be seen personally.⁸⁶ But even though there should be an actual exhibition of a bill or note or some clear indication that it is present, in making presentment and demand, still such exhibition may be waived, as where the production of the instrument is not asked for or its non-exhibition is not objected to at the time or payment is declined on other grounds.⁸⁷ Thus where a note was payable at no specific place and the

Misc. 428. See *First Nat. Bk. v. Bowner* (Tex. Civ. App.), 27 S. W. 698.

⁷⁷ *Heslan v. Bergeron*, 94 Me. 395, 47 Atl. 896.

⁷⁸ *Mobile Savings Bank v. McDonnell*, 83 Ala. 595, 4 So. 346.

⁷⁹ *Bonsted v. Cuyler*, 116 Pa. 551, 19 Week. N. C. 330, 8 Cent. Rep. 128, 8 Atl. 848.

⁸⁰ *Finch v. Skilton*, 29 N. Y. Supp. 925, 79 Hun 531, 61 N. Y. St. R. 544.

⁸¹ *Mumford v. Tolman* (Ill. App.), 8 Nat. Corp. Rep. 417; *Field v. Sibley*, 77 N. Y. Supp. 252, 11 N. Y. Ann. Cas. 187, 74 App. Div. 81, aff'd 174 N. Y. 514, 66 N. E. 1108.

⁸² *Rigley v. Watts*, 15 Ohio C. C. 645.

⁸³ *Young v. American Bank*, 89 N. Y. Supp. 915, 44 Misc. 308. But compare *Hunt v. Divine*, 37 Ill. 137;

Beardsley v. Weber, 104 Mich. 88, 62 N. W. 173; note to *Rapid City First National Bank v. Security National Bank*, 34 Neb. 71, 15 L. R. A. 386.

⁸⁴ *Negot. Inst. Law*, § 134, Appendix herein. See *Farmers' Bank v. Duvall*, 7 Gill & J. (Md.) 78; *Freeman v. Boynton*, 7 Mass. 483; *Fisher v. Beckwith*, 19 Vt. 31; *Hansard v. Robinson*, 7 Barn. & C. 90.

⁸⁵ *Musson v. Lake*, 4 How. (U. S.) 262.

⁸⁶ *Wiseman v. Chiappella*, 23 How. (U. S.) 368. See *Fisher v. Beckwith*, 19 Vt. 31.

Physical presentation of note payable to bearer. See *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39, 11 N. E. 799, 10 West. Rep. 485.

⁸⁷ *Legg v. Vinal*, 165 Mass. 555, 43 N. E. 518; *Porter v. Thorn*, 57 N. Y. Supp. 479, 40 App. Div. 34, aff'd 167

maker, having no place of business, demand was made upon him in the street, and the holder had the note with him but there was no request to produce the paper, it was decided that the demand was good and that an actual exhibition of the instrument was unnecessary.⁸⁸

§ 514. **Place of presentment.**—Presentment for payment should be made at the place of payment specified in the instrument. If no place of payment is specified, but the address of the person to make payment is given in the instrument it should be there presented. If no place of payment is specified and no address is given the instrument should be presented at the usual place of business or residence of the person to make payment. In any other case it should be presented to the person to make payment wherever he can be found, or presented at his last known place of business or residence.⁸⁹

N. Y. 584, 60 N. E. 1119; Waring v. Betts, 90 Va. 46, 17 S. E. 739, 17 Va. L. J. 370.

⁸⁸ King v. Crowell, 61 Me. 244, 14 Am. Rep. 560.

⁸⁹ Negot. Inst. Law, § 133; Bills of Exch. Act, § 45, Appendix herein.

See, also, *United States*.—Cox v. National Bank, 100 U. S. 704, 25 L. Ed. 739; Wiseman v. Chiappella, 23 How. (U. S.) 368, 16 L. Ed. 466; Wallace v. McConnell, 13 Pet. (U. S.) 136; McGruder v. Bank of Washington, 9 Wheat. (U. S.) 598. *Alabama*.—Isbell v. Lewis, 98 Ala. 550.

California.—Wild v. Van Valkenburgh, 7 Cal. 166.

Connecticut.—Hartford Bank v. Stedman, 3 Conn. 489.

District of Columbia.—Wilkins v. McGuire, 2 App. D. C. 448.

Indiana.—Hartwell v. Candler, 5 Blackf. (Ind.) 215.

Kentucky.—Germans' National Bank v. Butchers' Hide & T. Co. 97 Ky. 34.

Louisiana.—H. B. Claflin Co. v. Feibelman, 44 La. Ann. 518; Moore v. Britton, 22 La. Ann. 64.

Maine.—King v. Crowell, 61 Me. 244, 14 Am. Rep. 560.

Maryland.—People's Bank v. Brooke, 31 Md. 7, 1 Am. Rep. 11.

Massachusetts.—Farnsworth v. Mullen, 164 Mass. 112, 41 N. E. 131.

Michigan.—Holmes v. Roe, 62 Mich. 199.

Missouri.—Townsend v. Heer Dry Goods Co., 85 Mo. 526; Bailey v. Sharkey, 29 Mo. App. 518.

Nebraska.—Nicholson v. Barnes, 11 Neb. 452, 38 Am. Rep. 373.

New Jersey.—Freese v. Brownell, 35 N. J. L. 285, 10 Am. Rep. 239.

New York.—Bacon v. Hanna, 137 N. Y. 379, 50 N. Y. St. R. 660, 33 N. E. 303, aff'g 17 N. Y. Supp. 430, 43 N. Y. St. R. 906; Myer v. Hibscher, 47 N. Y. 265; Adams v. Leland, 30 N. Y. 309; Nichols v. Goldsmith, 7 Wend. (N. Y.) 160.

North Carolina.—Wittkowski v. Smith, 84 N. C. 671, 37 Am. Rep. 632.

Rhode Island.—Hazard v. Spencer, 17 R. I. 561.

Tennessee.—Bynum v. Apperson, 9 Heisk. (Tenn.) 632.

Virginia.—Waring v. Betts, 90 Va. 46.

§ 515. **Place of presentment continued.**—If a note is payable at a particular place, presentment or demand need only be made there, as presentment elsewhere or personal demand is by such designation impliedly dispensed with;⁹⁰ as it is sufficient to make demand at the place specified as that of payment by the terms of the instrument.⁹¹ If a note is payable at a specified business place, it is not a sufficient presentment for the notary to call there after the close of business hours for the day and exercise no other diligence to find the maker.⁹² But a note is not payable at a place certain where it only specifies a town as the place payable but designates no particular place therein.⁹³ A presumption may, however, arise as to a subsequent holder, that the maker has a residence at a certain street and number thereon where they are written upon the note, before maturity, after the maker's name, and a demand at such specified place will be sufficient, but due diligence is required in making presentment in such case.⁹⁴ If a particular city or town is specified as the place of payment without other specification as to place, the instrument is to be deemed and treated as payable generally, except it is expressly made payable at that city or town alone.⁹⁵ And where no particular place of payment in a city or town is specified in a draft, then presentment should be made at the residence or place of business of the maker, but if he has none then the presence of the paper in the place is sufficient.⁹⁶ Presentation need not, however, be made at the corner of certain streets where they are the only place of payment specified.⁹⁷ Again, where the note is not payable at any particular place, and the maker cannot be found at the place where the note is dated, then presentment must be made at his last known place of residence.⁹⁸ Where, however, no place of payment is specified, presentment is insufficient if it is made only at

West Virginia.—Peabody Ins. Co. v. Wilson, 29 W. Va. 528.

⁹⁰ *Ewen v. Wilbor*, 99 Ill. App. 132; *Nelson v. Grondahl*, 13 N. Dak. 363, 100 N. W. 1093. See *Leonard v. Olson*, 99 Iowa 162, 67 Am. St. Rep. 230, 35 L. R. A. 381, 67 N. W. 677.

⁹¹ *Guignon v. Union Trust Co.*, 156 Ill. 135, 40 N. E. 556, aff'g 53 Ill. App. 581.

⁹² *Clough v. Holden*, 115 Mo. 336, 37 Am. St. Rep. 393, 21 S. W. 1071, rev'g 20 S. W. 695.

⁹³ *Greenlief v. Watson*, 83 Me. 266,

22 Atl. 165; Me. Rev. Stat., Chap. 32, § 10.

⁹⁴ *Farnsworth v. Mullen*, 164 Mass. 112, 41 N. E. 131.

⁹⁵ *Leonard v. Olson*, 99 Iowa 162, 67 N. W. 677, 35 L. R. A. 381, 67 Am. St. Rep. 230.

⁹⁶ *National Bank v. Lutterloh*, 95 N. C. 495.

⁹⁷ *Wilkins v. McGuire*, 2 App. D. C. 448, 22 Wash. L. Rep. 155.

⁹⁸ *Haber v. Brown*, 101 Cal. 445, 35 Pac. 1035.

the former place of business of the maker without any inquiry for his residence or whereabouts, and the indorser will not be bound by such a demand.⁹⁹ So in case of removal of the maker's place of business, demand must be made at the new place or at his residence where it is known or is ascertainable by the exercise of reasonable diligence, and a demand made only at the old place is insufficient.¹⁰⁰ If the maker is a resident of the state, but before the maturity of the instrument he removes therefrom and takes up a permanent residence in another place, a presentment is sufficient if made at his last place of residence in the state where the note was made.¹⁰¹ But it is also held that if the maker has so removed from the state before maturity of the note and has left no representative there, no demand is necessary in order to bind the indorser.¹⁰² Where there is no place fixed for the payment of a bill, the holder must make a diligent search for the drawee, at his residence, or within the realm of England; but here drawee's absence from the state excuses this duty.¹⁰³ It is immaterial, however, whether the place of demand is the maker's place of business or not, where it is made upon him personally at an office during business hours, and the notes are produced, and he excuses payment upon the ground of inability to pay, and does not object to the place of demand.¹⁰⁴

§ 516. Presentment—Instrument payable at bank.—Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.¹⁰⁵ Presentment at the particular bank specified is necessary to warrant a recovery against the indorser and presentment to the cashier will not be sufficient unless made to him at the bank.¹⁰⁶ It is decided,

⁹⁹ Talbot v. National Bank of the Commonwealth, 129 Mass. 67, 38 Am. Rep. 302. See also Trease v. Haggin, 107 Iowa 458, 78 N. W. 58.

¹⁰⁰ Reinke v. Wright, 93 Wis. 368, 67 N. W. 737. See Wood v. Rosendale, 18 Ohio C. C. 247.

¹⁰¹ Herrick v. Baldwin, 17 Minn. 209, 10 Am. Rep. 161.

¹⁰² Leonard v. Olson, 99 Iowa 162, 35 L. R. A. 381, 67 Am. St. Rep. 230, 67 N. W. 677; Whitely v. Allen, 56

Iowa 224, 41 Am. Rep. 99. Examine Salisbury v. Bartleson, 39 Minn. 365, 40 N. W. 365.

¹⁰³ Taylor v. Bank of Illinois, 7 T. B. Mon. (Ky.) 576.

¹⁰⁴ Parker v. Kellogg, 158 Mass. 90, 32 N. E. 1038.

¹⁰⁵ Negot. Inst. Law, § 135, Appendix herein.

¹⁰⁶ Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. 888. See Dailey v. Sharkey, 29 Mo. App. 518.

however, in a Mississippi case, that because a note is made payable at a particular bank, it does not necessitate a demand of payment there.¹⁰⁷ A demand, however, at maturity is sufficient if made at the bank where the instrument is payable;¹⁰⁸ and it is not necessary to wait until the close of banking hours, but the demand may be made at any time during such hours.¹⁰⁹ It also constitutes a sufficient presentment and demand that the instrument is present at the bank where payable,¹¹⁰ provided it is known to be physically there by such bank.^{110*} So where the cashier of the bank has the note in his possession it shows that he is authorized to receive payment and it is unimportant that presentment was not made at the bank.¹¹¹

§ 517. Same subject continued.—If the bank is closed it does not necessitate personal demand upon the debtor, even though a new bank is occupying the former place of business of the bank where the paper is payable.¹¹² A presentment may be good where admittance is obtained after the bank has closed and payment is then and there demanded of the cashier.¹¹³ Again, where the bank at which the note is

¹⁰⁷ *Hibernia Bank & Trust Co. v. Smith* (Miss., 1906), 42 So. 345.

"It was not necessary to present the note for payment at the Mobile Savings Bank, in order to fix the liability of the maker, although it was made payable there. If the maker was there in readiness to meet his obligation, or had funds deposited there for this purpose, and he suffered loss by reason of the failure of the holder to make presentation at such place of payment, this would be matter of defense, which should properly be set up in the answer, and need not have been anticipated by negative allegations on the part of the complainants in their bill. *Connerly v. Planters', &c., Insurance Co.*, 66 Ala. 432; *Montgomery v. Elliott*, 6 Ala. 701; *Conn v. Gano*, 1 Ohio 483, 13 Amer. Dec. 639; *Weed v. Van Houten*, 4 Halst. (N. J.) 489, 17 Amer. Dec. 468;" *Sims v. National Commercial Bank*, 73 Ala. 250.

¹⁰⁸ *Dailey v. Sharkey*, 29 Mo. App. 518.

¹⁰⁹ *Evans v. George D. Cross Lumber Co.*, 21 Ohio Cir. Ct. R. 80, 11 O. C. D. 543.

¹¹⁰ *Dykman v. Northridge*, 36 N. Y. Supp. 962, 72 N. Y. St. R. 64, 1 App. Div. 26.

Presentment by notary after close of bank where note present sufficient. See *Metropolitan Bank v. Engel*, 72 N. Y. Supp. 691, 66 App. Div. 273.

^{110*} *Chicopee Bank v. Philadelphia Bank*, 8 Wall. (U. S.) 641.

¹¹¹ *Carrington v. Odom*, 124 Ala. 529, 27 So. 510.

¹¹² *Hutchison v. Crutcher*, 98 Tenn. 421, 39 S. W. 725, 37 L. R. A. 89. See *Roberts v. Mason*, 1 Ala. 373; *Spann v. Baltzell*, 1 Fla. 362, 46 Am. Dec. 346; *Berg v. Abbott*, 83 Pa. 177, 24 Am. Rep. 158, and note 160.

¹¹³ *Salt Springs National Bank v. Burton*, 58 N. Y. 430, 17 Am. Rep. 265.

payable is the holder, the proper officers of the bank may hand it to the notary after banking hours, informing him of the lack of funds to meet it, and it constitutes a sufficient presentment.¹¹⁴ And in such case where the bank is the holder it is sufficient to make demand at the bank.¹¹⁵ A note may be payable at the place of delivery, even though signed by the maker at his place of residence, as where it is dated at the place where it is to be indorsed and delivered and it is there placed for collection. In such case where the note is merely payable at bank and does not specify any particular one it is sufficient to present it at any bank in the place of delivery.¹¹⁶ If the specified bank, at which the note is made payable, is erroneously designated as located in a certain town and state, when in fact it is located in an adjoining state, but there is only a short distance between the place designated and the actual location of the bank, and the places are connected and have but one post office, it is sufficient to present the paper at the bank specified at the place where it is actually located.¹¹⁷ A presentment of a draft may also be good, although it is made at a bank some distance from the drawee's place of business specified in the paper, after the term "via" following the drawee's name and place of business.¹¹⁸ Presentment may also be properly made at a branch office of a bank at which the instrument is payable.¹¹⁹ And where agents of several banks meet for the settlement of accounts and presentment is made at such meeting by the bank holding the note for collection to the agent of the bank at which the note is payable and such agent presents it to his bank during banking hours, the demand is good.¹²⁰ But a note payable at any bank in a certain place does not include in those terms a loan and trust corporation, even though empowered to perform acts similar to those of banks of deposit and issue.¹²¹ In case the payee transfers a note as collateral to another bank than that specified as the one at which the note is payable and the collateral paper becomes due before the principal debt, such instrument should be deposited with the specified bank for payment

¹¹⁴ *United States Bank v. Carneal*,
2 Pet. (U. S.) 543.

¹¹⁵ *Hildeburn v. Turner*, 5 How.
(U. S.) 69; *United States v. Carneal*,
2 Pet. (U. S.) 543.

¹¹⁶ *Hazard v. Spencer*, 17 R. I. 561,
23 Atl. 729.

¹¹⁷ *Pawcatuck National Bank v. Barber*,
22 R. I. 73, 46 Atl. 1095.

¹¹⁸ *Bartholomew v. First National Bank*,
18 Wash. 683, 52 Pac. 239.

¹¹⁹ *Commercial Bank v. Bissett*, 7
Manitoba Rep. 586.

¹²⁰ *Martin v. Smith*, 108 Mich. 278,
2 Det. L. N. 841, 66 N. W. 61.

¹²¹ *Nash v. Brown*, 165 Mass. 384,
43 N. E. 180.

where no reason to doubt its solvency exists.¹²² A demand is not sufficient where it is made only by letter, written by the bank at which the note is payable in the absence of a showing that there were any funds of the maker in bank, or as to the character of the reply made, if any, to the letter.^{122*} If presentment is made during banking hours, but before noon, and shortly thereafter, and also before noon, the maker deposits funds for payment, but the note is not again presented, although it was the custom to allow until three o'clock to make payment, and the maker withdraws his funds, he is nevertheless liable at the suit of the holder.¹²³

§ 518. Same subject continued—Insolvency or suspension of bank.

—If the bank has become insolvent and the bank examiner is in possession, demand may be made upon him;¹²⁴ or it must, in case of the insolvency of a national bank, be made upon the receiver, appointed by the comptroller of the currency, at the former's location in the city, where such location is known, even though not the place where the bank had conducted its business.¹²⁵ Where the bank at which the instrument is payable has gone out of existence, thereby precluding presentment at its place of business during banking hours, the note may be presented to the residence of the indorser and last manager of the bank, as late as five o'clock in the afternoon, and the presentment is good.¹²⁶ If, however, a bank has become insolvent and a receiver has been appointed *pendente lite*, presentment and demand made upon him will not be sufficient to charge an indorser of a negotiable certificate of deposit issued by the bank.¹²⁷

§ 519. Presentment to whom—Person primarily liable dead.—

Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made

¹²² *Mt. Vernon Bridge Co. v. Knox County Savings Bank*, 46 Ohio St. 224, 20 N. E. 339, 21 Ohio L. J. 168.

^{122*} *National Hudson River Bank v. Moffett*, 162 N. Y. 623, 57 N. E. 1118, aff'g 45 N. Y. Supp. 588, 17 App. Div. 232.

¹²³ *Hills v. Place*, 48 N. Y. 520, 8 Am. Rep. 568.

¹²⁴ *Auten v. Manistee National Bank*, 67 Ark. 243, 54 S. W. 337. See note 61 L. R. A. 900.

¹²⁵ *Hutchison v. Crutcher*, 98 Tenn. 421, 39 S. W. 725, 37 L. R. A. 89. But compare *Schlesinger v. Schultz*, 96 N. Y. Supp. 383, 110 App. Div. 356.

¹²⁶ *Waring v. Betts*, 90 Va. 46, 17 S. E. 739, 17 Va. L. J. 370.

¹²⁷ *Jackson v. McInnis*, 33 Ore. 529; 43 L. R. A. 128, 15 Bkg. L. J. 705, 54 Pac. 884, 55 Pac. 535.

to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found.¹²⁸

§ 520. Same subject—Persons primarily liable—Partners—Joint debtors.—Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any of them, even though there has been a dissolution of the firm.¹²⁹ Where there are several persons not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.¹³⁰ And this rule is held to apply whether the form of the note is joint or joint and several.¹³¹

§ 521. Excuses for delay in presentment.—Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.¹³² The matters which will excuse such delay are various and difficult to enumerate, as they may be personal, as in case of serious illness under certain conditions and surroundings,¹³³ or public, as in case of an

¹²⁸ *Negot. Inst. Law*, § 136; *Bills of Exch. Act*, § 45 (7), Appendix herein. *Hubbard v. Matthews*, 54 N. Y. 43, 13 Am. Rep. 502.

See *United States*.—*Magruder v. Union Bank*, 3 Pet. (U. S.) 87.

Maine.—*Gower v. Moore*, 25 Me. 16.

Massachusetts.—*Goodnow v. Warren*, 122 Mass. 79, 23 Am. Rep. 289.

New York.—*Reed v. Spear*, 107 N. Y. App. Div. 1144.

South Carolina.—*Price v. Young*, 1 Nott & McC. (S. C.) 438.

¹²⁹ *Negot. Inst. Law*, § 137. See *Brown v. Turner*, 15 Ala. 832; *Mt. Pleasant Branch of State v. Mc-Leran*, 26 Iowa 306; *Fourth Nat. Bk. v. Henschen*, 52 Mo. 207.

Dissolution by bankruptcy—Demand on partnership. See *Gates v. Beecher*, 60 N. Y. 518, 19 Am. Rep. 207.

Dissolution of firm by war. See

Hubbard v. Matthews, 54 N. Y. 43, 13 Am. Rep. 502.

¹³⁰ *Negot. Inst. Law*, § 138; *Bills of Exch. Act*, § 45, Appendix herein. See *Closz v. Miracle*, 103 Iowa 198, 72 N. W. 502; *Shutts v. Finger*, 100 N. Y. 539; *Willis v. Green*, 5 Hill (N. Y.) 232.

¹³¹ *Benedict v. Schmieg*, 13 Wash. 476, 43 Pac. 374, 36 L. R. A. 703. See *Harris v. Clark*, 10 Ohio 6.

¹³² *Negot. Inst. Law*, § 141; *Bills of Exch. Act*, § 46, Appendix herein.

Excuses for delay—Presentment to acceptor for honor or referee in case of need. *Negot. Inst. Law*, § 288, making § 141 applicable; *Bills of Exch. Act*, § 67, see Appendix herein.

¹³³ See *Newbold v. Boraef*, 155 Pa. St. 227, 26 Atl. 305; *Wilson v. Senier*, 14 Wis. 380.

epidemic,¹³⁴ or an existing war;¹³⁵ or it may be any other impediment or obstruction beyond the holder's control rendering it impossible to make such presentment or demand during its continuance or existence.¹³⁶ Although war or other political causes may constitute an excuse for not making a demand at maturity, yet whenever the preventing cause or impediment ceases the holder must act promptly and with reasonable diligence, otherwise secondary parties will be released.¹³⁷

§ 522. **Excuses—When presentment dispensed with—Drawer—Indorser.**—Presentment for payment is dispensed with where, after the exercise of reasonable diligence, presentment cannot be made; or where the drawee is a fictitious person; or, by waiver of presentment, express or implied.¹³⁸ And presentment is not required (a) in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument; (b) in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.¹³⁹ If the holder has the note ready for presentment at the place where dated and makes diligent inquiry to ascertain the place of residence or business of the maker but is unsuccessful, demand upon the maker is excused;¹⁴⁰ for the holder is only

¹³⁴ *Tunno v. Lague*, 1 Johns. Cas. (N. Y.) 1.

¹³⁵ *Ray v. Smith*, 17 Wall. (U. S.) 411; *Peters v. Hobbs*, 25 Ark. 67.

"Judge Story, in his Commentaries on the Law of Promissory Notes, § 257, has enumerated, among the sufficient excuses for non-presentment and demand at the time and place when and where the promissory note is due and payable, the following: '(3) The presence of political circumstances, amounting to a virtual interruption and obstruction of the ordinary negotiations of trade, called the *vis major*; (4) the breaking out of war between the country of the maker and that of the holder; (5) the occupation of the country where the parties live, or where the note is payable, by a public enemy which sus-

pends commercial intercourse; (6) public and positive interdictions and prohibitions of the state which obstruct or suspend commerce and intercourse.' And in § 356 of the same work the learned commentator enumerates them also as constituting sufficient excuses for the omission of due and regular notice of the dishonor." *House v. Adams & Co.*, 48 Pa. St. 267.

¹³⁹ Violent storm.—When no excuse. See *McDonald v. Mosher*, 23 Ill. App. 206.

¹³⁷ *Durden v. Smith*, 44 Miss. 548.

¹³⁸ As to waiver, see §§ 524, 525, herein.

¹³⁶ *Negot. Inst. Law*, §§ 139, 140, 142; *Bills of Exch. Act*, § 46, Appendix herein.

¹⁴⁰ *Davis v. Eppler*, 38 Kan. 629, 16 Pac. 793.

required to exercise due or reasonable diligence to present or attempt to make presentment, and demand should be excused where he has done so and is unable to find the maker.¹⁴¹ And the holder has used the required diligence where he mails a note for collection to a bank in the city where the paper is payable and sends it in ample time, and upon its return by the postmaster with the indorsement that the bank had failed he immediately remails it to another agent in the same city and he at once makes presentment, although the note was past due when presented.¹⁴² But due diligence is not exercised where the notary making presentment failed to inquire of the cashier of the bank where he presented the paper as to the residence of the maker, when he could have obtained the necessary information by such inquiry.¹⁴³ And, although the holder is told that the maker has absconded and his place of business is found closed, such facts do not excuse presentment and demand.¹⁴⁴ And presentment is not dispensed with by the fact that the corporation maker has transferred its property to secure the indorser; unless it appears that such corporation has ceased to exist.¹⁴⁵ But demand is not necessary in order to charge the indorser of a forged bill.¹⁴⁶

§ 523. **Same subject continued.**—Under the California code presentment of a bill is excused where there is no reason to believe that it will be paid by the drawee.¹⁴⁷ This is substantially similar to the rule above given¹⁴⁸ and both are but statements in different forms of the well-settled general rule, that if the drawer has no reasonable expectation that his bill will be honored he does not stand in the same position as to a right to demand and notice as he would had he reason to believe that his paper would be paid, for in the former case he cannot suffer by want of presentment and notice of dishonor. This point is involved with or involves that of drawing without funds or authority or reasonable expectation of funds, and applies in such case, although other circumstances may exist under which the rule would

¹⁴¹ *Hazlett v. Bragdon*, 7 Pa. Super. Ct. 581. See § 503 herein.

¹⁴² *Pier v. Heinrichshoffen*, 67 Mo. 163, 29 Am. Rep. 501.

¹⁴³ *Sweet v. Powers*, 72 Mich. 393, 40 N. W. 471.

¹⁴⁴ *Glaser v. Rounds*, 16 R. I. 235, 14 Atl. 863, 6 N. Eng. Rep. 500.

¹⁴⁵ *Moore v. Alexander*, 68 N. Y. Supp. 888, 33 Misc. 613.

¹⁴⁶ *Hamer v. Brainard*, 7 Utah 245, 26 Pac. 299, 5 Bkg. L. J. 144, 12 L. R. A. 434.

¹⁴⁷ *Cushman v. Harrison*, 90 Cal. 297, 27 Pac. 283.

¹⁴⁸ § 522 herein (a).

also be applicable.¹⁴⁹ Since, therefore, the question of the drawer's right to presentment rests upon his right to expect or require, or his reason to believe, or his reasonable expectation that the paper will be paid, then if he has such right, reason or expectation it ought to follow that he should be entitled to demand and notice and it is so held.¹⁵⁰

¹⁴⁹ *United States*.—Dickens v. Beal, Murray v. Judah, 6 Cow. (N. Y.) 10 Pet. (U. S.) 572, 9 L. Ed. 538; 490.

Read v. Wilkinson, Fed. Cas. No. 11611; Brown, *In re*, Fed. Cas. No. 1985.

Alabama.—Stewart v. Desha, 11 Ala. 844; Armstrong v. Gay, 1 Stew. (Ala.) 175.

Arkansas.—McRae v. Rhodes, 22 Ark. 315.

Illinois.—Walker v. Rogers, 40 Ill. 278, 89 Am. Dec. 348; Brower v. Rupert, 24 Ill. 182.

Indiana.—Culver v. Marks, 122 Ind. 554, 17 Am. St. Rep. 377, 23 N. E. 1086, 7 L. R. A. 489.

Iowa.—Kimball v. Bryan, 56 Iowa 632, 10 N. W. 218.

Kentucky.—Baxter v. Graves, 2 A. K. Marsh. (Ky.) 152.

Louisiana.—Blum v. Bidwell, 20 La. Ann. 43; English v. Wall, 12 Rob. (La.) 137.

Maine.—Burnham v. Spring, 22 Me. 495; True v. Thomas, 16 Me. 36.

Massachusetts.—Beuregard v. Knowlton, 156 Mass. 395, 31 N. E. 389.

Mississippi.—Carson v. Alexander, 34 Miss. 528.

Missouri.—Merchants' Bank v. Easley, 44 Mo. 286, 100 Am. Dec. 287.

New York.—Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 304; Healey v. Gilman, 1 Bosw. (N. Y.) 235; Franklin v. Vanderpool, 1 Hall (N. Y.) 78. Examine Brush v. Barrett, 82 N. Y. 400; Eichner v. Bowery Bank, 20 Misc. 90; Little v. Phoenix Bank, 2 Hill (N. Y.) 425;

North Carolina.—Spear v. Atkinson, 1 Ired. (N. C.) 262.

Pennsylvania.—Callen v. Fawcett, 58 Pa. St. 113.

South Carolina.—Hubble v. Fougartie, 3 Rich. (S. C.) 413, 45 Am. Dec. 775.

Tennessee.—Planters' Bank v. Keese, 7 Heisk. (Tenn.) 200.

Texas.—Armendiaz v. Serna, 40 Tex. 291; Kottwitz v. Alexander, 34 Tex. 689.

Wisconsin.—Mehlberg v. Tisher, 24 Wis. 607.

England.—Bailey v. Porter, 14 Mees. & W. 44; Cory v. Scott, 3 Barn. & Ald. 619; Crofton v. Crofton, 33 Ch. Div. 612; Dennis v. Morris, 3 Esp. 158; Heath, *Ex parte*, 2 Ves. & B. 240; Hill v. Heap, 1 Dowl. & R. N. P. 517; Kemble v. Mills, 1 Man. & G. 757; Legge v. Thorpe, 2 Camp. 310; Orr v. Maginnis, 7 East 359; Rogers v. Stephens, 2 Term. R. 713.

¹⁵⁰ *United States*.—Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 28 L. Ed. 866, 5 Sup. Ct. 314; Mackall v. Gozler, Fed. Cas. No. 8835; Hopkirk v. Page, Fed. Cas. No. 6697. See French v. Bank of Columbia, 4 Cranch (U. S.) 141, 2 L. Ed. 576; Oldhausen v. Lewis, Fed. Cas. No. 10507.

Alabama.—Sherrod v. Rhodes, 5 Ala. 683; Shirley v. Fellows, 9 Port. (Ala.) 300.

Illinois.—Willets v. Paine, 43 Ill. 432. See Welch v. Taylor, 82 Ill.

It is declared in a New York case that: "It has been repeatedly decided that where there are any funds in the hands of the drawee, so that the drawer has a right to expect the bill will be paid, or where there are not any funds, yet if the bill was drawn under such circumstances as induced the drawer to entertain a reasonable expectation that the bill would be accepted and paid, the person so drawing it is entitled to notice; and *a fortiori*, he is entitled to have the bill duly presented."¹⁵¹ It is also said in a Mississippi case that: "No condition of things will excuse the holder from his duty to present the bill for payment if it be practicable for him to do so. Causes may intervene, beyond his control which suspend and postpone the performance of the act, but do not dispense with it when it becomes practicable. The want of funds, the absence of a right to draw, and of reasonable expectation of payment, absolve from the necessity of giving notice to secondary parties. But these things furnish no pretext for not making demand of the drawer or acceptor. For the want of prompt diligence in making the demand the drawer and indorsers are discharged."¹⁵² The fact, however, that no funds were at the bank to

574; *Walker v. Rogers*, 40 Ill. 278, 89 Am. Dec. 348.

Iowa.—*Hamlin v. Simpson*, 105 Iowa 125, 74 N. W. 906. See *Kimball v. Bryan*, 56 Iowa 632, 10 N. W. 218.

Kentucky.—*Clark v. Castleman*, 1 J. J. Marsh. (Ky.) 69.

Louisiana.—*Urquhart v. Thomas*, 24 La. Ann. 95; *Lacoste v. Harper*, 3 La. Ann. 385.

Maine.—*Campbell v. Pettingill*, 7 Me. 126.

Maryland.—*Orear v. McSinald*, 9 Gill (Md.) 350, 52 Am. Dec. 703.

Massachusetts.—*Stanton v. Blossom*, 14 Mass. 116, 7 Am. Dec. 198.

Missouri.—*Commercial Bank v. Barksdale*, 36 Mo. 563.

New Jersey.—*United States Bank v. Southard*, 17 N. J. L. 473.

New York.—*Schofield v. Bayard*, 3 Wend. (N. Y.) 488; *Robinson v. Eames*, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259. See *Cruger v. Armstrong*, 3 Johns. Cas. (N. Y.) 5.

North Carolina.—*Austin v. Rodman*, 1 Hawks (N. C.) 194, 9 Am. Dec. 630.

Ohio.—*Miser v. Trovinger*, 7 Ohio St. 281.

Texas.—*Cole v. Wintercost*, 12 Tex. 118.

England.—*Cory v. Scott*, 3 Barn. & Ald. 619; *Robins v. Gibson*, 3 Camp. 334; *Rucker v. Hiller*, 16 East 43; *Walwyn v. St. Quintin*, 2 Esp. 515; *Wilson, Ex parte*, 11 Ves. 411.

¹⁵¹ *Robinson v. Ames*, 20 Johns. (N. Y.) 146, 149, per Spencer, Ch. J. The court also says: "The rule is correctly laid down in *Claridge v. Dalton*, 4 Maule & Selw. 229, by Lord Ellenborough. The principle which has been stated is very ably supported by Chief Justice Marshall in *French v. The Bank of Columbia*, 4 Cranch (U. S.) 153, where the principal authorities are reviewed."

¹⁵² *Durden v. Smith*, 44 Miss. 548, 555, 556, per Simrall, J.

meet payment of other notes by the same maker and first indorser constitutes no excuse for non-presentment.¹⁵³ And the fact that another maker states that the maker of the note could not make payment does not do away with the necessity of making demand;¹⁵⁴ nor is the requirement of making a demand excused by the statement of the drawer to the payee that the drawee could not pay but that he, the drawer, would, where such information is not in conformity with the statute.¹⁵⁵ If the bill is drawn on the cashier of a bank without funds, or his authority, the bank holding the bill is not prejudiced by sending the cashier abroad, so that the demand could not be made of him in person.¹⁵⁶ Again, a demand is not necessary in the case of an indorser of a bill or note where such paper is given for his accommodation merely.¹⁵⁷ But accommodation indorsers for the maker are within the general rule as to presentment being necessary.¹⁵⁸ Nor does the maker's insolvency of itself alone operate as a legal excuse for failure to make presentment and demand.¹⁵⁹ And this rule applies to a corporation maker of paper,¹⁶⁰ and to a note payable on demand;¹⁶¹ and the acceptor's insolvency does not excuse presentment and demand.¹⁶²

§ 524. **Waiver of presentment and demand.**—Presentment for payment is dispensed with by waiver of presentment, express or im-

¹⁵³ *Manning v. Lyon*, 24 N. Y. Supp. 265, 54 N. Y. St. R. 6.

¹⁵⁴ *Closz v. Miracle*, 103 Iowa 198, 72 N. W. 502.

¹⁵⁵ *Los Angeles National Bank v. Wallace*, 101 Cal. 478, 36 Pac. 197; Cal. Civ. Code, § 3156.

¹⁵⁶ *Taylor v. Bank of Illinois*, 7 T. B. Mon. (Ky.) 577.

¹⁵⁷ *Shriner v. Keller*, 25 Pa. St. 61; *American National Bank v. Lumber & Mfg. Co.*, 94 Tenn. 624, 30 S. W. 753. See *Mayer v. Thomas*, 97 Ga. 772, 25 S. E. 761.

¹⁵⁸ *Perry v. Friend*, 57 Ark. 437. See *Moody v. Keller*, 127 Ala. 630, 29 So. 68; *Thielman v. Gueble*, 32 La. Ann. 260, 36 Am. Rep. 267. The note in this case was payable on demand and bore interest, and a delay of four years was held unreasonable.

¹⁵⁹ *Leonard v. Olson*, 99 Iowa 162, 61 Am. St. Rep. 230, 35 L. R. A. 381, 68 N. W. 677; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495, 48 N. W. 326; *Bassenhorst v. Wilby*, 45 Ohio St. 333, 13 N. E. 75, 11 West. Rep. 270; *Reinke v. Wright*, 93 Wis. 368, 67 N. W. 737.

¹⁶⁰ *Moore v. Alexander*, 68 N. Y. Supp. 888, 33 Misc. 613, aff'd 71 N. Y. Supp. 420, 63 App. Div. 100.

¹⁶¹ *O'Neill v. Meighan*, 66 N. Y. Supp. 313, 32 Misc. 51.

¹⁶² *Hawley v. Jette*, 10 Oreg. 31, 45 Am. Rep. 129.

As between the holder of negotiable paper and the prior parties thereto, the insolvency or bankruptcy of the maker or acceptor will constitute no excuse for want of presentment or demand. *Fugitt v. Nixon*, 44 Mo. 295.

plied;¹⁶³ as where the note stipulates for a waiver;¹⁶⁴ or has an indorsement thereon waiving presentment and demand;¹⁶⁵ and such an indorsement waives all legal steps required to charge the indorser;¹⁶⁶ so the words "protest waived" or "waiver of protest" or a waiver of notice and protest by the indorsers of a note include a waiver of demand.¹⁶⁷ Again, an indorser who signs a note underneath a waiver written upon the back thereof is bound thereby.¹⁶⁸ And this includes all the indorsers so signing.¹⁶⁹ The same rule applies where the agreement of waiver is stamped on the back of the instrument,¹⁷⁰ even though the blanks in such waiver are not filled out and a direction to pay the indorsee separates the signatures therefrom.¹⁷¹ The rule also applies where the waiver appears in the body of the note, where the indorsement is not qualified,¹⁷² or where the terms of the waiver are that

¹⁶³ Negot. Inst. Law, § 142; Bills of Exch. Act, § 46, Appendix herein.

¹⁶⁴ Leeds v. Hamilton Paint & G. Co. (Tex. Civ. App.), 35 S. W. 77. See State, Parks v. Hughes, 19 Ind. App. 266, 49 N. E. 393.

¹⁶⁵ Blanc v. Mutual National Bank, 28 La. Ann. 921, 26 Am. Rep. 119; Hammett v. Trueworthy, 51 Mo. App. 281; Seymour v. Francisco, 4 Ohio Dec. 12, 1 Cleve. Law Rec. 9.

¹⁶⁶ Hammett v. Trueworthy, 51 Mo. App. 281. See Wheeler v. Asher, 2 Mo. App. Rep'r 1236.

¹⁶⁷ Kansas.—Baker v. Scott, 29 Kan. 136, 44 Am. Rep. 628.

Louisiana.—Harvey v. Nelson, 31 La. Ann. 434, 33 Am. Rep. 222.

Massachusetts.—Johnson v. Parsons, 140 Mass. 173, 1 N. Eng. 381, 4 N. E. 196.

Minnesota.—Wolford v. Andrews, 29 Minn. 250, 43 Am. Rep. 201.

Mississippi.—Timberlake v. Thayer, 76 Miss. 76, 23 So. 767.

North Carolina.—Shaw v. McNeill, 95 N. C. 535.

Washington.—Wilkie v. Chandon, 1 Wash. 355, 25 Pac. 464.

But compare Sprague v. Fletcher, 8 Oreg. 367, 34 Am. Rep. 587.

See further the following cases:

Alabama.—Montgomery v. Crosthwaite, 90 Ala. 553, 12 L. R. A. 140.

California.—San Diego First National Bank v. Falkenhan, 94 Cal. 141, 29 Pac. 866, 7 Bkg. L. J. 105.

District Columbia.—Portsmouth Savings Bank v. Wilson, 5 App. D. C. 8.

Illinois.—Dunnigan v. Stevens, 122 Ill. 396, 13 N. E. 651.

Missouri.—Hammett v. Trueworthy, 51 Mo. App. 281.

¹⁶⁸ Farmers' Exchange Bank v. Altura Gold Mill & Mining Co., 129 Cal. 263, 61 Pac. 1077; Savings Bank v. Fisher (Cal.), 41 Pac. 490; Parshley v. Heath, 69 Me. 90, 31 Am. Rep. 246.

¹⁶⁹ Farmers' Exchange Bank v. Altura Gold Mill & Mining Co., 129 Cal. 263, 61 Pac. 1077.

¹⁷⁰ Savings Bank v. Fisher (Cal.), 41 Pac. 490; Loveday v. Anderson, 18 Wash. 322, 51 Pac. 463, 15 Bkg. L. J. 100.

¹⁷¹ Loveday v. Anderson, 18 Wash. 322, 51 Pac. 463, 15 Bkg. L. J. 100. See Farmers' Bank of Kentucky v. Ewing, 78 Ky. 264, 39 Am. Rep. 231.

¹⁷² Portsmouth Savings Bank v. Wilson (D. C.), 22 Wash. L. Rep. 817.

"each of us, whether principal, surety or indorser, waive demand," etc.;¹⁷³ nor is any new consideration necessary where the waiver was made on the day of maturity of the note.¹⁷⁴ One signing an indorsement and waiving demand waives it as an indorser, even though he is also a guarantor.¹⁷⁵ If an indorser of a note, when he signed a waiver, knew the facts which released him, his ignorance of its legal effect will not relieve him from the consequences of his waiver;¹⁷⁶ although an indorser's knowledge of the facts which release him from liability are held to be necessary.¹⁷⁷ But it is held, however, that even though the terms of the waiver expressly cover all notice of presentment, dishonor and protest, nevertheless the president of the corporation maker does not, as indorser, by such waiver include presentment and demand.¹⁷⁸ And waiver of presentment does not result from the indorser's knowledge of the maker's insolvency.¹⁷⁹ An extension of the time of payment, granted at the request of the indorser, who agrees that his name may remain on the note, operates as a waiver.¹⁸⁰ But a mere request not to force payment as against the maker, made after the lapse of the time for presentment and demand, does not constitute a waiver;¹⁸¹ nor does a mere request not to sue during the absence of payee.¹⁸²

§ 525. **Same subject continued.**—If there has been no presentment or demand, and the indorser unconditionally acknowledges his lia-

Examine Illinois.—Deering v. Wiley, 56 Ill. App. 309.

Indiana.—Pool v. Anderson, 116 Ind. 88, 1 L. R. A. 712.

Iowa.—Iowa Valley State Bank v. Sigstad, 96 Iowa 491, 65 N. W. 407.

Kentucky.—Bryant v. Merchants' Bank, 8 Bush (Ky.) 43.

Minnesota.—Bryant v. Lord, 19 Minn. 396.

Missouri.—Jacobs v. Gibson, 77 Mo. App. 244, 2 Mo. A. Rep'r 6.

¹⁷³ Woodward v. Cowry, 74 Ga. 148.

¹⁷⁴ Delsman v. Friedlander, 40 Oreg. 33, 66 Pac. 297.

¹⁷⁵ First National Bank v. Adamson, 25 R. I. 73, 54 Atl. 930.

¹⁷⁶ Toole v. Crafts (Mass., 1906), 78 N. E. 775.

¹⁷⁷ Closz v. Miracle, 103 Iowa 198, 72 N. W. 502.

¹⁷⁸ Hayward v. Empire State Sugar

Co., 93 N. Y. Supp. 449, 105 App. Div. 21.

¹⁷⁹ Kimmell v. Wiel, 95 Ill. App. 15.

¹⁸⁰ Cady v. Bradshaw, 116 N. Y. 188, 26 N. Y. St. R. 518, 22 N. E. 371, 5 L. R. A. 557, 2 Bkg. L. J. 84.

Examine Glaze v. Ferguson, 48 Kan. 157, 29 Pac. 396; *Ross v. Hurd*, 71 N. Y. 14, 14 Am. Rep. 1; *Sheldon v. Horton*, 43 N. Y. 93, 3 Am. Rep. 669; *Bassenhorst v. Wilby*, 45 Ohio St. 499, 13 N. E. 75, 11 West. Rep. 274; *McMonigal v. Brown*, 45 Ohio St. 333, 15 N. E. 860, 14 West. Rep. 147; *Burnham, H. M. & Co. v. McCornick*, 18 Utah 42, 55 Pac. 77.

¹⁸¹ Whittier v. Collins, 15 R. I. 44, 1 N. Eng. 135, 23 Atl. 39. See *Britton v. Milsom*, 19 Ont. App. 96.

¹⁸² Button v. Bratt (Ky.), 11 S. W. 821.

bility, or makes a binding promise to pay the note, or makes a partial payment, and at the time he has full knowledge of the laches and of all the material facts, he waives presentment and cannot afterward defend for want thereof.¹⁸³ It is essential, however, in order to constitute a waiver and make binding the promise to pay, that the indorser should have at the time such full knowledge of the laches and of all

¹⁸³ *United States*.—Sigerson v. Mathews, 20 How. (U. S.) 496, 15 L. Ed. 989; Thornton v. Wynn, 12 Wheat. (U. S.) 183, 6 L. Ed. 595; Donaldson v. Means, 4 Dall. (U. S.) 109.

Alabama.—Alabama National Bank v. Rivers, 116 Ala. 1, 22 So. 580.

Arkansas.—Hazard v. White, 26 Ark. 155.

California.—Curtis v. Sprague, 51 Cal. 239.

Illinois.—Givens v. Merchants' National Bank, 85 Ill. 442; Tobey v. Berley, 26 Ill. 426.

Iowa.—Davis v. Miller, 88 Iowa 114, 55 N. W. 89; Cheshire v. Taylor, 29 Iowa 492; Hughes v. Bowen, 15 Iowa 446.

Louisiana.—Hart v. Long, 1 Rob. (La.) 83.

Maine.—Thomas v. Mayo, 56 Me. 40.

Maryland.—Turnbull v. Maddux, 68 Md. 579; Beck v. Thompson, 4 Harr. & J. (Md.) 531.

Massachusetts.—Glidden v. Chamberlin, 167 Mass. 486, 46 N. E. 103; Rindge v. Kimball, 124 Mass. 209. See Hobbs v. Straine, 149 Mass. 212, 21 N. E. 365.

Michigan.—Parsons v. Dickinson, 23 Mich. 56.

Minnesota.—Amor v. Stoeckele, 76 Minn. 180, 78 N. W. 1046.

Missouri.—State Bank v. Bartle, 114 Mo. 276, 21 S. W. 816; Workingmen's Banking Co. v. Blell, 57 Mo. App. 410.

Montana.—Quaintance v. Goodrow, 16 Mont. 376, 41 Pac. 76.

New Hampshire.—Rogers v. Hackett, 21 N. H. 100.

New York.—Ross v. Hurd, 71 N. Y. 14, 27 Am. Rep. 1. See Cady v. Bradshaw, 116 N. Y. 188, 22 N. E. 371, 26 N. Y. St. R. 518. See Linticum v. Caswell, 160 N. Y. 702, 57 N. E. 1115, aff'g 19 App. Div. 541, 46 N. Y. Supp. 610.

North Carolina.—Shaw v. McNeill, 95 N. C. 535.

Oregon.—Smith v. Lownsdale, 6 Oreg. 78.

Pennsylvania.—Oxnard v. Varnum, 111 Pa. 193, 56 Am. Rep. 255; Morgan v. Wolstencroft, 1 Super. Ct. 13, 37 Wkly. N. C. 293, 52 Phila. Leg. Int. 495. See Sieger v. Allentown' Second National Bank, 132 Pa. 307, 19 Atl. 217, 2 Bkg. L. J. 335.

South Carolina.—Hall v. Freeman, 2 Nott & McC. 479, 10 Am. Dec. 621.

Tennessee.—Bogart v. McClung, 11 Heisk. (Tenn.) 105, 27 Am. Rep. 737. See People's National Bank v. Dibrell, 91 Tenn. 301, 18 S. W. 626.

Texas.—Stone v. Smith, 30 Tex. 138, 94 Am. Dec. 299.

Vermont.—Blodgett v. Durgin, 32 Vt. 361.

Virginia.—Tardy v. Boyd, 26 Gratt. (Va.) 637.

But compare Huntington v. Harvey, 4 Conn. 124; Sebree Deposit Bank v. Moreland, 96 Ky. 150, 28 S. W. 153, 29 L. R. A. 305.

the material facts.¹⁸⁴ An indorser's promise to pay, if the maker does not, made by letter after maturity of the paper, is held to be a waiver of demand and to raise the presumption of knowledge on the part of such indorser that the note had not been protested.¹⁸⁵ There is also a waiver where the promise is to pay whenever the holder shall require payment where such promise is an unconditional one;¹⁸⁶ or where the promise is to pay at maturity after days of grace, followed by subsequent promises and requests for delay;¹⁸⁷ or where there is an agreement after maturity to reduce the amount of the note by the application of certain assets.¹⁸⁸ So the sufficiency of the notice of demand is admitted by the indorser by a promise to pay, made after seeking counsel's advice and being advised that such notice was insufficient.¹⁸⁹ Again, a request by the indorser for a renewal, coupled with part payment are not such acts as amount to a waiver where he has no knowledge of material facts which discharge him.¹⁹⁰ So there

¹⁸⁴ *United States*.—Thornton v. Wynn, 12 Wheat. (U. S.) 183, 6 L. Ed. 595; Martin v. Winslow, Fed. Cas. No. 9172.

Alabama.—Kennon v. M'Rea, 7 Port. (Ala.) 175.

Illinois.—Walker v. Rogers, 40 Ill. 278, 89 Am. Dec. 348.

Kentucky.—Bank of United States v. Leathers, 10 B. Mon. (Ky.) 64.

Louisiana.—James v. Wade, 21 La. Ann. 548.

Maryland.—Lewis v. Brehme, 33 Md. 412, 3 Am. Rep. 190.

Massachusetts.—Parks v. Smith, 155 Mass. 26, 28 N. E. 1044; Landrum v. Trowbridge, 2 Metc. (Mass.) 281.

Mississippi.—Baskerville v. Harris, 41 Miss. 535.

New Hampshire.—Norris v. Ward, 59 N. H. 487.

New Jersey.—United States Bank v. Southard, 17 N. J. L. 473, 35 Am. Dec. 521.

New York.—Meyer v. Hibsher, 47 N. Y. 265; O'Rourke v. Hanchett, 35 N. Y. Supp. 328, 69 N. Y. St. R. 717.

North Carolina.—Lilly v. Pette-way, 73 N. C. 358.

Ohio.—City National Bank of Dayton v. Clinton County National Bank, 49 Ohio St. 351, 30 N. E. 958, 27 Ohio L. J. 325, 6 Bkg. L. J. 515.

Rhode Island.—Glaser v. Rounds, 16 R. I. 235, 14 Atl. 863.

South Carolina.—Fotheringham v. Price, 1 Bay (S. C.) 291, 1 Am. Dec. 618.

Tennessee.—See Carnegie Steel Co. v. Chattanooga Const. Co. (Tenn. Ch. App.), 38 S. W. 102.

Wisconsin.—Schiel v. Baumel, 75 Wis. 75, 43 N. W. 724.

See McFatridge v. Williston, 25 N. S. 11.

¹⁸⁵ Davis v. Miller, 88 Iowa 114, 55 N. W. 89.

¹⁸⁶ State Bank v. Bartle, 114 Mo. 276, 21 S. W. 816.

¹⁸⁷ Quaintance v. Goodrow, 16 Mont. 876, 41 Pac. 76.

¹⁸⁸ Brown v. Mechanics' & T. Bank, 44 N. Y. Supp. 645, 16 App. Div. 207.

¹⁸⁹ Peoples' National Bank v. Dibrrell, 91 Tenn. 301, 18 S. W. 626.

¹⁹⁰ Carnegie Steel Co. v. Chatta-

may be an implied waiver of presentment consequent upon an understanding between the indorser and the holder in pursuance of which an assignment is made before maturity of the note.¹⁹¹ And any language which is intended to and does induce the holder not to make demand, as in case of a promise to pay the note when due and a request not to protest it, constitutes a waiver.¹⁹² So directions, given by the indorser, that nothing shall be done with the instrument in case of default in payment, will be a waiver;¹⁹³ as will also a statement by the indorser to the holder that it will be useless to make demand.¹⁹⁴ And there may be a waiver where interest is paid on the note after it is due.¹⁹⁵ Again, although the drawee procures and indorses a duplicate check, after laches of the indorsee in presentment of the original check, indorsed by the drawee, and the loss thereof, such act of the drawee does not constitute a waiver.¹⁹⁶ Under a Rhode Island decision the taking of security by the indorser from the maker is not a waiver.¹⁹⁷ A partner may waive demand, after the co-partnership is dissolved, of a note which is indorsed by and discounted for the firm.¹⁹⁸

nooga Const. Co. (Tenn. Ch. App.),
38 S. W. 102.

¹⁹¹ Swift, *In re*, 106 Fed. 65.

¹⁹² Seldner v. Mt. Jackson National
Bank, 66 Md. 488, 6 Cent. Rep. 478,
8 Atl. 262. See Souther v. McKenna,
20 R. I. 645, 40 Atl. 736, 15 Bkg. L.
J. 541.

¹⁹³ Markland v. McDaniel, 51 Kan.
350, 32 Pac. 1114.

¹⁹⁴ Seldner v. Mt. Jackson National
Bank, 66 Md. 488, 8 Atl. 262, 6 Cent.
Rep. 478.

¹⁹⁵ Greeley v. Whitehead, 35 Fla.
523, 17 So. 643, 28 L. R. A. 286, 48
Am. St. Rep. 258.

¹⁹⁶ Eebi v. Bank of Evansville, 124
Wis. 73, 102 N. W. 329.

¹⁹⁷ Whittier v. Collins, 15 R. I. 44,
23 Atl. See:

Alabama.—Carlisle v. Hill, 16 Ala.
19.

Maine.—Marshall v. Mitchell, 34
Me. 227.

Maryland.—Walters v. Munroe, 17
Md. 154, 77 Am. Dec. 328.

Massachusetts.—Creamer v. Perry,
17 Pick. (Mass.) 332, 27 Am. Dec.
297.

New Hampshire.—Woodman v.
Eastman, 10 N. H. 359.

New York.—Spencer v. Harvey, 17
Wend. (N. Y.) 489.

North Carolina.—Denny v. Pal-
mer, 27 N. C. 710.

Pennsylvania.—Kramer v. Sand-
ford, 4 Watts. & S. (Pa.) 328.

See Selby v. Brinkley (Tenn.), 17
S. W. 479.

Compare Stephenson v. Primrose,
8 Port. (Ala.) 155, 33 Am. Dec. 281.

Beard v. Westerman, 32 Ohio St.
29.

¹⁹⁸ Seldner v. Mount Jackson Na-
tional Bank, 66 Md. 488, 8 Atl. 262,
6 Cent. Rep. 478. Compare Presbrey
v. Thomas, 1 App. D. C. 171, 21
Wash. L. Rep. 659.

CHAPTER XXIV.

PROTEST AND WANT OF PROTEST.

Sec.	Sec.
526. Protest defined.	535. Where made.
527. In what cases protest necessary.	536. When protest dispensed with—
528. In what cases protest unnecessary.	Excuses.
529. Same subject, continued.	537. Waiver of protest generally.
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tificate.	541. Same subject—Parties.
533. By whom made.	542. Certificate of protest—Evi-
534. When to be made.	dence.
	543. Same subject.

§ 526. **Protest defined.**—There are numerous definitions of the term “protest,”¹ but in a recent case it has been defined as “a formal statement in writing that the described instrument was, on a certain day, presented for payment or acceptance, and that such payment or acceptance was refused. It is a formal declaration executed by a notary which in its popular sense means all the steps and acts accompanying the dishonor of a bill or note necessary to charge an indorser. The word signifies to ‘testify before.’ As said by Daniel,² the testimony before the notary that proper steps were taken to fix the drawer’s liability is the substance of the certificate of the notary, the formal evidence, to which the term ‘protest’ is legally applicable. The same idea is suggested by the language of the statute³ which calls the writing made by the notary the ‘instrument of protest.’ * * * The object of protest is to fix the liability of indorsers.”⁴ And where an in-

¹See Vol. 6 of “Words and of St. Charles (Minn. 1906), 108 Phrases,” pp. 5742-5745. N. W. 272, 275, per Elliott, J.

²2 Daniel Neg. Inst. (5th Ed.), § 929. Protest “in a given case may include all the acts which by law are

³Rev. Laws Minn. 1905, § 2663. necessary to charge an indorser on

⁴Peabody v. Citizens’ State Bank such (commercial) paper. * * *

dorser writes upon a note an acknowledgment of receipt of notice of protest the word "protest" comprises all the acts necessary to charge indorsers and it has the legal effect to dispense with demand and notice on the part of the holder.⁵

§ 527. **In what cases protest necessary.**—Where a foreign bill, appearing on its face to be such, is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged.⁶ Under the general law merchant protest is only necessary on a foreign bill.⁷ So, under the Negotiable Instruments Law, where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange.⁸ A bill drawn in one of the states of the union upon a resident of another is a foreign bill requiring protest.⁹ So, unless protest is waived, an indorser before delivery

With business men includes all the steps necessary to charge an indorser. Demand of payment of a note in proper form and at a proper time; and in case of non-payment, due and reasonable notice to the indorsers, by any suitable person. In the popular sense, includes demand of the maker and notice of non-payment to indorsers. * * * Protest includes, in a popular sense, all the steps taken to fix the liability of a drawer or indorser." Anderson's Dict. of Law "Protest."

⁵ *City Savings Bank v. Hopson*, 53 Conn. 453, 2 N. Eng. 556, 5 Atl. 601. As to waiver generally, see §§ 524, 525 herein.

⁶ *Negot. Inst. Law*, § 260; *Bills of Exch. Act*, § 51 (2), Appendix herein.

Alabama.—*Cullum v. Casey*, 9 Port. (Ala.) 131.

Kentucky.—*Piner v. Clarey*, 17 B. Mon. (Ky.) 645.

New York.—*Amsinck v. Rogers*, 93 N. Y. Supp. 87, 103 App. Div. 428.

North Carolina.—*Shaw v. McNeill*, 95 N. C. 535.

England.—*Orr v. Maginnis*, 7 East 49.

⁷ *Burke v. McKay*, 2 How. (U. S.) 66. See *United States v. Bank of United States*, 5 How. (U. S.) 382, under Maryland Statute 1785.

⁸ *Negot. Inst. Law*, § 189. See *Bills of Exch. Act*, § 51, Appendix herein. See § 528 herein.

⁹ *Nelson v. First National Bank*, 69 Fed. 798, 32 U. S. App. 554, 16 C. C. A. 425, 12 Bkg. L. J. 672.

As to such bills being foreign bills see *Armstrong v. American Exchange Bank*, 133 U. S. 433, 33 L. Ed. 747, 10 Sup. Ct. 450; *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32; *Mason v. Donsay*, 35 Ill. 424, 85 Am. Dec. 368; *American Express Co. v. Haire*, 21 Ind. 4, 83 Am. Dec. 334; *Commercial Bank of Kentucky v. Varnum*, 49 N. Y. 269, rev'g 3 Lans. 86.

A bill drawn in one state upon a resident of another, is a foreign bill,

of the note is entitled to notice of protest, and it must be given in order to hold him liable.¹⁰ Notice of protest must also be given in a reasonable time to indorsers for accommodation or value of a note payable at bank.¹¹ And protest is required to render an indorser liable, even though the note was paid before its purchase by the indorsee.¹² But protest and notice of protest do not charge an indorser where no demand upon or attempt to collect from the maker is made.¹³

§ 528. **In what cases protest unnecessary.**—Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.¹⁴ Protest is not necessary by the law merchant to fix the liability of the parties to an inland bill.¹⁵ So that, in the absence of a statute to the contrary, protest of an inland bill or of a domestic draft, operating entirely within the state, is not necessary; a presentation or demand of acceptance or payment and notice of non-payment are sufficient.¹⁶ So it is held that protest in the case of inland bills is only necessary to enable damages to be recovered, as the indorser of such paper is liable to the holder for the amount and the interest upon proof of default and notice.¹⁷ A bill of exchange in form drawn on one government by another is not subject to protest and consequential damages.¹⁸ And where a drawee of a bill has ac-

and the failure on the part of the holder to have it protested for non-payment is a discharge of the drawer, unless the drawer had no funds in the hands of the drawee and no authority to draw the bill. *Aborn v. Pardon Bosworth*, 1 R. I. 401.

¹⁰ *Burke v. Shreve*, 2 N. J. L. 92; *Carnegie Steel Co. v. Chattanooga Const. Co.* (Tenn. Ch. App.), 38 S. W. 102.

¹¹ *Apple v. Lesser*, 93 Ga. 749, 21 S. E. 171.

¹² *Moore v. Steigel*, 50 Mo. App. 308.

¹³ *Williams v. Planters' & M. National Bank*, 91 Tex. 651, 45 S. W. 690, 15 Bkg. L. J. 346, rev'g 44 S. W. 617.

¹⁴ *Negot. Inst. Law*, § 260; *Bills of Exch. Act*, § 51 (2), Appendix herein. See § 527 herein.

¹⁵ *Knott v. Venable*, 42 Ala. 186, 194.

¹⁶ *People's National Bank v. Lutterloh*, 95 N. C. 495; *Knott v. Venable*, 42 Ala. 186, 194. See, also, *Burke v. McKay*, 2 How. (U. S.) 66; *Union Bank v. Hyde*, 6 Wheat. (U. S.) 572; *Young v. Bryan*, 6 Wheat. (U. S.) 146; *Murphy v. Citizens' Savings Bank*, 22 Ky. L. Rep. 1672, 61 S. W. 25, 62 S. W. 1028; *Shaw v. McNeill*, 95 N. C. 535.

Protest made necessary by statute in case of inland bill. *Ewen v. Wilbor*, 99 Ill. App. 132, aff'd 208 Ill. 492, 70 N. E. 575.

¹⁷ *Wanzer v. Tupper*, 8 How. (U. S.) 234; *Bailey v. Dozier*, 6 How. (U. S.) 23.

¹⁸ *United States v. Bank of United States*, 5 How. (U. S.) 382.

cepted it he is not entitled to notice of protest.¹⁹ If the person presenting a bill agrees to present it again, no protest can be made without a new demand.²⁰ No formal protest of a promissory note is required, such note not being within the rules of the law merchant.²¹ An exception has been made, however, where the note is made by a resident of one state payable to a resident of another.²²

§ 529. **Same subject continued.**—A note payable at a bank in Indiana need not be protested for non-payment; all that is required, under a decision in that state, to fix the liability of those secondarily liable is a demand of payment and notice of non-payment.²³ Again, protest, or notice of protest, is unnecessary in case of a mere surety on a note payable at a chartered bank.²⁴ And where the signatures of third parties, who indorse a note by a creditor to his debtor, are obtained under an agreement for an extension of time, such indorsers are sureties and not entitled to notice of protest.²⁵ Nor is protest necessary in case of an indorsee who is not the payee, and whose signature is obtained at the inception of the note, as such person's liability is that of surety or original promisor.²⁶ So an indorser is liable without protest where he indorses as surety before delivery of the note.²⁷ And where a note is indorsed before delivery and the payee elects to

¹⁹ *Garden City National Bank v. Fittler*, 155 Pa. 210, 26 Atl. 372.

²⁰ *Case v. Burt*, 15 Mich. 82.

²¹ *Alabama*.—*Knott v. Venable*, 42 Ala. 186.

Georgia.—*Pattillo v. Alexander*, 96 Ga. 60, 22 S. E. 646.

Illinois.—*Bond v. Bragg*, 17 Ill. 69.

Indian Territory.—*Waples-Painter Co. v. Bank of Commerce* (Ind. Ty. 1906), 97 S. W. 1025.

Kentucky.—*Louisville Banking Co. v. Asher*, 23 Ky. L. Rep. 1180, 65 S. W. 133, 23 Ky. L. Rep. 1661, 65 S. W. 831.

South Carolina.—*Brown v. Wilson*, 45 S. C. 519, 23 S. E. 630.

Compare Hinsey v. Studebaker Bros. Mfg. Co., 73 Ill. App. 278, 15 Nat. Corp. Rep. 805; *Merchants' National Bank v. Standard Wagon Co.*, 6 Ohio N. P. 264.

Protest "or" suit; protest and suit

not necessary. *Leeds v. Hamilton Paint & G. Co.* (Tex. Civ. App.), 35 S. W. 77.

²² *Brown v. Wilson*, 45 S. C. 519, 23 S. E. 630. See *Bay v. Church*, 15 Conn. 15; *Louisville Banking Co. v. Asher*, 23 Ky. L. Rep. 1180, 65 S. W. 133, 23 Ky. L. Rep. 1661, 65 S. W. 831.

²³ *Green v. Louthain*, 49 Ind. 139, decided 1874. See, also, *Pritchard v. Smith*, 77 Ga. 463.

²⁴ *Sibley v. American Exchange National Bank*, 97 Ga. 126, 25 S. E. 170. See *Hunnicut v. Perot*, 100 Ga. 312, 27 S. E. 787.

²⁵ *Eppens v. Forbes*, 82 Ga. 748, 9 S. E. 723.

²⁶ *Beissner v. Weekes*, 21 Tex. Civ. App. 14, 50 S. W. 138.

²⁷ *Tredway v. Antisdel*, 86 Mich. 82, 48 N. W. 956.

hold the indorser as a guarantor or joint maker no protest is required.²⁸ Again, where the indorsement is made before delivery, upon a note executed for an antecedent debt, for the purpose of obtaining its discount and as additional security, such indorser is a joint maker and protest is unnecessary.²⁹ Protest is also not required to charge the indorser of a non-negotiable instrument,³⁰ or of a note sent for "collection."³¹

§ 530. **How made—Form, contents and sufficiency of.**—The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify: the time and place of presentment; the fact that presentment was made and the manner thereof; the cause or reason for protesting the bill, and the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.³² Ordinarily the protest, or notice of protest, need not follow any particular or precise form of words, but it is sufficient where, as a whole, it conveys a knowledge of the particular note by a true description or designation, clearly indicating what note is intended and showing its due presentment and dishonor, to whom it was presented, and that the holder looks for payment to the indorser. The paper should, however, be sufficient to put the holder upon inquiry and should not be such that he is misled thereby.³³ If the notice sets out a copy of the bill, but erroneously states by whom there was an acceptance, it is nevertheless sufficient.³⁴ So where the certificate recites that "the above" is a complete and true copy and also refers again to such copy, and states that presentment has been made and refused, and that the note has been protested and notice thereof served through the mail

²⁸ *Miller v. Clendenin*, 42 W. Va. 416, 26 S. E. 512. See *Rhett v. Poe*, 2 How. (U. S.) 457.

²⁹ *Bank of Jamaica v. Jefferson*, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100.

³⁰ *Kampmann v. Williams*, 70 Tex. 568, 8 S. W. 310.

³¹ *Waddell's Succession, In re*, 44 La. Ann. 361, 10 So. 808.

³² *Negot. Inst. Law*, § 261; *Bills of Exch. Act*, § 52, Appendix herein.

³³ *Mills v. Bank of United States*,

11 Wheat. (U. S.) 431, 6 L. Ed. 514; *Rudd v. Deposit Bank*, 20 Ky. L. Rep. 1276, 49 S. W. 207, aff'd 20 Ky. L. Rep. 1497, 49 S. W. 971; *Witkowski v. Maxwell*, 69 Miss. 56, 10 So. 453; *Glicksman v. Earley*, 78 Wis. 223, 47 N. W. 272, 4 Bkg. L. J. 58. See *Bank of Alexandria v. Swan*, 9 Pet. (U. S.) 33; *Second National Bank v. Smith*, 118 Wis. 18, 94 N. W. 664.

³⁴ *Dennistown v. Stewart*, 17 How. (U. S.) 606.

upon the indorsers, such certificate is sufficient.³⁵ The requirement of a seal of the notary upon the protest must rest upon statutory provisions, at least it seems to be the rule that none is necessary unless the statute so provides, although it is decided in an Alabama case, where a bill was protested in a state where the law merchant was presumed to prevail, and the notarial certificate contained only an illegible mark made by some instrument in place of a seal, that such mark was not a sufficient seal and that the protest did not bind the indorser. Other points, however, entered into the decision, such as insufficiency of presentment and demand, the want of authority of the notary, his inability to perform his duty by a deputy, and the insufficient service of notice.³⁶

§ 531. Same subject—Signature.—The signature to the protest need not necessarily be in writing and it may be appended by a properly authorized clerk.³⁷ And the fact that the suffix “Jr.” to the notary’s name in the body of the certificate is omitted from his signature does not warrant the implication that they are different officials.³⁸

§ 532. Same subject—Instances—Certificate.—The protest should state where the note was presented and not merely that it was presented, and should show that every requisite has been complied with and performed to authorize the demand upon the indorser.³⁹ The certificate, in order to be sufficient, should state that the place to which the notice was addressed was the indorser’s residence or postoffice.⁴⁰ It must also contain a statement showing not only the place where, but also to what person the presentment was made and the manner of making it;⁴¹ although it is determined that a certificate need not show that

³⁵ *Second National Bank v. Smith*, 118 Wis. 18, 94 N. W. 664. See § 542 herein.

³⁶ *Donegan v. Wood*, 49 Ala. 242, 20 Am. Rep. 275. See *Bank of Rochester v. Gray*, 2 Hill (N. Y.) 227. But compare *Bank of Kentucky v. Pursley*, 3 T. B. Mon. (Ky.) 238; *Lambeth v. Caldwell*, 1 Rob. (La.) 61; *Carter v. Burley*, 9 N. H. 558; § 542 herein.

³⁷ See *Fulton v. Maccracken*, 18 Md. 528, 81 Am. Dec. 620; *Bank of Cooperstown v. Woods*, 28 N. Y. 545.

See *Second National Bank v. Smith*, 118 Wis. 18, 94 N. W. 664.

³⁸ *Guianon v. Union Trust Co.*, 156 Ill. 135, 40 N. E. 556, aff’d 53 Ill. App. 581.

³⁹ *People’s Bank v. Brooke*, 31 Md. 7, 1 Am. Rep. 11. See *McLean v. Ryan*, 55 N. Y. Supp. 232, 36 App. Div. 281, 16 Bkg. L. J. 102.

⁴⁰ *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

⁴¹ *Union National Bank v. Williams Milling Co.*, 117 Mich. 535, 76 N. W. 1, 15 Bkg. L. J. 523, 5 Det. L. N. 336.

demand was made of any individual where it appears therefrom that demand of payment was made at the bank where the note was payable and that payment was refused.⁴² It is also decided that the place where presented and the inability to make presentment, by reason of such place being closed, and to find any person to whom the paper could be presented, sufficiently appear from the statement that the bill was duly presented.⁴³ Under another decision, if a certificate fails to designate the person to whom the draft was presented, such deficiency may be obviated by the testimony of the notary, and he may state orally what the fact is.⁴⁴ A certificate which is otherwise sufficient is not rendered insufficient by the fact that the statement as to notice is separated from the body of the certificate and is written below the official seal.⁴⁵ Again, it is held that, if the protest conform to the law and practice of the place where made, the notary is protected.⁴⁶

§ 533. **By whom made.**—Protest may be made by a notary public; or by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.⁴⁷ Under a Texas decision a notary public may, upon the maker's non-appearance, protest a note, payable at a certain city without more specific designation of the place, where such maker has no residence or place of business in that city.⁴⁸ In Mississippi it is decided that the notary who fills up and certifies the protest must present the bill himself, as it cannot be done by an agent.⁴⁹ Again, the indirect pecuniary interest of a notary in a note does not render him incompetent to protest it for non-payment.⁵⁰ And it is also held that where a bank holds a note or bill, its cashier and stockholder, who is a notary public, has the legal right to protest such an instrument as the relation sustained by

⁴² *Douglas v. Bank of Commerce*, 97 Tenn. 133, 36 S. W. 874. See, also, *Witkowski v. Maxwell*, 69 Miss. 56, 10 So. 453.

⁴³ *Brown v. Jones*, 125 Ind. 375, 25 N. E. 452, 3 Bkg. L. J. 442.

⁴⁴ *Cook v. Merchants' National Bank*, 72 Miss. 982, 18 So. 481, 13 Bkg. L. J. 32.

⁴⁵ *Jordan v. Long*, 109 Ala. 414, 19 So. 843.

⁴⁶ *Musson v. Lane*, 4 How. (U. S.) 262; *Wiseman v. Chiappella*, 23 How. (U. S.) 368.

⁴⁷ *Negot. Inst. Law*, § 262, Appendix herein.

⁴⁸ *Williams v. Planters' & M. National Bank*, 91 Tex. 651, 45 S. W. 690, 15 Bkg. L. J. 346, rev'g 44 S. W. 617.

⁴⁹ *Carmichael v. Bank of Pennsylvania*, 4 How. (Miss.) 567. "The sufficiency of such presentment and noting seems to be a matter of doubt in England." *Id.* 569, per Sharkey, C. J.

⁵⁰ *Patton v. Bank of Lafayette*, 124 Ga. 965, 53 S. E. 664.

him to the bank is not a disqualifying interest.⁵¹ A person not lawfully authorized by the owner or holder or one who is wrongfully in possession cannot make a valid, binding protest.⁵²

§ 534. **When to be made.**—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as provided by law. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.⁵³ The formal protest need not be made at the time of the presentment of the bill for payment.⁵⁴ In cases where the paper carries days of grace the indorser is not charged by a protest of the note before the expiration of such days of grace,⁵⁵ as a bill may be prematurely protested where allowance is not made therefor.⁵⁶ But in such case the protest is not premature when made on the third day of grace;⁵⁷ and the protest may be made on the last day thereof.⁵⁸ If an instrument entitled to days of grace matures on a Sunday protest must be made within three days thereafter.⁵⁹ And where, under a statute, paper is to be protested according to the custom and usage of merchants, protest on the third day of grace is sufficient without waiting until the next day.⁶⁰

⁵¹ *Moreland v. Citizens' Savings Bank*, 97 Ky. 211, 17 Ky. L. Rep. 88, 30 S. W. 637, 16 Ky. L. Rep. 860, 30 S. W. 19; *Nelson v. First National Bank*, 69 Fed. 798, 32 U. S. App. 554, 16 C. C. A. 425, 12 Bkg. L. J. 672.

⁵² *Hofrichter v. Enyeart* (Neb.), 99 N. W. 658.

⁵³ *Negot. Inst. Law*, § 263; *Bills of Exch. Act*, § 51, Appendix herein.

⁵⁴ *Bailey v. Dozier*, 6 How. (U. S.) 23. See:

Iowa.—*Chatham Bank v. Allison*, 15 Iowa 357.

Kentucky.—*Mattingly v. Bank of Commerce*, 21 Ky. 1029, 53 S. W. 1043.

Mississippi.—*Grimball v. Marshall*, 3 Smedes & M. (Miss.) 359.

New York.—*First National Bank v. Crittenden*, 2 Thomp. & C. (N. Y.) 118.

Texas.—*Lombard Lumber Co. v.*

First National Bank, 86 Tex. 300, 24 S. W. 260.

⁵⁵ *Cruger v. Lindheim* (Tex. App.), 16 S. W. 420.

⁵⁶ *Bell v. First National Bank of Chicago*, 115 U. S. 373, 29 L. Ed. 409, 6 Sup. Ct. 105.

⁵⁷ *Cary-Lombard Lumber Co. v. Ballinger First National Bank* (Tex. Civ. App.), 24 S. W. 702, 86 Tex. 299, 24 S. W. 260, 10 Bkg. L. J. 122.

⁵⁸ *Guignon v. Union Trust Co.*, 156 Ill. 135, 40 N. E. 556, aff'g 53 Ill. App. 581. See *Fenwick v. Sears*, 1 Cranch (U. S.) 259.

⁵⁹ *Morris v. Bailey*, 10 S. Dak. 507, 74 N. W. 443. So held, notwithstanding statute (*Comp. Laws S. Dak.*, § 4492) as to paper being due next business day where it matures on a holiday.

⁶⁰ *Cary-Lombard Lumber Co. v. Ballinger First National Bank*, 86 Tex. 299, 10 Bkg. L. J. 122, 24 S. W. 260; *Rev. Stat. Tex.*, Art. 273.

But a protest made on the fourth day of grace is held to be insufficient in the absence of usage justifying it.⁶¹ And it is held that the indorser is liable, even though protest is not made and notice given until the third day after that on which the note is by its terms to be paid, and although days of grace are abolished by statute, it appearing that the note bore date before, but was not made until after the statute was enacted.⁶² If a note is indorsed when overdue a second or subsequent demand and protest are of no force where protest was not made or notice given after the first demand.⁶³ In case of a demand note, the day of its maturity cannot be fixed by a request for payment on a certain future date, made by letter from the bank where the note is payable, so as to necessitate protest.⁶⁴ Again it may properly be left to the jury whether the refusal of the drawee to accept was within or after business hours so that the bill could be put in the notary's hands on that day or not until the next day.⁶⁵

§ 535. Where made.—A bill must be protested at the place where it is dishonored, except that when a bill, drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.⁶⁶ Protest may be made by the notary upon finding the doors of the acceptor's usual place of business closed where presentment has been made there during proper hours of the day, as in such a case he is not obligated to make further inquiries at the acceptor's residence or other effort to locate him.⁶⁷ And an indorser may be treated in a protest as continuing his residence in the place where he lived when he indorsed the note, where his name still remains in the city directory and his sign is retained at his former place of business, although he had removed from the city, but of that fact the notary was ignorant.⁶⁸

⁶¹ *Adams v. Otterback*, 15 How. (U. S.) 539.

⁶² *Button v. Belding*, 48 N. Y. Supp. 981, 22 App. Div. 618.

⁶³ *Rosson v. Carroll*, 90 Tenn. 16 S. W. 66, 43 Alb. L. J. 493.

⁶⁴ *National Hudson River Bank v. Kinderhook & H. R. Co.*, 45 N. Y. Supp. 588, 17 App. Div. 232, 14 Bkg. L. J. 383.

⁶⁵ *Nelson v. Fotteral*, 7 Leigh. (Va.) 179.

⁶⁶ *Negot. Inst. Law*, § 264; *Bills of Exch. Act*, § 51, Appendix herein.

⁶⁷ *Sulzbacher Bros. v. Bank of Charleston*, 86 Tenn. 201, 6 Am. St. Rep. 228, 6 S. W. 129.

⁶⁸ *Reier v. Strauss*, 54 Md. 278, 39 Am. Rep. 390.

If a note is payable in one city but it is protested in another, such protest is insufficient.⁶⁹

§ 536. **When protest dispensed with—Excuses.**—Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.⁷⁰ Substantially the same rule as that above stated in the first clause is held in Alabama to be the rule applicable to foreign bills.⁷¹ And excuses applicable in cases of notice of dishonor will also generally apply in cases of protest.⁷² If the drawer has failed to meet his obligation and the indorser obtains knowledge thereof on the day of maturity his liability becomes fixed without protest.⁷³ Protest is unnecessary as to the acceptor.⁷⁴ But an indorser of a forged bill may be liable to a subsequent holder, even though the bill is not protested, and the bill is paid and the money subsequently refunded.⁷⁵

§ 537. **Waiver of protest generally.**—It may be generally stated that whatever constitutes waiver of notice of dishonor as to inland bills is also applicable in determining whether there is a waiver of protest, in so far as an indorser of a foreign bill is concerned.⁷⁶ If the conduct of the indorser is such as is calculated to put the holder, when acting with reasonable prudence, off his guard, and to induce him not to insist upon his rights and to omit the step of protest, he is thereby relieved of the necessity of a protest.⁷⁷ So where the holder is misled to his injury by the indorser's act in writing over the in-

⁶⁹ *H. B. Claflin Co. v. Feibleman*, 44 La. Ann. 518, 10 So. 862.

⁷⁰ *Negot. Inst. Law*, § 267; *Bills of Exch. Act*, § 49 (9), Appendix herein. See § 570, *et seq.*, herein.

⁷¹ *Alabama National Bank v. Rivers*, 116 Ala. 1, 22 So. 580.

⁷² *Alabama National Bank v. Rivers*, 116 Ala. 1, 22 So. 580.

⁷³ *Mutual National Bank v. Rotgé*, 28 La. Ann. 933, 26 Am. Rep. 126.

⁷⁴ *Gillespie v. Planters Oil-Mill & Mfg. Co.*, 76 Miss. 406, 24 So. 900.

⁷⁵ *Wells F. & Co. v. Simpson National Bank*, 19 Tex. Civ. App. 636, 47 S. W. 1024, 16 Bkg. L. J. 35.

⁷⁶ *Alabama National Bank v. Rivers*, 116 Ala. 1, 22 So. 580.

⁷⁷ *Boyd v. Bank of Toledo*, 32 Ohio St. 526, 30 Am. Rep. 624. See *Seldner v. Mt. Jackson National Bank*, 66 Md. 488, 8 Atl. 62, 6 Cent. Rep. 478. As to principle involved see *Bank of Richland v. Nicholson*, 120 Ga. 622, 48 S. E. 240.

dorsement a waiver of protest, the latter is estopped thereby, even though the question of forgery of the indorsement is raised, but the evidence thereon is conflicting.⁷⁸ Protest may be expressly waived, or the circumstances may be such after the lapse of time as to justify an inference of waiver.⁷⁹ So there may be a conditional waiver of protest, not binding where the terms and conditions thereof are not fulfilled.⁸⁰

§ 538. **Waiver of protest, continued.**—If an indorser has knowledge of the laches in not taking the prerequisite legal steps, and also of all material facts, and he subsequently promises to pay, he waives such laches and becomes bound.⁸¹ But want of knowledge as to the legal effects of the facts will not release him from the obligation of the waiver.⁸² And the promise must, it is held, be a new and valid one;⁸³ although it is also decided that no new consideration is required for a waiver of protest by an indorser on an overdue note.⁸⁴ And it is determined in Pennsylvania that from the nature of an indorser's contract a new consideration is not required to support a waiver of protest before or after the maturity of the paper. Thus where the indorser, eighteen months after the maturity of a note, with knowledge that no demand for the payment of it had been made, and no notice of its dishonor had been given, without any new consideration, indorses on the note a waiver of protest, he will be bound by the waiver and be liable on the note.^{84*} If the note or the body thereof contains a

⁷⁸ *Robinson v. Barnett*, 19 Fla. 670, 45 Am. Rep. 24.

⁷⁹ *Murphy v. Citizens' Savings Bank*, 22 Ky. L. Rep. 1872, 62 S. W. 1028, 61 S. W. 25.

⁸⁰ *Lititz National Bank v. Siple*, 145 Pa. 49, 222 Atl. 208, 5 Bkg. L. J. 140.

⁸¹ *Alabama National Bank v. Rivers*, 116 Ala. 1, 22 So. 580. See §§ 524, 525 herein.

⁸² *Toole v. Crafts* (Mass. 1906), 78 N. E. 775.

⁸³ *White v. Keith*, 97 Ala. 668, 12 So. 611.

⁸⁴ *Lockwood v. Bock*, 50 Minn. 142, 52 N. W. 391. See *Delsman v. Friedlander*, 40 Oreg. 33, 66 Pac. 297.

^{84*} *Burgettstown National Bank v. Nill*, 213 Pa. 456, 63 Atl. 186. In this case Mr. Justice Mestrezat said: "The indorser may waive protest after the date of maturity of the note with like effect as if done prior to that date. *Barclay v. Weaver*, 19 Pa. 396; *Hoadley v. Bliss*, 9 Ga. 303; *Sheldon v. Horton* (N. Y.), 3 Am. Rep. 669; *Ross v. Hurd* (N. Y.), 27 Am. Rep. 1; *Rindge v. Kimball*, 124 Mass. 209; 1 *Parsons on Bills and Notes* 594; 2 *Randolph on Commercial Paper*, § 1456. In *Barclay v. Weaver*, this court said (p. 401): 'It seems, therefore, that the duty of demand and notice, in order to hold an in-

dorser, is not a part of the contract, but a step in the legal remedy, that may be waived at any time in accordance with the maxim *quilibet potest renunciare juri pro se introducto*.' In some jurisdictions it is held that the waiver, when made after the maturity of the note, must be with full knowledge of the indorser's laches and that it requires a new consideration. But it is settled by numerous American authorities that a waiver of protest need not be supported by a new consideration. *Neal v. Wood*, 23 Ind. 523; *Hughes v. Bowen*, 15 Iowa 446; *Cheshire v. Taylor*, 29 Iowa 492; *Sheldon v. Horton* (N. Y.), 3 Am. Rep. 669; *Tebbetts v. Dowd*, 23 Wend. 379; *Wall v. Bry*, 1 La. Ann. 312; *Lane v. Steward*, 20 Me. 98. We know of no decision in this court holding that such waiver must be supported by a new consideration. The contrary rule, however, is distinctly recognized in *Barclay v. Weaver*, 19 Pa. 396. In that case Mr. Justice Lowrie, in construing the contract of an indorser of negotiable paper, says (p. 400): 'The most, therefore, that can be said of an indorsement of negotiable paper is, that from it there is implied a contract to pay, on condition of the usual demand and notice; and that this implication is liable to be changed on the appearance of circumstances inconsistent with it, whether those circumstances be shown orally or in writing. But it may well be questioned whether the condition of demand and notice is truly part of the contract, or only a step in the legal remedy upon it. If it is part of the contract, how

can it be effectually dispensed with without a new contract for a sufficient consideration, especially after the maturity of the note? Yet there are decisions without number that a waiver of it during the currency, or after the maturity of the note, will save from the consequences of its omission. This could not be if it was a condition of the contract, for then the omission of it would discharge the indorser both morally and legally; and no new promise afterwards, even with full knowledge of the facts, could be of any validity. If, however, an indorsement without other circumstances be regarded as an implied contract to pay, provided the holder use such diligence that the indorser loses nothing by his negligence or indulgence, then it accords with all these decisions. Then the law, and not the contract, declares the usual demand and notice to be in all cases conclusive, and in some cases necessary evidence of such diligence. * * * It (the law) therefore, is perfectly consistent in declaring that an indorser is bound by a new promise, after he knows of the omission of demand and notice, for this is an admission that he was not entitled to it, or has not suffered for want of it. It declares demand and notice necessary, in some cases, to save the indorser from loss and it declares that his own admission may be submitted for them.' It is manifest, therefore, that from the nature of the indorser's contract, a new consideration is not required to support a waiver of protest before or after maturity of the paper."

waiver of protest, persons indorsing the note are bound thereby.⁸⁵ And indorsers who write on the note a waiver are likewise bound;⁸⁶ and an indorser in blank is also obligated by a waiver of protest placed over his name.⁸⁷ Protest may also be waived by indorsing a note on the back of which is a printed waiver thereof, even though the name is not in juxtaposition as to the memorandum;⁸⁸ and all the indorsers who sign a stamped waiver on the back of a note will be held thereby.⁸⁹

§ 539. **Waiver of protest continued—What is included.**—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.⁹⁰ Again, protest may be waived by a guaranty to a bank.⁹¹ So a written

⁸⁵ *Woodward v. Lowry*, 74 Ga. 148; *Iowa Valley State Bank v. Sigstad*, 96 Iowa 491, 65 N. W. 407; *Jacobs v. Gibson*, 77 Mo. App. 244, 2 Mo. A. Rep. 6. See *Portsmouth Savings Bank v. Wilson* (D. C. App.), 22 Wash. L. Rep. 817; *German-American Insurance Savings Bank v. Hanna* (Iowa), 100 N. W. 57.

⁸⁶ *Blanc v. Mutual National Bank*, 28 La. Ann. 921, 27 Am. Rep. 119.

⁸⁷ *Dunnigan v. Stevens*, 122 Ill. 396, 13 N. E. 651; *Davis v. Eppler*, 38 Kan. 629, 16 Pac. 793.

⁸⁸ *Farmers' Bank of Kentucky v. Ewen*, 78 Ky. 264, 39 Am. Rep. 231; *Loveday v. Anderson*, 18 Wash. 322, 51 Pac. 463, 15 Bkg. L. J. 100. See *Savings Bank v. Fisher* (Cal.), 41 Pac. 490.

⁸⁹ *Farmers' Exchange Bank v. Altura Gold Mill Mining Co.*, 129 Cal. 263, 61 Pac. 1077.

⁹⁰ *Negot. Inst. Law*, § 182, Appendix herein.

See also the following cases:

California.—*San Diego First National Bank v. Falkenhan*, 94 Cal. 141, 29 Pac. 866, 7 Bkg. L. J. 105.

Kansas.—*Baker v. Scott*, 29 Kan. 136, 44 Am. Rep. 628.

Louisiana.—*Harvey v. Nelson*, 31 La. Ann. 434, 33 Am. Rep. 222.

Massachusetts.—*Johnson v. Parsons*, 140 Mass. 173, 4 N. E. 196, 1 N. Eng. 181.

Minnesota.—*Wolford v. Andrews*, 29 Minn. 250, 43 Am. Rep. 201.

Mississippi.—*Timberlake v. Thayer*, 76 Miss. 76, 23 So. 767.

Missouri.—*Bradley v. Asher*, 65 Mo. App. 589; *Hammett v. Trueworthy*, 51 Mo. App. 281; *Johnson County Savings Bank v. Lowe*, 47 Mo. App. 151; *Wheeler v. Asher*, 2 Mo. App. Rep'r. 1236. See *Richards v. Harrison*, 71 Mo. App. 224.

North Carolina.—*Shaw v. McNeill*, 95 N. C. 535.

Ohio.—*Seymour v. Francisco*, 4 Ohio Dec. 12, 1 Cleve. Law Rec. 9.

Washington.—*Wilkie v. Chandon*, 1 Wash. 355, 25 Pac. 464.

But compare *Blatchford v. Harris*, 115 Ill. App. 160; *Wilkins v. Gillis*, 20 La. Ann. 538; *Hayward v. Empire State Sugar Co.*, 93 N. Y. Supp. 499, 105 App. Div. 21; *Sprague v. Fletcher*, 8 Oreg. 367, 34 Am. Rep. 587.

⁹¹ *First National Bank of Lancaster v. Hartman*, 110 Pa. St. 196, 1 Atl. 271.

agreement, made by the indorser, to become responsible for the amount of the note, is a waiver of protest, such agreement being made the day after maturity.⁹²

§ 540. **Waiver of protest continued—Decisions.**—Protest may be waived by an agreement for or by an extension of time for payment;⁹³ or by an offer, before maturity, of a renewal note;⁹⁴ or by an indorsement, before maturity, of such a note.⁹⁵ But a mere request for renewal and a partial payment, without knowledge that protest had been made and notice given to all other parties, is not a waiver.⁹⁶ And the indorsement of a subsequent note for a sum equal to the balance due on a prior note is not a sufficient evidence of waiver of protest, even though the indorsement was made on the same day on which the unpaid note matured, where there is no evidence of knowledge on the part of the indorser as to the intent in giving such second note.⁹⁷ Again, there may be a waiver consequent upon a telegram to a collecting bank to pay and not protest and to draw on the sender of the message, who was one of the partners of a firm.⁹⁸ If a letter, ambiguous in its terms, is claimed to constitute a waiver of protest, it must have been intended by the indorser to so operate.⁹⁹ Where an indorser permitted a note to become overdue and he by letter requested that no costs be incurred on another note and offered security, and thereafter wrote asking if payment had been made, it was held that there was no waiver.¹⁰⁰ And an indorser's express waiver of protest will not bind him where it is sent to a person not then holding or owning the note, although it subsequently comes into such person's possession for collection, but it does not appear that the indorsee who had indorsed the note for collection knew of such waiver.¹⁰¹ The payment of inter-

⁹² *McLaurin v. Seguin*, Rap. Jud. Quebec, 12 C. S. 63.

⁹³ *Glaze v. Ferguson*, 48 Kan. 157, 29 Pac. 396; *McMonigal v. Brown*, 45 Ohio St. 499, 15 N. E. 860; *Basenhorst v. Wilby*, 45 Ohio St. 333, 13 N. E. 75, 11 West. Rep. 274.

⁹⁴ *Jenkins v. White*, 147 Pa. 303, 23 Atl. 556.

⁹⁵ *First National Bank v. Weston*, 49 N. Y. Supp. 542, 25 App. Div. 414. See *Hudson River National Bank v. Reynolds*, 10 N. Y. Supp. 669, 32 N. Y. St. R. 124.

⁹⁶ *Carnegie Steel Co. v. Chatta-*

nooga Const. Co. (Tenn. Ch. App.), 38 S. W. 102.

⁹⁷ *R. & W. Jenkinson Co. v. Eggers*, 28 Pa. Super. Ct. 151.

⁹⁸ *Seldner v. Mt. Jackson National Bank*, 66 Md. 488, 8 Atl. 262, 6 Cent. Rep. 478.

⁹⁹ *First National Bank v. McCord* (Tex. Civ. App.), 39 S. W. 1003.

¹⁰⁰ *Martin v. Perqua*, 20 N. Y. Supp. 285, 47 N. Y. St. R. 518, 65 Hun 225.

¹⁰¹ *National Bank of Poultney v. Lewis*, 50 Vt. 622, 28 Am. Rep. 514.

est on a note after its maturity will not constitute a waiver where it does not appear that the indorser knew of the want of protest.¹⁰² Again, an express waiver of protest of a note payable a certain time after demand made operates to dispense with demand and notice.¹⁰³

§ 541. **Waiver of protest—Parties.**—The fact that the indorser of a note payable at a chartered bank is a president and also director does not dispense with the necessity of notice and protest to charge the indorser. The relation which the indorser sustains to the bank does not amount to a waiver of his right to such notice.¹⁰⁴ But protest of a bill drawn and indorsed by a copartnership may be waived by one of its members, even though he is cashier of the bank which has discounted such bill;¹⁰⁵ although a settling partner, after dissolution of the firm, has no power to waive protest of a draft then given to pay a partnership debt, and so bind a former dormant partner.¹⁰⁶ In case of notes indorsed by a corporation it is decided that its secretary may make a binding agreement to waive protest.¹⁰⁷ And a maker's general waiver of protest as to his paper in a bank is sufficient to justify recovery on an unprotested instrument held by such bank, notwithstanding other paper held by that bank had been protested.¹⁰⁸ Protest of a note of an insolvent indorser may also be waived by the curator.¹⁰⁹ But diligence must, it is held, nevertheless be exercised in bringing action against the maker, even though protest of a non-negotiable note has been waived by the assignor.¹¹⁰ And although there is no protest or waiver of protest as to other indorsers, still a first indorser may orally waive protest and insist upon contribution if held liable and forced to pay.¹¹¹

§ 542. **Certificate of protest—Evidence.**—It is declared that it is not disputed that, by the general custom of merchants in the United

¹⁰² *Werr v. Kohles*, 71 N. Y. Supp. 713, 64 App. Div. 117.

¹⁰³ *Cooke v. Pomeroy*, 65 Conn. 466, 32 Atl. 935.

¹⁰⁴ *Ennis v. Reynolds* (Ga. 1906), 56 S. E. 104. See § 533 herein.

¹⁰⁵ *Hays v. Citizens' Savings Bank*, 101 Ky. 201, 40 S. W. 573, 19 Ky. L. Rep. 367, 14 Bkg. L. J. 327.

¹⁰⁶ *Mauney v. Coit*, 80 N. C. 300, 30 Am. Rep. 80.

¹⁰⁷ *Ludington v. Thompson*, 38 N. Y. Supp. 768, 4 App. Div. 117.

¹⁰⁸ *Valley National Bank v. Urich*, 191 Pa. 556, 43 Atl. 354, 16 Bkg. L. J. 406.

¹⁰⁹ *Boutin, In re*, Rap. Jud. Quebec, 12 C. S. 186.

¹¹⁰ *Burke v. Ward* (Tex. Civ. App.), 32 S. W. 1047.

¹¹¹ *Sloan v. Gibbes*, 56 S. C. 480, 35 S. E. 408.

States, bills of exchange, drawn in one state on another state, are, if dishonored, protested by a notary; and the production of such protest is the customary document of dishonor.¹¹² The question, however, of evidence and the force and effect thereof in cases of notarial certificates of protest is regulated to a great extent by statutory provisions. A properly attested and valid certificate of protest affords presumptive or *prima facie* evidence of the facts stated therein,¹¹³ and this applies as well to an inland as to a foreign bill;¹¹⁴ but it is held to be only *prima facie* or presumptive evidence.¹¹⁵ The seal of a notary makes the certificate of protest at least presumptive evidence of the truth of the facts recited,¹¹⁶ and entitles it, so it is held, to full faith and credit.¹¹⁷ A certificate is held to be presumptive evidence that presentment to a bank was made during banking hours where it contains a statement that the note was presented for payment on a certain day and that the bank was found closed.¹¹⁸ In Wisconsin such certificate is not only *prima facie* or presumptive evidence, but when properly made is sufficient proof of notice.¹¹⁹ Under a New York decision a notary's certificate, made in Pennsylvania, where such cer-

¹¹² *Townsley v. Sumrall*, 2 Pet. (U. S.) 170.

¹¹³ *Arkansas*.—*Fletcher v. Arkansas National Bank*, 62 Ark. 265, 35 S. W. 228.

Georgia.—*Patton v. Bank of Lafayette*, 124 Ga. 965, 53 S. E. 664.

Kentucky.—*Mattingly v. Bank of Commerce*, 21 Ky. 1029, 53 S. W. 1043.

Maryland.—*People's Bank v. Brooke*, 31 Md. 7, 1 Am. Rep. 11.

Massachusetts.—*Legg v. Vinal*, 165 Mass. 555, 48 N. E. 518.

New York.—*Bank of United States v. Davis*, 2 Hill (N. Y.) 551; *Bell v. Lent*, 24 Wend. (N. Y.) 230; *De Wolf v. Murray*, 2 Sandf. (N. Y.) 166; *Townsend v. Auld*, 31 N. Y. Supp. 29, 63 N. Y. St. R. 418, 24 Civ. Proc. 181, 10 Misc. 343, rev'g 28 N. Y. Supp. 746, 59 N. Y. St. Rep. 274. See *McAndrew v. Radway*, 34 N. Y. 511; *Union Bank v. Gregory*, 46 Barb. (N. Y.) 98; *Bank of Ver-*

genes v. Cameron, 7 Barb. (N. Y.) 143.

North Dakota.—*Ashe v. Beasley*, 6 N. Dak. 191, 69 N. W. 188.

See *Sims v. Hundley*, 6 How. (U. S.) 1; *McAfee v. Doremus*, 5 How. (U. S.) 53; *Brandon v. Loftus*, 4 How. (U. S.) 127.

¹¹⁴ *Ashe v. Beasley*, 6 N. Dak. 191, 69 N. W. 188.

¹¹⁵ *Mattingly v. Bank of Commerce*, 21 Ky. 1029, 53 S. W. 1043; *Meise v. Newman*, 76 Hun (N. Y.) 341; *Townsend v. Auld*, 31 N. Y. Supp. 29, 24 Civ. Proc. 181, 63 N. Y. St. R. 418, 10 Misc. 343, rev'g 28 N. Y. Supp. 746, 59 N. Y. St. R. 274.

¹¹⁶ *Second National Bank v. Smith*, 118 Wis. 18, 94 N. W. 664.

¹¹⁷ *Pierce v. Indseth*, 106 U. S. 546, 1 Sup. Ct. 418. See *Dickins v. Beal*, 10 Pet. (U. S.) 572.

¹¹⁸ *Schlesinger v. Schultz*, 96 N. Y. Supp. 383, 110 App. Div. 356.

¹¹⁹ *Second National Bank v. Smith*, 118 Wis. 18, 94 N. W. 664.

tificates are evidence, may be admitted in an action in the former state to prove non-payment and notice.¹²⁰ In a Minnesota case the certificate is held to be competent to prove the statements therein, where it is admitted without objection except as to the signatures.¹²¹ Under a Mississippi decision the certificate evidences the fact of presentment and that it was made in the manner set forth therein.¹²² And in North Dakota it is held sufficient evidence of a like fact and also that demand was made.¹²³ So the receipt of notice of protest is sufficiently evidenced, under a New York decision, by a certificate stating that it was mailed, there being no affidavit of denial of the fact.¹²⁴ Again, in a federal supreme court case it is declared that a notarial protest is of itself sufficient proof of dishonor of a foreign bill.¹²⁵

§ 543. **Same subject.**—If the certificate of protest is exclusively relied on, it should sufficiently set forth the doing of every essential act.¹²⁶ Under a Pennsylvania decision a certificate of protest is not conclusive evidence and has merely the force of a deposition.¹²⁷ If the notary's testimony can be given, such certificate is held, in the absence of a statute, not to be even *prima facie* evidence of a statement therein that notice of dishonor was served, as the law merchant makes it no part of the notary's duty to give such notice.¹²⁸ So it is also determined that the certificate of protest of an inland bill is not evidence of any fact stated therein.¹²⁹ Where it does not appear from the certificate that notice of protest was given, it is not evidence of that fact, even though it contains a recital that protest was made.¹³⁰

¹²⁰ *Persons v. Kruger*, 60 N. Y. Supp. 1071, 45 App. Div. 187, 7 N. Y. Ann. Cas. 100.

¹²¹ *Herrick v. Baldwin*, 17 Minn. 209, 10 Am. Rep. 161.

¹²² *Witkowski v. Maxwell*, 69 Miss. 56, 10 So. 453.

¹²³ *Ashe v. Beasley*, 6 N. Dak. 191, 69 N. W. 188.

¹²⁴ *McLean v. Ryan*, 55 N. Y. Supp. 232, 36 App. Div. 281, *aff'd* 165 N. Y. 620, 59 N. E. 1126. See *First National Bank v. Briggs*, 70 Vt. 599, 41 Atl. 586, 16 Bkg. L. J. 40.

¹²⁵ *Townsend v. Sumrall*, 2 Pet. (U. S.) 170, where it is declared that it is admitted, that in respect to for-

eign bills of exchange, the notarial certificate of protest is, of itself, sufficient proof of the dishonor of a bill, without any auxiliary evidence.

¹²⁶ *Berg v. Abbott*, 83 Pa. St. 17, 24 Am. Rep. 158. See *Mason v. Kilcourse*, 71 N. J. 472, 59 Atl. 21.

¹²⁷ *Farmers' National Bank v. Marshall*, 9 Pa. Super. Ct. 621, 44 W. N. C. 68.

¹²⁸ *Schofield v. Palmer* (U. S. C. C.) 134 Fed. 753.

¹²⁹ *Union Bank v. Hyde*, 6 Wheat. (U. S.) 572; *Young v. Bryan*, 6 Wheat. (U. S.) 146.

¹³⁰ *Hobbs v. Chemical National*

A certificate may be attacked and impeached by proper and sufficient evidence contradicting a material fact recited therein.¹³¹ If the facts certified to are disputed by oral testimony, as in case of a recital that the bank where the presentment was made was closed, the question is one for the jury.¹³²

Bank, 97 Ga. 524, 25 S. E. 348. See *Am. St. Rep.* 828. In this case, however, the evidence was held insufficient. *Peabody Insurance Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

¹³¹ *Sulzbacher v. Charlestown Bank*, 86 Tenn. 201, 6 S. W. 129, 6 ¹³² *Berg v. Abbott*, 83 Pa. St. 177, 24 Am. Rep. 158.

CHAPTER XXV.

WANT OF NOTICE OF PROTEST AND DISHONOR.

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| <p>Sec.</p> <p>544. To whom notice of dishonor must be given—Discharge of drawer or indorser.</p> <p>545. Same subject.</p> <p>546. Notice to all other parties—Necessary after non-acceptance at holder's election, notwithstanding subsequent acceptance.</p> <p>547. To whom notice may be given.</p> <p>548. Same subject—Notice of protest.</p> <p>549. By whom given.</p> <p>550. Effect of notice given on behalf of holder or by party entitled to give notice.</p> <p>551. When notice sufficient—Form of notice—Notice personally or by mail.</p> <p>552. Form, contents and sufficiency of notice, continued.</p> <p>553. Manner or mode—Oral, written, and personal notice.</p> <p>554. Manner or mode, continued—Notice by mail.</p> <p>555. Manner or mode, continued—Sufficiency of address and mailing.</p> <p>556. Manner or mode, continued—What is included in the term mailing.</p> <p>557. Manner or mode, continued—Mailing notice—Usage or custom.</p> | <p>Sec.</p> <p>558. Manner or mode, continued—Mailing notice—When sufficient and insufficient—Instances.</p> <p>559. To whom notice given—Where party dead.</p> <p>560. Notice to partners.</p> <p>561. Notice to persons jointly liable.</p> <p>562. Notice to bankrupt.</p> <p>563. Time within which notice must be given.</p> <p>564. Same subject, continued—Diligence—Reasonable time.</p> <p>565. Same subject, continued—Where parties reside in same place.</p> <p>566. Same subject, continued—Where parties reside in different places.</p> <p>567. Time of notice—Subsequent and antecedent parties.</p> <p>568. Same subject—Notice received on Saturday—Form of notice sent by last indorser—Pleading.</p> <p>569. Where notice must be sent.</p> <p>570. When notice is dispensed with—Drawer — Indorser — Excuses.</p> <p>571. Same subject.</p> <p>572. Delay in giving notice—Excuses—Circumstances beyond holder's control.</p> <p>573. Waiver of notice.</p> |
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§ 544. To whom notice of dishonor must be given—Discharge of drawer or indorser.—Except as otherwise provided by statute, when a negotiable instrument has been dishonored by non-acceptance or non-

payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.¹ The holder is not required to notify all the parties liable, but he may do so, or may give notice to any of them, but those not notified will not be bound;² although it is also held that an indorsee is entitled to serve notice of protest only upon those indorsers whom he intends and desires to hold liable.³ Under an Ohio decision any one of the successive indorsers may be given notice;⁴ and under a Michigan case the indorsee need only notify the immediate indorser.⁵ It is decided in Georgia that where notes are payable at a chartered bank and indorsed by the payee, it is immaterial whether he is an indorser for value or for accommodation. He is entitled to notice of dishonor and can only be held liable as indorser in the event such notice is given; not only the indorsers for value, but all other persons whose indorsement is essential to a due transmission of title, as distinguished

¹ Negot. Inst. Law, § 160, Appendix herein. See §§ 490 et seq., 502 et seq. herein.

See also the following cases:

United States.—*Mitchell v. De-grand*, 1 Mason (U. S. C. C.) 176, 180.

Delaware.—*Standard Sewing Machine Co. v. Smith*, 1 Marv. (Del.) 330, 40 Atl. 1117.

Florida.—See *Robinson v. Aird*, 43 Fla. 30, 29 So. 633.

Georgia.—*Ennis v. Reynolds*, (Ga. 1906), 56 S. E. 104; *Apple v. Lesser*, 93 Ga. 749, 21 S. E. 171.

Illinois.—*Industrial Bank v. Bowes*, 165 Ill. 70, 46 N. E. 10, rev'g 64 Ill. App. 300, 1 Chic. L. J. Wkly. 455; *Kimmel v. Wiel*, 95 Ill. App. 15.

Kentucky.—See *Murphy v. Citizens' Savings Bank*, 22 Ky. L. Rep. 1672, 61 S. W. 25, 62 S. W. 1028.

Massachusetts.—*Browning v. Carson*, 163 Mass. 255, 39 N. E. 1037.

Missouri.—*Westby v. Stone*, 112 Mo. App. 411, 87 S. W. 34. See *Glasgow*, *Harrison v. Copeland*, 8 Mo. 268.

New York.—*Kelly v. Theiss*, 72 N.

Y. Supp. 467, 65 App. Div. 146. See *Lawrence v. Miller*, 16 N. Y. 235.

North Carolina.—*National Bank v. Bradley*, 117 N. C. 526, 23 S. E. 455.

Pennsylvania.—*Lititz National Bank v. Siple*, 10 Pa. Co. Ct. 391, aff'd 22 Atl. 208, 5 Bkg. L. J. 140.

Tennessee.—*Carnegie Steel Co. v. Chattanooga Const. Co.* (Tenn. Ch. App.), 38 S. W. 102.

Washington.—*Galbraith v. Shepard* (Wash. 1906), 86 Pac. 1114; Sess. Laws 1899, § 89, p. 356.

² *Standard Sewing Machine Co. v. Smith*, 1 Marv. (Del.) 330, 40 Atl. 1117.

³ *Lyddane v. Owensboro Banking Co.*, 21 Ky. L. Rep. 320, 51 S. W. 453.

⁴ *City National Bank of Dayton v. Clinton County National Bank*, 49 Ohio St. 351, 30 N. E. 958, 27 Ohio L. J. 325, 6 Bkg. L. J. 515. There was also a point in this case as to effect of giving notice to earlier indorser as to time and immediate indorser.

⁵ *Wood v. Callaghan*, 61 Mich. 402, 1 Am. St. Rep. 597, 28 N. W. 162.

from mere sureties by indorsement, are entitled to notice of non-payment and protest.⁶

§ 545. **Same subject.**—Notice of non-acceptance must be given in the case of a bill of exchange, especially so where it is payable at sight.⁷ So the holder is bound to give notice to the drawer of non-acceptance, without which the original payee, to whom the bill is returned, cannot recover against the drawer.⁸ Again, the rule requiring notice of dishonor in order to render the indorser liable has been applied to a note payable in annual installments;⁹ to one who sends paper for collection, irrespective of the fact of indorsement;¹⁰ to demand notes;¹¹ to indorsers of overdue notes;¹² to an order for the payment of money;¹³ to notes of a series;¹⁴ to one who indorses after its maturity the notes of an insolvent;¹⁵ to co-makers;¹⁶ and to indorsers whose names are necessary in order to transmit title to a note which it is purposed to negotiate at a chartered bank or which is there payable.¹⁷ Where the other requisites exist notice of non-pay-

⁶ *Ennis v. Reynolds* (Ga. 1906), 56 S. E. 104. See, also, *Apple v. Lesser*, 93 Ga. 749, 21 S. E. 171.

⁷ *Smith v. Unangst*, 46 N. Y. Supp. 340, 20 Misc. 564, aff'g 45 N. Y. Supp. 1164, 19 Misc. 711.

⁸ *Orr v. Maginnis*, 7 East. 359.

⁹ *Reed v. Spear*, 94 N. Y. Supp. 1007, 107 App. Div. 144.

¹⁰ *Rosson v. Carroll*, 90 Tenn. 90, 16 S. W. 66, 43 Alb. L. J. 493.

¹¹ *Leonard v. Olson*, 99 Iowa 162, 61 Am. St. Rep. 230, 68 N. W. 677, 35 L. R. A. 381; *Harrisburg National Bank v. Moffitt*, 3 Dauph. Co. Rep. 69, 10 Pa. Dist. R. 22.

¹² *Beer v. Clifton*, 98 Cal. 323, 33 Pac. 204, 35 Am. St. Rep. 172, 20 L. R. A. 580; *Kimmel v. Wiel*, 95 Ill. App. 15; *Landon v. Bryant*, 69 Vt. 203, 37 Atl. 297. See *Bassenhorst v. Wilby*, 45 Ohio St. 333, 13 N. E. 75, 11 West. Rep. 270.

Agreement after maturity to indorse notice necessary. *Sachs v. Fuller Bros. Toll Lumber & Box Co.*, 69 Ark. 270, 62 S. W. 902.

¹³ *Agee v. Smith*, 7 Wash. 471, 35 Pac. 370.

¹⁴ *Galbraith v. Shepard* (Wash. 1906), 86 Pac. 1114. In this case there was no evidence at the trial in support of the allegation that the first note was at maturity presented to the makers with demand for payment followed by notice to the indorser of its dishonor. This was held necessary in order to charge respondent as indorser, unless he had waived such presentment, demand, and notice. See *Bank of Edgefield v. Farmers' Cooperative Mfg. Co.*, 52 Fed. 98, 2 U. S. App. 282, 2 C. C. A. 637, 18 L. R. A. 201.

¹⁵ *Hudson v. Walcott*, 4 Ohio Dec. 459, 2 Cleve. L. Rep. 194.

¹⁶ *Legg v. Vinal*, 165 Mass. 555, 43 N. E. 518. Under Mass. Pub. Stat., Chap. 77, § 15. But compare *Bank of Jamaica v. Jefferson*, 92 Tenn. 537, 36 Am. St. Rep. 100, 22 S. W. 211.

¹⁷ *Sibley v. American Exchange National Bank*, 97 Ga. 126, 25 S. E. 470.

ment renders the indorsers or drawee of an inland bill liable;¹⁸ and if the drawer of a domestic bill is misled by statements of the holder, and he sustains a financial loss by reason thereof, he will be discharged to the extent of such loss or injury.¹⁹ But want of notice to an indorser who has satisfied the note is not available to the maker as a defense in an action against him by such indorser.²⁰ A surety on a note is not discharged from liability by reason of the fact that he was not given notice of dishonor, as the liability of a surety is primary and he is absolutely required by the terms of the instrument to pay the same.²¹ Nor is a mere surety entitled to notice, even though the note is payable at a bank.²² It is also decided that a guarantor of a note is not entitled to notice of dishonor,²³ where the guaranty is unqualified and an absolute contract.²⁴ So it is determined that a guarantor must prove damage sustained by failure to make demand and give notice, and even in such case he is discharged only to the amount of the damage sustained; and that in case of a guaranty on a separate contract the rule as to notice is not so strict.²⁵ Notice of dishonor need not be given the maker of a note;²⁶ nor to a third party who becomes a maker or original promisor by indorsing paper before

¹⁸ *Waples-Painter Co. v. Bank of Commerce* (Ind. Ty. 1906), 97 S. W. 1025; *Peoples' National Bank v. Lutterloh*, 95 N. C. 495.

¹⁹ *Bank of Richmond v. Nicholson*, 120 Ga. 622, 48 S. E. 240; *Stafford v. Yeates*, 18 Johns. (N. Y.) 327.

²⁰ *Stanley v. McElrath*, 86 Cal. 449, 22 Pac. 673, 10 L. R. A. 545.

²¹ *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430; *Negot. Inst. Law* (Chap. 54, Revisal), §§ 2213, 2219, 2239, 2342 considered.

²² *Hunnicut v. Perot*, 100 Ga. 312, 27 S. E. 787; *Sibley v. American Exchange National Bank*, 97 Ga. 126, 25 S. E. 470.

²³ *Farrar v. Peoples' Trust Co.*, 63 Kan. 881, 64 Pac. 1031.

²⁴ *City Savings Bank v. Hopson*, 53 Conn. 455, 2 N. Eng. 556, 5 Atl. 601.

Guarantor "necessity of notice and default.—While there is some con-

flict among the authorities, the generally accepted doctrine seems to be, that in case of an absolute and unconditional guaranty the guarantor becomes liable upon default of the principal, without demand and notice of non-payment. And this rule is generally recognized whether the instrument guaranteed is negotiable or not. * * * A different doctrine appears to prevail in some jurisdictions, at least in case of a guaranty of negotiable instruments. * * * Where a person gives a continuing guaranty, or a guaranty relating to future transactions, demand and notice seem necessary to charge him." Note 105 Am. St. Rep. 516-518.

²⁵ *Rhett v. Poe*, 2 How. (U. S.) 457.

²⁶ *Guignon v. Union Trust Co.*, 156 Ill. 135, 40 N. E. 556, aff'g 53 Ill. App. 581.

its delivery.²⁷ So in a case where such a person placed the word indorser after his name upon the face of the note it was held that notice need not be given to him.²⁸

§ 546. Notice to all other parties necessary after non-acceptance at holder's election, notwithstanding subsequent acceptance.—If a bill is payable at so many days after sight and the holder presents the bill for acceptance and elects to consider that there has been a non-acceptance, even though what passes on presentment shows an acceptance, and the bill is protested for non-acceptance, the holder is bound by such election as to all the other parties to the bill and must give them notice of dishonor or they will be discharged, and a subsequent acceptance the next day will not be sufficient to charge the drawer, in case no such notice is given, and the drawee fails before the day of payment. "When once a bill is dishonored the right of the other parties to notice immediately and absolutely attaches, and no subsequent acts between the holder and drawee can vary that right. Whatever is afterwards done by the holder is at his own peril, and cannot change the responsibility of others. A holder cannot elect to treat a bill as dishonored, and afterwards as duly honored. The consequences of such a doctrine would be most mischievous to the commercial world."²⁹

§ 547. To whom notice may be given.—Notice of dishonor may be given either to the party himself or to his agent in that behalf.³⁰ It is held that it must be shown that the agent upon whom notice was served had authority or was empowered to receive it.³¹

§ 548. Same subject—Notice of protest.—A notice of protest is sufficiently served when such service is made upon an agent of the indorser, where such agent not only has a power of attorney, but also general supervision and authority, and has been accustomed to exercise the same, in negotiations concerning drafts and notes and the transfer, indorsement, acceptance and discounting thereof in his principal's dealings with the plaintiff bank.³² So service may be

²⁷ *Cherry v. Sprague*, 187 Mass. 113, 72 N. E. 456, 67 L. R. A. 33. of Exch. Act, § 49 (8), Appendix herein. See §§ 497, 499, 503, 517

²⁸ *Herrick v. Edwards*, 106 Mo. App. 633, 81 S. W. 466. herein.

²⁹ *Mitchell v. Degrand*, 1 Mason

³¹ *Robinson v. Aird*, 43 Fla. 30, 29 So. 633.

(U. S. C. C.) 176, 180, per Story, J.

³² *Persons v. Kruger*, 60 N. Y.

³⁰ *Negot. Inst. Law*, § 168; *Bills Supp.* 1078, 45 App. Div. 184, 7 N.

made upon an indorser and a person signing as attorney.³³ And where an agent of a non-resident indorses an indorsed note of the latter, sent to such agent for delivery to another, if a certain agreement can be made, he is sufficiently authorized to receive notice of dishonor, so that notices of protest sent him, including notice for the non-resident, whose address was unknown to the holder, are sufficiently served.³⁴

§ 549. **By whom given.**—The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given. Such notice may also be given by an agent, either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.³⁵ Notice of dishonor must be given by the holder of a bill in order to charge the drawer where acceptance or payment has been refused;³⁶ it may also be given by an agent or subagent holding that instrument for collection.³⁷ But it cannot be given by one acting without lawful authority or one wrongfully in possession.³⁸ Although makers, who are members of a

Y. Ann. Cas. 100, *aff'd* Kruger v. Persons, 66 N. Y. Supp. 1135, 52 App. Div. 635.

³³ J. H. Mohlman Co. v. McKane, 69 N. Y. Supp. 1046, 60 App. Div. 546.

³⁴ Billings' Estate, *In re* (Minn), 85 N. W. 162.

³⁵ Negot. Inst. Law, §§ 161, 162, 165; Bills of Exch. Act, § 49, Appendix herein. See Safford v. Wyckoff, 1 Hill (N. Y.) 11; Bank of Utica v. Smith, 18 Johns. (N. Y.) 230.

Notice by holder or agent. Although notice need not be given by the holder personally, still it may be given by him or by his agent

(Harris v. Robinson, 4 How. [U. S.] 336; Standard Sewing Machine Co. v. Smith, 1 Marv. [Del.] 330, 40 Atl. 1117; Lawrence v. Miller, 16 N. Y. 235), or by the latter in his own name (Drexler v. McGlynn, 99 Cal. 143, 33 Pac. 773).

³⁶ Morehouse & Wells Co. v. Schwaber, 118 Ill. App. 44.

³⁷ Ashe v. Beasley, 6 N. Dak. 191, 69 N. W. 188. See note to § 550 herein.

³⁸ Hofrichter v. Enyeart (Neb.), 99 N. W. 658. Examine Viets v. Union National Bank, 101 N. Y. 563, 5 N. E. 457, *rev'g* 31 Hun 454.

firm and in the position of subsequent indorsers, are not entitled to give a valid notice of protest to another partner, who is an accommodation indorser, still they may act in behalf of the holder as his agent and forward by mail to such partner a notice inclosed to them by the notary.³⁹ Under a Kentucky decision, a statute, which imposes upon notaries the duty to give notice of dishonor to parties entitled to notice by law in order to bind them, does not change the law merchant as to an indorsee's right to give notice of protest to certain indorsers.⁴⁰ In a federal case it is declared that a notary is not bound under the law merchant to give to the indorser notice of dishonor in protesting a note.⁴¹ It is also held that notice that a notary public had protested an inland bill of exchange is not equivalent to notice of the dishonor of the bill, and is insufficient.⁴²

§ 550. Effect of notice given on behalf of holder or by party entitled to give notice.—Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.⁴³

§ 551. When notice sufficient—Form of notice—Notice personally or by mail.—A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice

³⁹ *Traders' National Bank v. Jones*, 93 N. Y. Supp. 768, 104 App. Div. 433.

⁴⁰ *Lyddane v. Owensboro Banking Co.*, 21 Ky. L. Rep. 320, 51 S. W. 423; Ky. Stat., § 3725.

⁴¹ *Schofield v. Palmer*, 134 Fed. 753.

Bankers as collecting agents—Notary as public officer—Bank's responsibility for acts of, and also duties and liabilities of bank considered, see *Britton v. Niccolls*, 104 U. S. 757; *Bird v. Louisiana State Bank*, 93 U. S. 96.

⁴² *Taylor v. Bank of Illinois*, 7 T.

B. Mon. (Ky.) 576. Examine *Smedes v. Bank of Utica*, 20 Johns. (N. Y.) 372, aff'd 3 Cow. (N. Y.) 662.

⁴³ *Negot. Inst. Law*, §§ 163, 164; *Bills of Exch. Act*, § 49, Appendix herein. Examine *Beale v. Parish*, 20 N. Y. 407.

Notice of dishonor given by a proper party may be availed of by every party entitled at the time to a like notice, as it enures to such party's benefit. *Ashe v. Beasley*, 6 N. Dak. 191, 69 N. W. 188. Examine *Swayze v. Britton*, 17 Kan. 627.

unless the party to whom the notice is given is in fact misled thereby. The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.⁴⁴ A notary may be authorized to sign the notice, even though the demand was made by the holder.⁴⁵ If the notice is unsigned by the notary sending it, it is held to be insufficient.⁴⁶

§ 552. **Same subject.**—A notice of dishonor should so sufficiently describe the instrument as to identify and show with reasonable certainty what paper is referred to and intended.⁴⁷ No particular form, however, is necessary.⁴⁸ The notice should indicate in clear terms, at least sufficiently so as to put the indorser on inquiry, that the instrument was presented and dishonored, and that the holder will resort to the indorser for payment.⁴⁹ But it is sufficient if such notice recites a demand, a refusal to pay, the dishonor and protest, and an intention to so resort to the person to whom it is sent;⁵⁰ although the indorser will be charged, notwithstanding the intent to look to him for payment is not stated in express and exact terms or words.⁵¹ It is also held to be sufficient to describe, in the notice, the bill by its date, the date of its maturity, the drawer's name and the amount.⁵² The notice is not invalidated where the indorser is not misled thereby, even though the amount is not correctly stated and there are other indorsers

⁴⁴ *Negot. Inst. Law*, §§ 166, 167; *Bank v. Warden*, 6 N. Y. 19; *Donner Bills of Exch. Act*, § 49, Appendix herein. See §§ 552-558 herein.

Notice may be in writing. *Standard Sewing Machine Co. v. Smith*, 1 Marv. (Del.) 330, 40 Atl. 1117.

⁴⁵ *Meise v. Newman*, 29 N. Y. Supp. 201, 78 Hun 428, 60 N. Y. St. R. 756, rev'g 27 N. Y. Supp. 708, 76 Hun 341, 59 N. Y. St. R. 143.

⁴⁶ *People's National Bank v. Dibrrell*, 91 Tenn. 301, 18 S. W. 626.

⁴⁷ *Dodson v. Taylor*, 56 N. J. L. 11, 28 Atl. 316; *Gates v. Beecher*, 60 N. Y. 518; *Artisans' Bank v. Backus*, 36 N. Y. 100, 107; *Cayuga County*

Bank v. Warden, 6 N. Y. 19; *Donner v. Renier*, 23 Wend. (N. Y.) 670.

⁴⁸ *Standard Sewing Machine Co. v. Smith*, 1 Marv. (Del.) 330, 40 Atl. 1117.

⁴⁹ *Witkowski v. Maxwell*, 69 Miss. 56, 10 So. 453.

⁵⁰ *Legg v. Vinal*, 165 Mass. 555, 43 N. E. 518.

⁵¹ *Nelson v. First National Bank*, 69 Fed. 798, 32 U. S. App. 554, 16 C. A. 425, 12 Bkg. L. J. 672; *Salomon v. Pfeister & V. Leather Co.* (N. J.), 31 Atl. 602.

⁵² *Brown v. Jones*, 125 Ind. 375, 25 N. E. 452, 3 Bkg. L. J. 442.

in the state to which it is sent.⁵³ Nor will a misdescription of the note void the notice where the indorser is not misled as to the identity of the paper.⁵⁴ Nor is the notice vitiated by its not stating the holder of the bill, nor by the designation of the date in consecutive figures intended to represent the month, day and year.⁵⁵ And a mistake as to the date will not make the notice insufficient where it conveys the necessary information as to the instrument intended.⁵⁶ So a notice is sufficient where it sets forth that a certain note was indorsed by the person to whom it was sent and also by his wife, with a statement that it has matured, that no surplus exists and that the note has not been renewed and also requests that a check be sent for discount.⁵⁷ Mere knowledge, obtained by the indorser through the maker, of the note's dishonor does not constitute notice as it should come from the party who intends to resort to the former for payment.⁵⁸ A notice of dishonor is a sufficient and valid one where a letter, properly addressed and mailed, describes the note, states its non-payment, and that the indorser will be looked to for payment.⁵⁹

§ 553. **Manner or mode—Oral, written and personal notice.**—It is held that notice of protest or dishonor may be given orally to the indorser;⁶⁰ so notice may be given orally or in writing where the parties reside in the same town, or written notice may be left at the residence or place of business;⁶¹ although personal notice should ordi-

⁵³ *King v. Hurley*, 85 Me. 525, 27 Atl. 463.

⁵⁴ *Northup v. Cheney*, 50 N. Y. Supp. 389, 27 App. Div. 418.

⁵⁵ *Brown v. Jones*, 125 Ind. 375, 25 N. E. 452, 3 Bkg. L. J. 442. Dates were represented by figures, such as 3-15-1884.

⁵⁶ *Mills v. Bank of United States*, 11 Wheat. (U. S.) 431; *Bank of Alexandria v. Swann*, 9 Pet. (U. S.) 33.

⁵⁷ *Counsell v. Livingston*, 2 Ont. Law Rep. 582.

⁵⁸ *Jagger v. National German-American Bank*, 53 Minn. 386, 55 N. W. 545. See *State Bank v. Postal*, 34 N. Y. Supp. 18, 67 N. Y. St. R. 873, 12 Misc. 546.

⁵⁹ *Cromer v. Platt*, 37 Mich. 132, 26 Am. Rep. 503.

⁶⁰ *Kelly v. Theiss*, 78 N. Y. Supp. 1050, 12 N. Y. Annot. Cas. 206, 77 App. Div. 81.

See *Alabama*.—*Martin v. Brown*, 75 Ala. 422.

California.—*Pierce v. Schaden*, 55 Cal. 406.

Delaware.—*Standard Sewing Machine Co. v. Smith*, 1 Marv. (Del.) 330, 40 Atl. 1117.

Iowa.—*McKewer v. Kirtland*, 33 Iowa 348.

Maine.—*Ticonic Bank v. Stackpole*, 41 Me. 321, 66 Am. Dec. 246.

Compare *Union Bank v. Fonteneau*, 12 Rob. (La.) 120.

⁶¹ *Bowling v. Harrison*, 6 How. (U. S.) 248; *Williams v. Bank of United States*, 2 Pet. (U. S.) 96.

narily be given where the holder and indorser reside in the same town.⁶² And under a West Virginia decision the notice is required to be personal or left at the residence or place of business of the indorser if he resides in the same place where the demand of payment is made.⁶³ So in Virginia it is held that a surety is entitled to personal service of the notice, even though he resides outside the city limits and is absent therefrom, it appearing that he is located very near such limits.⁶⁴ But it is also decided that personal service of a notice of protest is not necessary, even though the note is payable at the same town in which the indorser resides, where such paper is held for collection by the bank at which it is payable but the owner resides in another place and all notices are sent to him, and in such case it is sufficient if he sends such notice by mail.⁶⁵ It is held sufficient, however, although the parties reside in the same place, that the notice is actually received in time, whether a personal delivery or notice by mail would or would not be otherwise sufficient.⁶⁶ And if the notice is actually received in proper time by the indorser, there is a sufficient service when made at his store upon his wife, who was his assistant there.⁶⁷ So, where a notice is duly and properly sent by mail and is delivered to the indorser's wife at his residence, it is sufficiently served.⁶⁸ Again, service by mail may be equivalent to personal service, irrespective of place of residence.⁶⁹ But a notice is not sufficiently served by delivering it at the window of the cashier of a hotel corporation, where it does not appear that the attention of any proper person was called thereto, or that any such party had received the same.⁷⁰ Nor, it is held, is personal service on the in-

⁶² *John v. City National Bank of Selma*, 62 Ala. 529, 34 Am. Rep. 35. 1120; *First National Bank of North Bennington v. Wood*, 51 Vt. 473, 33

⁶³ *Peabody Insurance Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 838. 78 Wis. 223, 47 N. W. 272, 4 Bkg. L.

⁶⁴ *Brown v. Bank of Abington*, 85 J. 58. Va. 95, 7 S. E. 357.

⁶⁵ *Big Sandy National Bank v. Chilton*, 40 W. Va. 491, 21 S. E. 774. 1007, 107 App. Div. 144.

⁶⁶ *Carter v. Odom*, 121 Ala. 162, 25 So. 774; *M. V. Monarch Co. v. Farmers' & D. Bank*, 20 Ky. L. Rep. 1351, 49 S. W. 317, 16 Bkg. L. J. 160; 20 Ky. L. Rep. 1275, 49 S. W. 310. See 26 Pac. 800, 25 Pac. 161, 10 L. R. A. 549, 545.

⁶⁷ *Reed v. Spear*, 94 N. Y. Supp. 223, 47 N. W. 272, 4 Bkg. L. J. 58.

⁶⁸ *Glicksman v. Earley*, 78 Wis. 223, 47 N. W. 272, 4 Bkg. L. J. 58. ⁶⁹ *American Exchange National Bank v. American Hotel Victoria Co.*, 92 N. Y. Supp. 1006, 103 App. Div. 372. 355, aff'd 165 N. Y. 642, 59 N. E.

dorser, who lived in the same city as the notary by whom it was protested, evidenced by proof of mailing the notice.⁷¹

§ 554. **Same subject.—Notice by mail.**—Notice is sufficient to fix the indorser's liability if the certificate of notice of protest is served by mail, it being regular and valid in other respects.⁷² Such service by mail is valid and binding where notice is received, even though personal service might have been otherwise required;⁷³ and if the indorser receives such notice through the mail it cures an omission to address the notice itself.⁷⁴ Again, a notice is properly given when sent by mail to an indorser residing in a city having a free postal delivery.⁷⁵

§ 555. **Same subject.—Sufficiency of address and mailing.**—Where notice of dishonor is duly addressed and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.⁷⁶ The notice should be sufficiently addressed to the proper postoffice of the indorser,⁷⁷ although if the town or place is a small one it may be directed to the postoffice there;⁷⁸ and if no specific address is given by the indorser, it may properly be directed to the city in which he resides.⁷⁹ If the

⁷¹ *C. C. Thompson & W. Co. v. Appleby*, 5 Kan. App. 680, 48 Pac. 933.

⁷² *German-American Bank v. Mills*, 91 N. Y. Supp. 142, 99 App. Div. 312. See, also, *Alabama*.—*Carter v. Odom*, 121 Ala. 162, 25 So. 774; *Brennan v. Vogt*, 97 Ala. 647, 11 So. 893.

Kentucky.—*M. V. Monarch Co. v. Farmers' & D. Bank*, 20 Ky. L. Rep. 1351, 1275, 49 S. W. 319, 317, 16 Bkg. L. J. 160.

New Jersey.—*Salomon v. Pfeister* (N. J.), 31 Atl. 602.

New York.—*J. H. Molman Co. v. McKane*, 69 N. Y. Supp. 1046; *McLean v. Ryan*, 55 N. Y. Supp. 232, 36 App. Div. 281, 16 Bkg. L. J. 102, aff'd 165 N. Y. 620, 59 N. E. 1126.

Pennsylvania.—See *Newbold v. Boraef*, 155 Pa. 227, 26 Atl. 305.

Tennessee.—*First National Bank v. Reid* (Tenn.), 58 S. W. 1124.

Wisconsin.—*Glicksman v. Earley*, 78 Wis. 223, 47 N. W. 272, 4 Bkg. L. J. 58.

⁷³ *Carter v. Odom*, 121 Ala. 162, 25 So. 774; *M. V. Monarch Co. v. Farmers' & D. Bank*, 20 Ky. L. Rep. 1351, 1275, 49 S. W. 319, 317, 16 Bkg. L. J. 160; *Chapman v. Ogden*, 56 N. Y. Supp. 73, 37 App. Div. 355, aff'd 165 N. Y. 642, 59 N. E. 1120.

⁷⁴ *Glicksman v. Earley*, 78 Wis. 223, 47 N. W. 272, 4 Bkg. L. J. 58.

⁷⁵ *Brennan v. Vogt*, 97 Ala. 647, 11 So. 893.

⁷⁶ *Negot. Inst. Law*, § 176, Appendix herein.

⁷⁷ *Northwestern Coal Co. v. Bowman*, 69 Iowa 150.

⁷⁸ *Morse v. Chamberlain*, 144 Mass. 406, 11 N. E. 560, 4 N. Eng. 211.

⁷⁹ *Webber v. Gotthold*, 28 N. Y. Supp. 763, 59 N. Y. St. R. 416, 8 Misc. 503.

envelope or cover containing the proper notice is correctly addressed, postage prepaid and duly deposited in the mail, it is ordinarily sufficient,⁸⁰ even though it is never received by the indorser, as the holder cannot be held chargeable for miscarriage of the mail.⁸¹ If notice is received in due time, it is sufficient, even though improperly addressed.⁸² So the fact that a notice properly addressed was received by another having the same name does not prevent the notice being effectual.⁸³ And even though a notice of protest is not received by an indorser, it is sufficient where it is remailed to him by another indorser residing in the same place to whom both notices were sent under one cover.⁸⁴ Again, a notice of protest is properly given, even though it is not received by the indorser and she has changed her residence before it is mailed, where it appears that the notary, acting upon information received as to her residence, sent the notice to that place by mail in care of the maker, although there was no postoffice at such place, and her residence had in fact been at another place, and she had been accustomed to receive her mail at the postoffice nearest to that to which the notice was sent and to which it was the duty of the postal agent to forward mail in such cases.⁸⁵ If, however, the notary of a bank to which notes are sent for collection misdirects the notice of protest, and in consequence thereof it is not received, and the indorser is not notified, no liability ensues.⁸⁶ Ad-

⁸⁰ *Glicksman v. Earley*, 78 Wis. 223, 47 N. W. 272, 4 Bkg. L. J. 58. See, also, *Manchester v. Van Brunt*, 40 N. Y. St. R. 56, and cases cited in the first note to § 533 herein.

⁸¹ *Liggett v. Wing*, 1 Ohio Dec. 277, 31 Ohio L. J. 85; *Cook v. Forker*, 193 Pa. St. 461, 44 Atl. 560.

See the following cases:

Maine.—*Lord v. Appleton*, 15 Me. 270.

Massachusetts.—*Morse v. Chamberlain*, 144 Mass. 406, 11 N. E. 560, 4 N. Eng. 211; *Munn v. Baldwin*, 6 Mass. 316.

Minnesota.—*Wilson v. Richards*, 28 Minn. 337, 9 N. W. 872.

Mississippi.—*Ellis v. Commercial Bank of Natchez*, 7 How. (Miss.) 294, 40 Am. Dec. 63.

Ohio.—*Walker v. Stetson*, 14 Ohio St. 89, 84 Am. Dec. 362.

Examine Apple v. Lesser, 93 Ga. 749, 21 S. E. 171.

⁸² *Bank of United States v. Corcoran*, 2 Pet. (U. S.) 121.

⁸³ *Morse v. Chamberlain*, 144 Mass. 406, 11 N. E. 560, 4 N. Eng. 211.

⁸⁴ *Van Brunt v. Vaughn*, 47 Iowa 145, 29 Am. Rep. 468.

⁸⁵ *Central National Bank v. Adams*, 11 S. C. 452, 32 Am. Rep. 495.

⁸⁶ *Davey v. Jones*, 13 Vroom (N. J.) 28, 36 Am. Rep. 505.

Not mailing to correct address.—See, also, *Hart v. McLellan*, 80 Me. 95, 13 Atl. 272, 6 N. Eng. 138; *Albany Trust Co. v. Frothingham*, 99 N. Y. Supp. 343, 50 Misc. 598; *Howard v. Van Gieson*, 61 N. Y. Supp. 349, 46 App. Div. 77.

addressing the notice to personal representatives or executors as “administrators” does not invalidate it.⁸⁷ If due diligence is exercised in sending notice, another notice is not required, even though the exact address is ascertained.⁸⁸ Again, testimony of the notary that he deposited the notice in the postoffice constitutes sufficient proof of notice.⁸⁹

§ 556. Same subject—What is included in the term mailing.—The right to deposit a notice in the postoffice is not limited, but extends to all kinds of proper places;⁹⁰ so that a notice may be deposited in a mailing or postoffice box on the street, and it is effectual where such box is part of the mailing or delivery system.⁹¹ A notice of protest properly inclosed, addressed and stamped may also be delivered to a letter-carrier on his route discharging his duty of delivering and collecting mail.⁹²

§ 557. Same subject—Mailing notice—Usage or custom.—The mode of giving notice may be affected by the usage of the bank at which the note is payable, and such usage may justify and make sufficient and binding a notice sent through the postoffice to indorsers residing in the place where the bank is located.⁹³ Again, even though the holder and indorser reside in the same town, if it is customary to give notice of protest by mail it is sufficient, it appearing that such notice was received by the indorser.⁹⁴

§ 558. Same subject—Mailing notice—When sufficient and insufficient—Instances.—A notice of protest is sufficient if sent by mail to the indorser at his place of residence, even though he was absent at a temporary summer residence at another place, where the indorser had given instructions to address mail to him at the former

⁸⁷ *Drexler v. McGlynn*, 99 Cal. 143, 33 Pac. 773.

⁸⁸ *Lambert v. Ghiselin*, 9 How. (U. S.) 552.

⁸⁹ *Dickins v. Beal*, 10 Pet. (U. S.) 572.

⁹⁰ *Morse v. Chamberlain*, 144 Mass. 406, 11 N. E. 560.

⁹¹ *Casco National Bank v. Shaw*, 79 Me. 376, 10 Atl. 67, 4 N. Eng. 673; *Johnson v. Brown*, 154 Mass. 105, 27 N. E. 994, 5 Bkg. L. J. 84; *Wood*

v. Callaghan, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597; *Manchester v. Van Brunt*, 40 N. Y. St. R. 56. See, also, *Negot. Inst. Law*, § 177, Appendix herein.

⁹² *Pearce v. Langfit*, 101 Pa. St. 507, 47 Am. Rep. 737.

⁹³ *Carolina National Bank v. Wallace*, 13 S. C. 347, 36 Am. Rep. 694.

⁹⁴ *Carter v. Odom*, 121 Ala. 162, 25 So. 774. See *Isbell v. Lewis*, 98 Ala. 550, 13 So. 335.

place.⁹⁵ Such a notice is also properly given and is sufficient where on the day of maturity it is mailed to the indorser to his former residence and on the day following it is forwarded to him by the same mail and is received by him at his residence.⁹⁶ And prior indorsers are bound where the manifests of protest are forwarded to them by the last indorser, in due time after receiving all the notices from the notary, who had sent them all to him for the reason that the notary did not know the residence or place of business of any of the prior indorsers.⁹⁷ But if notices are thus sent to the last indorser, and he fails to perform his duty in forwarding to a prior indorser one of the notices so received, the latter is not bound, where no notice is served upon him in any other manner.⁹⁸ A notice is, however, sufficient when mailed to the indorser and to a person who signed the indorsement as her attorney and addressed to them at the town where the note was dated, and at the time of sending such notice the defendant's residence had not been changed.⁹⁹ And where it appears from the notarial certificate that the notice was mailed to the indorser, a proper service thereof upon him is shown.¹⁰⁰ But where a surety is entitled to personal service of a notice of protest, a drop-letter mailed to him at the same town, there being no mail carriers there, is insufficient.¹⁰¹ If a note is received by a bank and forwarded by it for collection, and it neglects or fails to forward notices of protest sent to it by a notary, and the indorsers are thereby discharged, such bank will be responsible to the holder for loss so sustained by him.¹⁰² It is sufficient, if the evidence shows that the letter was mailed, for the proof to be submitted to the jury.¹⁰³ It is also evidence of notice that an insolvent indorser specifies the bill as part of his indebtedness.¹⁰⁴

⁹⁵ *Lowell Trust Co. v. Pratt*, 183 Mass. 379, 67 N. E. 363, under St. 1881, Ch. 77, § 16, p. 428. See, also, *First National Bank v. Reid* (Tenn.), 58 S. W. 1124.

⁹⁶ *First National Bank of North Bennington v. Wood*, 51 Vt. 473, 33 Am. Rep. 692.

⁹⁷ *Metropolitan Bank v. Engel*, 72 N. Y. Supp. 691, 66 App. Div. 273.

⁹⁸ *Henry v. Spengler*, 12 Ohio C. C. 153, 1 Ohio C. D. 362.

⁹⁹ *J. H. Mohlman Co. v. McKane*, 69 N. Y. Supp. 1046, 60 App. Div.

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¹⁰⁰ *McLean v. Ryan*, 55 N. Y. Supp. 232, 36 App. Div. 281, 16 Bkg. L. J. 102, aff'd 165 N. Y. 620, 59 N. E. 1126. See *Peabody Insurance Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

¹⁰¹ *Brown v. Bank of Abington*, 85 Va. 95, 7 S. E. 357.

¹⁰² *Bird v. Louisiana State Bank*, 93 U. S. 96.

¹⁰³ *Lindenberger v. Beal*, 6 Wheat. (U. S.) 104.

¹⁰⁴ *Hyde v. Stone*, 20 How. (U. S.)

§ 559. To whom notice given—Where party dead.—When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.¹⁰⁵ It is held that in case the indorser is dead, notice of protest may be given to his executors or personal representatives, even before they are appointed.¹⁰⁶ And if, on the death of the person primarily liable, no personal representative has been appointed, and no place of payment is specified, reasonable diligence has been exercised in making presentment and giving notice of dishonor, in the required manner and mode, the indorser will be charged.¹⁰⁷ But the required degree of diligence should be exercised in giving notice to known personal representatives, and in case none is known or can be found, then the notice may be sent to the indorser's last known place of residence.¹⁰⁸ It is also decided that notice of protest must be given to the executor of an indorser who dies before the note matures, even though the maker is such executor.¹⁰⁹ If the holder and notary have no knowledge of the death of the indorser who had died a short time prior to the note's maturity, and the notice of protest is sent to his address, such notice is sufficient to charge his estate where one of the heirs and the administrator actually receive the notice.¹¹⁰

§ 560. Notice to partners.—Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.¹¹¹ So, upon the question of protest and

¹⁰⁵ *Negot. Inst. Law*, § 169; *Bills of Exch. Act*, § 49, Appendix herein. *Y. Supp.* 153, 91 *Hun* 236, 72 *N. Y. St. R.* 54.

¹⁰⁶ *Drexler v. McGlynn*, 99 *Cal.* 143, 33 *Pac.* 773.

¹⁰⁷ *Reed v. Spear*, 94 *N. Y. Supp.* 1007, 107 *App. Div.* 144.

¹⁰⁸ *Dodson v. Taylor*, 56 *N. J. L.* 11, 28 *Atl.* 316. See this case, also, as to sufficiency of notice.

¹⁰⁹ *Carolina National Bank v. Wallace*, 13 *S. C.* 347, 36 *Am. Rep.* 694.

¹¹⁰ *Maspero v. Pedesciaux*, 22 *La. Ann.* 227, 2 *Am. Rep.* 727. See, also, *Bank of Ravenswood v. Wetzel* (*W. Va.*), 50 *S. E.* 886. Examine *Bank*

of *Port Jefferson v. Darling*, 36 *N. Y. Supp.* 153, 91 *Hun* 236, 72 *N. Y. St. R.* 54.

¹¹¹ *Negot. Inst. Law*, § 170, Appendix herein. See *Maspero v. Pedesciaux*, 22 *La. Ann.* 227, 2 *Am. Rep.* 727; *Bank of America v. Shaw*, 142 *Mass.* 290, 2 *N. Eng.* 572, 7 *N. E.* 779; *Gates v. Beecher*, 60 *N. Y.* 518; *Hubbard v. Matthews*, 54 *N. Y.* 43; *Bank of Vergennes v. Cameron*, 7 *Barb. (N. Y.)* 143.

That protest and notice of protest may be given to one of partners in case of dissolution, see *Fourth Na-*

notice in case of a partnership, such notice is properly left at the residence of one of the firm or at its place of business with some one there in charge.¹¹² If a bank holds a foreign bill and has notice of its non-payment, the fact that its cashier is one of the members of a firm which drew and indorsed the paper renders protest of such bill unnecessary to charge the partners.¹¹³

§ 561. **Notice to persons jointly liable.**—Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.¹¹⁴ And where by the state law the same notice should be given to joint makers as to indorsers the former are nevertheless entitled to notice, even though their names are on a corporation's note as such makers and they also are directors thereof and are a majority of the board.¹¹⁵ But notice need not be given to joint makers who are sureties.¹¹⁶ And it has been decided that where one of the joint makers has knowledge that the note is unpaid, the fact that the other maker of the bill has not been notified of the non-payment will not operate to release him from liability, even though the former's name is not signed to the paper.¹¹⁷

tional Bank v. Altheimer, 91 Mo. 190, 8 West. Rep. 562, 3 S. W. 858; Myer v. Withman, 41 Mo. App. 397.

Notice may be directed to partner by individual name. United States National Bank v. Burton, 58 Vt. 426, 2 N. Eng. 206, 3 Atl. 756.

Notice to drawers unnecessary where drawer and acceptor are firms with common partner. New York & Alabama Contracting Co. v. Selma Savings Bank, 51 Ala. 305, 23 Am. Rep. 552.

Effect of waiver by one partner and holder's notice of fraud and want of authority and necessity of notice of protest. See Presbrey v. Thomas, 1 App. D. C. 171, 21 Wash. L. Rep. 659.

¹¹² Fourth National Bank v. Altheimer, 91 Mo. 190, 8 West. Rep. 562, 3 S. W. 858.

¹¹³ Hays v. Citizens' Savings Bank, 101 Ky. 201, 19 Ky. L. Rep. 367, 14 Bkg. L. J. 327, 40 S. W. 573. See

Citizens' Savings Bank v. Hays, 16 Ky. L. Rep. 505, 29 S. W. 20.

¹¹⁴ Negot. Inst. Law, § 171; Bills of Exch. Act, § 49, Appendix herein. See Bowie v. Hume, 13 App. D. C. 286 (citing Shepard v. Hawley, 1 Conn. 368, 6 Am. Dec. 244; People's Bank v. Keech, 26 Md. 521, 90 Am. Dec. 118; Willis v. Green, 5 Hill (N. Y.) 232, 40 Am. Dec. 351; Bank of United States v. Beirne, 1 Gratt. (Va.) 234, 42 Am. Dec. 551); Jarnigen v. Stratton, 95 Tenn. 619, 32 S. W. 625, 30 L. R. A. 495.

¹¹⁵ Phipps v. Harding, 70 Fed. 468, 34 U. S. App. 148, 17 C. C. A. 203, 30 L. R. A. 513.

¹¹⁶ Marion National Bank v. Phillips, 16 Ky. L. Rep. 159, 35 S. W. 910.

¹¹⁷ Citizens' Savings Bank v. Hays, 16 Ky. L. Rep. 505, 29 S. W. 20. See Hays v. Citizens' Savings Bank, 101 Ky. 201, 19 Ky. L. Rep. 367, 14 Bkg. L. J. 327, 40 S. W. 573.

§ 562. **Notice to bankrupt.**—Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.¹¹⁸ So notice is held sufficient where received by the trustee or assignee at an insolvent firm's former place of business.¹¹⁹ And notice to parties secondarily liable is necessary notwithstanding the insolvency of the drawee and acceptor of a draft.¹²⁰

§ 563. **Time within which notice must be given.**—The negotiable instruments law provides that notice may be given as soon as the instrument is dishonored; and unless delay is excused as provided by that enactment, it must be given within the times fixed by the act.¹²¹ It is held that after demand made for payment and refusal, notice should be immediately given¹²² without delay, even though the indorser lives in the place where the draft is presented for payment;¹²³ and where demand is made on the third day of grace notice given to the indorser on the same day is sufficient.¹²⁴ But it is also decided that notice of dishonor may properly be given on the day after maturity as evidenced by the actual date of the note and not by the date of its delivery.¹²⁵ So it is determined in another case that notice sent by mail the next day after dishonor is sufficient.¹²⁶ Immediate notice must be given after demand and refusal, to an indorser after maturity of negotiable paper.¹²⁷ A notice to the indorser on the last day

¹¹⁸ *Negot. Inst. Law*, § 172; *Bills of Exch. Act*, § 49, Appendix herein. See, also, *Callahan v. Bank of Kentucky*, 82 Ky. 231; *American National Bank v. Junk Bros. Lumber & Mfg. Co.*, 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492, 40 Cent. L. J. 450.

Notice of protest—To whom given after receiver appointed. See note 61 L. R. A. 900.

¹¹⁹ *Case National Bank v. Shaw*, 79 Me. 376, 10 Atl. 67, 4 N. Eng. 673; *Importers' National Bank v. Shaw*, 144 Mass. 421, 11 N. E. 666, 4 N. Eng. 344. See *Bank of America v. Shaw*, 142 Mass. 290, 2 N. Eng. 572, 7 N. E. 779.

¹²⁰ *National Bank v. Bradley*, 117 N. C. 526, 23 S. E. 455.

¹²¹ *Negot. Inst. Law*, § 173; *Bills of Exch. Act*, § 49, Appendix herein.

¹²² *German-American Bank v. Atwater*, 165 N. Y. 36, 58 N. E. 763, aff'g 53 N. Y. Supp. 1104. See *Bowes v. Industrial Bank*, 64 Ill. App. 300, 1 Chic. L. J. wkly., rev'd 165 Ill. 70, 46 N. E. 10.

¹²³ *Manning First National Bank v. Farneman*, 93 Iowa 161, 61 N. W. 424, 12 Bkg. L. J. 73.

¹²⁴ *Lindenberger v. Beall*, 6 Wheat. (U. S.) 104.

¹²⁵ *Meyer v. Foster*, 147 Cal. 166, 81 Pac. 402.

¹²⁶ *Bank of Alexandria v. Swann*, 9 Pet. (U. S.) 33.

¹²⁷ *Graul v. Strutzel*, 53 Iowa 712, 36 Am. Rep. 250.

Time for notice where indorsed

of grace is not premature.¹²⁸ And although a notice bears a date of the day preceding its service it is insufficient when such service is made personally or by mail on the second day after maturity.¹²⁹ If a bank receives for collection a bill sent to it by another and branch bank, which had also received it for collection, the bank last receiving the bill gives due notice of dishonor where it directs such notice to the sending bank at a still different branch on the day following dishonor, and also sends a telegram to the sending bank on the day next thereafter.¹³⁰

§ 564. Same subject, continued—Diligence—Reasonable time.—A party upon whom falls the duty to give notice of dishonor is bound to use due diligence.¹³¹ "The time of giving notice is affected by different conditions and circumstances. If the residence of the party is unknown of course notice is an impossibility. But in such case it is incumbent upon the holder, and all other parties who are bound to give notice, to use reasonable diligence and make due inquiries as to the actual residence of the party so entitled to notice. What will be due and reasonable diligence in this respect must depend upon the circumstances of the particular case, for no invariable or definite rule

after maturity same as when indorsed before. *Rosson v. Carroll*, 90 Tenn. 90, 16 S. W. 66, 43 Alb. L. J. 493.

¹²⁸ *King v. Crowell*, 61 Me. 244, 14 Am. Rep. 560.

¹²⁹ *Hirt v. Vincent*, 29 N. Y. Supp. 61, 59 N. Y. St. R. 687, 9 Misc. 87, rev'g 27 N. Y. Supp. 258, 58 N. Y. St. R. 36, 7 Misc. 237.

¹³⁰ *Fielding v. Corry*, 67 L. J. Q. B. N. S. 7 [1898], 1 Q. B. 268 (C. A.), 77 Law T. Rep. 453.

¹³¹ *Bank of Columbia v. Lawrence*, 1 Pet. (U. S.) 578; *Hart v. McLellan*, 80 Me. 95, 13 Atl. 272, 6 N. Eng. 138; *Billings Est., In re* (Minn.), 85 N. W. 162; *Hazlett v. Bragdon*, 7 Pa. Super. Ct. 581. See *Lambert v. Ghiselin*, 9 How. (U. S.) 52; *University Press, John Wilson & Son v. Williams*, 59 N. Y. Supp. 817, 28 Misc. 52.

Duty of holder to use due dili-

gence in ascertaining place of residence of indorser and to inform notary. *Hazlett v. Bragdon*, 7 Pa. Super. Ct. 581.

Diligence—Sundays, holidays and Saturdays. See *Hitchcock v. Hogan*, 99 Mich. 124, 57 N. W. 1095, 10 Bkg. L. J. 292; *Sylvester v. Crohan*, 138 N. Y. 494, 53 N. Y. St. R. 113, 34 N. E. 273, aff'g 63 Hun 509, 18 N. Y. Supp. 546, 45 N. Y. St. R. 320; *Lenhart v. Ramey*, 2 Ohio C. D. 77; *Newbold v. Boraef*, 155 Pa. 227, 26 Atl. 305. See § 568 herein.

Notary—Negligence in not giving sufficient notice of dishonor of inland draft not chargeable to collecting bank, of which notary is assistant cashier, even though part of a notary's official duty to give such notices. See *First National Bank v. German Bank*, 107 Iowa 543, 44 L. R. A. 133, 78 N. W. 195, 16 Bkg. L. J. 220.

can be laid down; and what would be due and reasonable diligence in one case might fall far short in another."¹³² Where a note was protested and notice was not received by the indorser for about three months after protest, it having been sent to a place which was not the last known address of defendant and the plaintiff not having exercised reasonable diligence to ascertain the actual address it was held that no recovery could be had by the payee against the indorser.¹³³ A delay of thirty-three months,¹³⁴ of more than ten months,¹³⁵ and of four and a half months is unreasonable.¹³⁶ So a delay of two weeks will discharge the indorsers.¹³⁷

§ 565. Same subject, continued—Where parties reside in same place.—Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times: (1) If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following; (2) if given at his residence, it must be given before the usual hours of rest on the day following; (3) if sent by mail, it must be deposited in the postoffice in time to reach him in usual course on the day following.¹³⁸ A notice of dishonor must be given in con-

¹³² *Fugitt v. Nixon*, 44 Mo. 295, 299, citing *Story on Prom. Notes*, § 335.

Notice must be given in reasonable time. *Apple v. Lesser*, 93 Ga. 749, 21 S. E. 171; *Industrial Bank v. Bowes*, 165 Ill. 70, 46 N. E. 10, rev'g 64 Ill. App. 300, 1 Chic. L. J. Wkly. 455; *Leonard v. Olson*, 99 Iowa 162, 68 N. W. 677, 35 L. R. A. 381, 61 Am. St. Rep. 230. See *Hart v. McLellan*, 80 Me. 95, 13 Atl. 272, 6 N. Eng. 138; *Saco National Bank v. Sanborn*, 63 Me. 340, 18 Am. Rep. 224; *New York Belting & P. Co. v. Ela*, 61 N. H. 352.

Notice to indorser of demand note must be given in reasonable time. *Harrisburg National Bank v. Moffitt*, 10 Pa. Dist. R. 22, 3 Dauph. Co. Rep. 69.

Notice received on following day is in reasonable time where indorser resided but a short distance

from the place where note payable. *Phelps v. Stocking*, 21 Neb. 443.

Reasonable time question for jury. See *Bank of North America v. Pettit*, 4 Dall. (U. S.) 127; *Ball v. Deniston*, 4 Dall. (U. S.) 163. But compare *Watson v. Terpley*, 18 How. (U. S.) 517.

¹³³ *Albany Trust Co. v. Frothingham*, 99 N. Y. Supp. 343.

¹³⁴ *Harrisburg National Bank v. Moffitt*, 10 Pa. Dist. R. 22, 3 Dauph. Co. Rep. 69.

¹³⁵ *Turner v. Iron Chief Mining Co.*, 74 Wis. 355, 43 N. W. 149, 5 L. R. A. 533.

¹³⁶ *Pattillo v. Alexander*, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616.

¹³⁷ *German-American Bank v. Atwater*, 165 N. Y. 36, 58 N. E. 763, aff'g 53 N. Y. Supp. 1104.

¹³⁸ *Negot. Inst. Law*, § 174; *Bills of Exch. Act*, § 49, Appendix herein.

formity with a statutory requirement, and where the time is thereby limited to the close of business hours on the day following dishonor if it is given thereafter it is not in time.¹³⁹ But it is held that the holder has all the day following that of dishonor within which to give notice,¹⁴⁰ and if such notice is received on the first business day after protest it is sufficient.¹⁴¹ So where custom warrants sending such notice by mail, and it is sent in time, and the indorser receives it, it is sufficient, even though he resides in the same town.¹⁴² Again, it is a sufficient notice where it is mailed immediately after protest to the city residence of the indorser, even though she was away at a temporary summer residence.¹⁴³

§ 566. Same subject, continued—Where parties reside in different places.—Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times: (1) If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter. (2) If given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail, if it had been deposited in the postoffice within the time specified in the last subdivision.¹⁴⁴ Where the parties to a bill reside at a distance and the ordinary mode of communication is by the general post, the universal rule seems to be that the holder or party to give the notice must forward it by the post of the next day after the dishonor, or after he received notice of such dishonor; and if there be no post on such next day, then he must send off notice by the very next post that occurs after that day; but he is not legally bound on account of there being no post on the day after he receives notice, to forward it on the very day he receives it. If the notice be placed in the proper postoffice in due time it is legal diligence; the holder or party to give notice not being responsible for the irregularities of the mail.¹⁴⁵ It is

See, as to mailing, §§ 551, 553-558 herein.

¹³⁹ *Solomon v. Cohen*, 94 N. Y. Supp. 502.

¹⁴⁰ *Marks v. Boone*, 24 Fla. 177, 4 So. 532.

¹⁴¹ *M. V. Monarch Co. v. Farmers' & D. Bank*, 20 Ky. L. Rep. 1351, 1275, 49 S. W. 319, 317, 16 Bkg. L. J. 160. See *Hendershot v. Nebraska Na-*

tional Bank, 25 Neb. 127, 41 N. W. 133.

¹⁴² *Carter v. Odom*, 121 Ala. 162, 25 So. 774. See *Cassidy v. Kreamer* (Pa.), 13 Atl. 744, 12 Cent. Rep. 286.

¹⁴³ *First National Bank v. Reid* (Tenn. Ch. App.), 58 S. W. 1124.

¹⁴⁴ *Negot. Inst. Law*, § 175; *Bills of Exch. Act*, § 49, Appendix herein.

¹⁴⁵ *Knott v. Venable*, 42 Ala. 186,

held that where the parties did not reside in the same place, and the bankers who held the note for collection mailed the notice of protest, on the day such protest was made, to the owners, who, on receiving the same, mailed it to the indorser at another place, such notice is valid and proper diligence is exercised, even though several days elapse between the date of protest and the date when the notice is received by the indorser, and although there is a daily mail between his place and the place where the bank is located, and the residence of the indorser was known to the parties but not to the notary.¹⁴⁶

§ 567. Time of notice—Subsequent and antecedent parties.—

Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.¹⁴⁷ Notice sent on the same day on which it is received is sufficient.¹⁴⁸ And if notice is sent to his prior indorser by each successive indorser the day after the latter receives such notice it is transmitted in time;¹⁴⁹ and it is held that notice in such case must be sent not later than the following day.¹⁵⁰ Again notices may be served upon prior indorsers whose residences are unknown by sending all notices to the last indorser whose duty in such

195, 196, per Judge, J. (citing *Crawford v. Branch Bank at Mobile*, 7 Ala. 206; *Whitman v. Farmers' Bank of Chattanooga*, 8 Port. (Ala.) 258; *Lord v. Appleton*, 3 Shep. (Me.) 270; *Bell v. Hagerstown Bank*, 7 Gill (Md.) 216; *Ellis v. Commercial Bank*, 7 How. (Miss.) 294; *Bray v. Hadman*, 5 Maule & S. 68; *Chitty on Bills*, M. p. 486.

See the following cases:

United States.—*Bussard v. Levering*, 6 Wheat. (U. S.) 102; *Alexandria Bank v. Swann*, 9 Pet. (U. S.) 33.

Indiana.—*Brown v. Jones*, 125 Ind. 375, 21 Am. St. Rep. 227, 25 N. E. 452.

Maine.—*Goodman v. Norton*, 17 Me. 381.

Nebraska.—*Phelps v. Stocking*, 21 Neb. 443, 32 N. W. 217.

New York.—*Robinson v. Ames*, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259.

North Carolina.—*National Bank v. Bradley*, 117 N. C. 526, 23 S. E. 455.

West Virginia.—*Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

Notice by mail where parties reside in different places. See *Carlington v. Odom*, 124 Ala. 529, 27 So. 510; *Sharpe v. Drew*, 9 Ind. 281; *Wood v. Rosendale*, 18 Ohio Cir. Ct. R. 247, 10 O. C. D. 66; see, also, §§ 551, 553-558 *herein*.

¹⁴⁶ *Seaton v. Scovill*, 18 Kan. 433, 26 Am. Rep. 779.

¹⁴⁷ *Negot. Inst. Law*, § 178; *Bills of Exch. Act*, § 49 (14), *Appendix herein*.

¹⁴⁸ *Smith v. Poillon*, 87 N. Y. 590, 41 Am. Rep. 402.

¹⁴⁹ *Standard Sewing Machine Co. v. Smith*, 1 Marv. (Del.) 330, 40 Atl. 1117.

¹⁵⁰ *Wolf v. Hostetter* (Pa.), 13 Lanc. L. Rev. 201.

case is to forward them.¹⁵¹ And although the last indorser is only an agent for collection, notice is sufficient if sent to him by the first mail and one additional day should be allowed him in which to notify his immediate indorser.¹⁵² But an immediate indorser is not charged by notice, where a bank, which had discounted the paper and had received notice of its dishonor the day following such dishonor, sends notice at the close of business hours on that day by drop letter, at a place having no letter carrier system, so that such notice is not received until the next following day, making the time of receiving the notice the second day after the bank had received it.¹⁵³

§ 568. Same subject—Notice received on Saturday—Form of notice sent by last indorser—Pleading.—In an important case decided in Nebraska it is held that notice of dishonor of a promissory note is sufficient if sent to the last indorser by the first mail of the day following dishonor, even though such indorser is an agent for collection, merely, and he is entitled to one additional day to notify the indorser immediately preceding him. It is also decided that where such last indorser receives the notice of dishonor on Saturday, his notice to the next prior indorser is timely if served on the following Monday. It is further determined that the notice served by the last indorser need not be actually prepared by him, but he may adopt and utilize for that purpose a notice sent him by the protesting officer, addressed to the next prior indorser; and that in an action on a note, an averment by the holder that he caused due notice of dishonor to be served on the last indorser but one, is sufficient, in the absence of a motion to make more specific, to admit evidence that the notice was given to the last indorser and by him transmitted to the one next prior.¹⁵⁴

¹⁵¹ Metropolitan Bank v. Engel, 72 N. Y. Supp. 691, 66 App. Div. 273; Henry v. Spengler, 12 Ohio C. C. 153, 1 Ohio C. D. 362.

¹⁵² Oakley v. Carr, 66 Neb. 751, 92 N. W. 1000, 60 L. R. A. 431.

¹⁵³ Shelburne Falls National Bank v. Townsley, 102 Mass. 177, 3 Am. Rep. 445.

¹⁵⁴ Oakley v. Carr, 66 Neb. 751, 92 N. W. 1000, 103 Am. St. Rep. 739. The opinion in this case is as follows: "Lobingier, C.—This is an action on a promissory note exe-

cuted and delivered by one U. O. Anderson, of Seward, Nebraska, to defendant in error, who is a resident of Lincoln, and who, before maturity of the note, indorsed it in blank and sold it to plaintiff in error. By its terms the note became due December 5, 1899, the three days of grace expiring on December 8. Some time before the first-named date it was deposited for collection with the First National Bank of Lincoln, which forwarded it to a correspondent bank at Sew-

§ 569. **Where notice must be sent.**—Where a party has added an address to his signature, notice of dishonor must be sent to that ad-

ard, having first indorsed as follows: 'Pay any bank or banker or order. First National Bank, Lincoln, Neb. H. S. Freeman, Cashier.' On the last day of grace a notary employed by the Seward bank presented the note for payment at the maker's office and residence, and, not finding him at either place, the note was duly protested. On the same day the notary mailed a notice of protest to the maker at Seward, another to the First National Bank at Lincoln, and a third directed as follows: 'John Carr, Lincoln, Nebr., care of First National Bank,'—all of these notices being deposited in the Seward postoffice not later than the evening of December 8. The first mail from Seward to Lincoln, if on time, was delivered at the Lincoln postoffice about 11 o'clock, and there was a regular delivery by carriers about 12 o'clock. The mail of the First National Bank, however, was delivered by its own special messenger, and the letter addressed to Carr was by this messenger carried with the bank's other mail, and appears to have reached the bank some time after noon of the 9th, which was Saturday. The cashier of the bank testifies that before 2 o'clock on that day a notice of dishonor from the Lincoln bank was mailed to defendant in error, but the latter testifies that he never received it. The notice from the notary at Seward, however, was given to the messenger of the Lincoln bank and by him delivered to defendant in error on Monday forenoon at 10:40, one of the clerks having previously noted in pencil on the envelope defendant in error's

address, '52 Brownell Block.' This action is brought against the indorser alone, and the sole defense is that the notice of dishonor was not served in time. There was a trial to the court, a jury being waived, and a judgment for defendant, of which plaintiff now seeks a reversal by error proceedings. At common law, by weight of authority, the indorser of a dishonored note or bill was entitled to notice thereof on the day following the dishonor, if he resided in the same town with the maker; and if he resided elsewhere, the notice was required to be posted by the first seasonable mail sent on the day following dishonor. The rule was not universal. In *Bank of North America v. McKnight*, 1 Yeates (Pa.) 145, an indorser living in the same city with the maker was held, though not notified until the second day after dishonor. Moreover, we have in this state a statute governing such cases, which provides that 'notice of non-payment or non-acceptance thereof to the indorser within a reasonable time shall be adjudged due diligence.' Compiled Statutes, Ch. 41, § 3; Cobbey's Annot. Stat., § 8902. Whether this statute enlarges the common law liability of the indorser and restricts his rights as to notice, or whether it is intended merely to re-enact the rule of the *lex mercatoria*, is a question which we need not here determine, because, as we view it, the case at bar is governed by a different principle, presently to be discussed. Suffice it to say that the cases relied upon in the able and ingenious argument for

dress; but if he has not given such address, then the notice must be sent as follows: (1) Either to the postoffice, nearest to his place of

defendant in error were decided in jurisdictions which are without such a statute as ours. But the same law merchant which required the notice of dishonor to be given or sent on the day following non-payment also limited the duty of the holder or protesting officer in this regard to notifying the last indorser, who in turn was allowed an additional day to send notice to the indorser immediately preceding him, and so on until all had been notified. 2 Randolph Commercial Paper, § 1261. Thus, in the case before us, the notary was not legally bound to notify Carr at all. It would have been sufficient had he simply sent the one notice to the First National Bank, which was the last indorser, and the latter would have had until the following business day to notify Carr. As the bank received its notice on Saturday, it would, under this rule, have until the following Monday to send its notice to defendant in error, for in such cases the intervening Sunday is not to be counted. *Eagle Bank v. Chapin*, 3 Pick. (Mass.) 180; *Agnew v. Bank*, 2 H. & G. (Md.) 478, and many cases cited in *Century Digest*, Vol. 7, § 1169. It is claimed, however, that this doctrine should not be applied to a case like this, where the last indorser had received and indorsed the note simply for collection. It will be remembered that the indorsements themselves were not such as to disclose that the Lincoln bank was an indorsee for collection only. Carr had indorsed the note in blank and the Lincoln bank had indorsed it merely so that its corre-

spondent might collect, and there was nothing to indicate to the notary but that the Lincoln bank was the holder as well as the last indorser. But aside from this, no authority is cited for the exception contended for by plaintiff in error in the case of indorsers who hold for collection only. On the other hand, there is ample support for the proposition that it is sufficient to notify such indorsers in the same way as other last indorsers are notified, and that prior indorsers may be held by virtue of the usual notice from them. *Carmena v. Bank of Louisiana*, 1 La. Ann. 369; *Eagle Bank v. Hathaway*, 5 Met. (Mass.) 212; *Brown v. Ferguson*, 4 Leigh (Va.) 37, 24 Am. Dec. 707; *Linn v. Horton*, 17 Wis. 151; 2 Randolph Commercial Paper, §§ 1241, 1262. *Boyer v. Richardson*, 52 Neb. 156, cited by defendant in error, in no way conflicts with the foregoing. The court there was simply considering the effect of an indorsement for collection on the title to a note, and held that such an indorsee acquired no right of action against a prior indorser. But it is contended that the First National Bank has never so notified Carr. 'They simply attended to the courtesy of seeing that Carr eventually got a letter that was sent to him in their care without even knowing its contents.' If it had developed that the letter which the bank delivered to Carr by its messenger was not in fact a notice of dishonor, and none other had been sent, he, of course, would have been released from liability. In taking the course it did, the bank might have been assuming

residence, or to the postoffice where he is accustomed to receive his letters; or (2) if he live in one place, and have his place of business

some risk, though it must be remembered that its agent claimed to have mailed a separate letter to Carr, and testified that it was their custom, out of ample caution, to adopt in such cases both methods of notification. But since the letter delivered to Carr was complete and sufficient notice of dishonor, we are unable to see how it can profit defendant in error that it was not actually prepared by the clerks or officers of the Lincoln bank. The latter had a right to employ such agencies as it saw fit, both in the preparation and delivery of the notice; among others, it had a right to adopt and utilize the work of the notary employed by its correspondent bank at Seward. The form of the notice and the time of its delivery are the important elements. Who may have prepared it, provided it was done by authority, we deem unimportant. It seems to us, therefore, that this letter from the notary, received by the Lincoln bank in the due course of mail and sent by it with a notation of his office address to defendant in error on the next business day, was a sufficient compliance with the rules of the law merchant as well as with the requirements of our statute. But it is urged that plaintiff in error did not, in the trial court, rely upon this so-called doctrine of the 'sequence of notices,' but claimed to have notified Carr directly. What plaintiff in error's counsel may have urged in his argument below we have no means of knowing, nor do we deem it material. In the petition, which is our only guide in determining what was the cause of

action, it is alleged, after setting forth the non-payment of the note, that plaintiff 'caused due notice of such demand and non-payment to be forthwith served upon said defendant, said John Carr, and he duly received such notice.' It will be seen that this is not an averment that plaintiff notified Carr directly, but merely that she 'caused due notice * * * to be served'; and it would seem to constitute a sufficient compliance with § 129 of the code, requiring the facts 'which fix liability' to be stated. Whether the allegation might not have been open to a motion to make it more specific by stating the manner and means of service, we need not now inquire, for no motion of the kind was made; and, in its absence, the averment was certainly sufficient to permit the introduction of evidence that the notice was served by an agent for collection employed by the plaintiff. At any rate, no objection was made to the admission of such evidence, and we are unable to see how the alleged variance in the theory of recovery, even if it existed, could now avail defendant in error. The conclusions at which we have arrived might, we think, be reached in another way and still satisfy the strict requirements of the law merchant. Under that law, where a note or bill is sent by the holder to an agent in another town for presentment to the maker, the agent is allowed one day to post the notice of dishonor to his principal, and the latter is entitled to an additional day to send notice to the last indorser, and the agent is

in another, notice may be sent to either place; or (3) if he is sojourning in another place, notice may be sent to the place where he is sojourning. But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.¹⁵⁵ Notice may be sent to the residence¹⁵⁶ last known,¹⁵⁷ although changed;¹⁵⁸

not required to notify the indorser directly, though this would afford him earlier notice. *Ellis v. Commercial Bank*, 7 How. (Miss.) 294, 40 Am. Dec. 63; *Lawson v. Farmers' Bank*, 1 Ohio St. 206; *Church v. Barlow*, 9 Pick. (Mass.) 547; *United States Bank v. Goddard*, 5 Mason (U. S. C. C.) 366, Fed. Cas. No. 917; *State Bank v. Ayres*, 7 N. J. L. 130, 11 Am. Dec. 535; 2 *Randolph Commercial Paper*, § 1262. If, therefore, in the case at bar, the notary had sent the notice of dishonor directly to plaintiff in error, and she had received it in due course of mail and had presented her notice to defendant in error by the time the bank's messenger reached him, she would have been within the letter of the *lex mercatoria*. Can it make any legal difference that her place in the transaction was taken by her agent, the First National Bank? The Seward notary might well have thought that he was complying with this rule in sending the notice to the Lincoln bank, for the indorsements were such as to indicate that it was the holder. And, as was well stated by Ross, J., in *First Nat. Bank v. Wood*, 51 Vt. 471, 31 Am. Rep. 692, where a notice of dishonor, sent to the wrong address, and thence forwarded, was held sufficient: 'All the rules requiring the holder to use diligence to ascertain the residence of the indorser, and to leave notice at his place of business or residence, when they reside in the same town, or to mail notice as

soon as the day following the day of the maturity of the note, addressed to him at his place of residence, when they reside in different towns, are made and enforced that the indorser may be informed that his liability on the note has not been discharged by the party whose duty it was to pay the note at maturity. When, therefore, the indorser in fact receives notice in due season that the note has been duly presented for payment and protested, the purpose of the law has been accomplished, although the holder of the note has not complied with one of the established rules in regard to the use of diligence in giving notice?' It seems to us that in this case both the purpose and the letter of the law have been complied with, and we are forced to the conclusion that the learned trial judge erred in finding for the defendant. We recommend that the judgment be reversed and the cause remanded for further proceedings according to law."

¹⁵⁵ *Negot. Inst. Law*, § 179, Appendix herein.

¹⁵⁶ *Bank of Columbia v. Lawrence*, 1 Pet. (U. S.) 578; *Cornett v. Hafer*, 43 Kan. 60, 22 Pac. 1015, 2 Bkg. L.

¹⁵⁷ *Cornett v. Hafer*, 43 Kan. 60, 22 Pac. 1015, 2 Bkg. L. J. 233.

¹⁵⁸ *Cornett v. Hafer*, 43 Kan. 60, 22 Pac. 1015, 2 Bkg. L. J. 233; *Importers & T. National Bank v. Shaw*, 144 Mass. 421, 11 N. E. 666, 4 N. Eng. 344.

and the circumstances may be such as to show that a change of residence was contemplated.¹⁵⁹ Notice may also be sent to the indorser's place of business;¹⁶⁰ or to his address at the time the note was issued;¹⁶¹ or it may be left in his office when he is absent;¹⁶² or at a room used as a place of business;¹⁶³ or it may be directed to the indorser's proper postoffice;¹⁶⁴ or to the postoffice at the place where the note was dated and indorsed;¹⁶⁵ or to the indorser's customary or principal place of receiving his mail;¹⁶⁶ or to the place where it is found by the exercise of due and reasonable diligence that he will be most likely to receive it.¹⁶⁷ If the indorser resides in a place where the bank at which the note is payable is located, but the maker does not reside there and such bank goes out of existence it is sufficient and proper to protest the note at the successor bank's place, that being the only one in business in that town.¹⁶⁸

§ 570. When notice dispensed with—Drawer—Indorser—Excuses.

—Notice of dishonor is dispensed with when, after the exercise of

J. 233; *Morse v. Chamberlain*, 144 Mass. 406, 11 N. E. 560, 4 N. Eng. 211; *Bank of America v. Shaw*, 142 Mass. 290, 2 N. Eng. 572.

"Residence" not strictly construed and may include permanent, temporary or constructive residence. *Wachusett National Bank v. Fairbrother*, 148 Mass. 181, 19 N. E. 345, 5 R. R. & Corp. L. J. 354.

Notice to permanent residence, though temporary removal is sufficient. *Isbell v. Lewis*, 98 Ala. 550, 13 So. 335.

Notice left with servant having charge of house in Confederate lines when not sufficient. See *Alexandria Savings Inst. v. McVeigh*, 84 Va. 41, 3 S. E. 885.

¹⁵⁹ *Wood v. Rosendale*, 18 Ohio Cir. Ct. R. 247, 10 Ohio C. D. 66.

¹⁶⁰ *Morse v. Chamberlain*, 144 Mass. 406, 11 N. E. 560, 4 N. Eng. 211; *Bank of America v. Shaw*, 142 Mass. 290, 2 N. Eng. 572.

¹⁶¹ *Importers & T. National Bank v. Shaw*, 144 Mass. 421, 11 N. E. 666, 4 N. Eng. 344.

¹⁶² *Hobbs v. Straine*, 149 Mass. 212, 21 N. E. 365, under Mass. Pub. Stat., Chap. 77, § 16.

¹⁶³ *Lamkin v. Edgerly*, 151 Mass. 348, 24 N. E. 49.

¹⁶⁴ *Northwestern Coal Co. v. Bowman*, 69 Iowa 150.

¹⁶⁵ *Davis v. Eppler*, 38 Kan. 629, 16 Pac. 793.

¹⁶⁶ *Wachusett National Bank v. Fairbrother*, 148 Mass. 181, 19 N. E. 345, 5 R. R. & Corp. L. J. 354; *Burke v. Shreve*, 2 N. J. Law J. 92. *Examine Citizens' National Bank v. Cade*, 73 Mich. 449, 41 N. W. 500 (under How. Mich. Stat., § 1586); *Phillip & William Ebling Brewing Co. v. Reinheimer*, 66 N. Y. Supp. 458, 32 Misc. 594; *University Press v. Williams*, 62 N. Y. Supp. 986, 48 App. Div. 188, rev'g 59 N. Y. Supp. 817, 28 Misc. 52.

¹⁶⁷ *Bank of America v. Shaw*, 142 Mass. 421, 2 N. Eng. 572.

¹⁶⁸ *Texarkana First National Bank v. Wever (Tex.)*, 15 S. W. 41, 11 L. R. A. 295, 4 Bkg. L. J. 181.

reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.¹⁶⁹ And notice of dishonor is not required to be given to the drawer in either of the following cases: (1) Where the drawer and drawee are the same person. (2) Where the drawee is a fictitious person or a person not having capacity to contract. (3) Where the drawer is the person to whom the instrument is presented for payment. (4) Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument. (5) Where the drawer has countermanded payment. Again, notice of dishonor is not required to be given to an indorser in either of the following cases: (1) Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument. (2) Where the indorser is the person to whom the instrument is presented for payment. (3) Where the instrument was made or accepted for his accommodation.¹⁷⁰ We have considered the points stated in the preceding section.¹⁷¹ And it would seem that the same facts which would dispense with or excuse presentment for acceptance or for payment, or protest would ordinarily operate in a like manner as to notice of dishonor.¹⁷²

¹⁶⁹ *Negot. Inst. Law*, § 183; *Bills of Exch. Act*, § 50, Appendix herein. See §§ 544, 564 herein.

See the following cases:

United States.—*Harris v. Robinson*, 4 How. (U. S.) 345, 11 L. Ed. 1004.

Alabama.—*Isbell v. Lewis*, 98 Ala. 550, 13 So. 335.

Indiana.—*Palmer v. Whitney*, 21 Ind. 58.

Louisiana.—*Franklin v. Verbois*, 6 La. 727.

Maine.—*National Shoe & L. Bank v. Gooding*, 87 Me. 337, 32 Atl. 967.

Maryland.—*Staylor v. Ball*, 24 Md. 183.

Missouri.—*Shepard v. Citizens' Ins. Co.*, 8 Mo. 272.

New Jersey.—*Burke v. Shreve*, 2 N. J. Law J. 42.

New York.—*Albany Trust Co. v. Frothingham*, 99 N. Y. Supp. 343; *Holtz v. Boppe*, 37 N. Y. 634; *Bank*

of *Utica v. Bender*, 21 Wend. (N. Y.) 645, 34 Am. Dec. 281.

Pennsylvania.—*Hazlett v. Bragdon*, 7 Pa. Super. Ct. 58.

South Carolina.—*Central National Bank v. Adams*, 11 S. C. 452, 32 Am. Rep. 495.

Tennessee.—*Ratcliffe v. Planters' Bank*, 2 Sneed (Tenn.) 425.

Wisconsin.—*Turner v. Iron Chief Mining Co.*, 74 Wis. 355, 43 N. W. 149, 5 L. R. A. 533.

¹⁷⁰ *Negot. Inst. Law*, §§ 185, 186; *Bills of Exch. Act*, § 50, Appendix herein.

¹⁷¹ See §§ 490, 494, 495, 501, 522, 523, 536 herein.

¹⁷² See *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653.

That accommodation indorser entitled to notice, see *French v. Bank of Columbia*, 4 Cranch (U. S.) 141; *Ennis v. Reynolds* (Ga. 1906), 56 S. E. 104; *Aldine Manufacturing Co.*

If the drawer has a right to expect that his bill will be honored he is entitled to notice.¹⁷³ And it is no excuse for not giving notice of non-acceptance that the drawer had no effects in the drawee's hands at the time the bill was refused acceptance or afterward, if he had some effects, to whatever amount, in the drawee's hands when the bill was drawn.¹⁷⁴ It is also decided that even though the drawer has no effects in the drawee's hands the indorser is entitled to notice.¹⁷⁵ And it is held that want of funds in the hands of the drawee of an accommodation inland bill, is no excuse for not giving notice to an indorser entitled to recover on the drawer.¹⁷⁶ But, as above stated, a drawer is not entitled to notice where he is without funds, is not authorized

v. Warner, 96 Ga. 370, 23 S. E. 404; *St. Charles First National Bank v. Hunt*, 25 Mo. App. 170; *Carter v. Flower*, 16 Mees. & W. 751. Compare *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653; *Boutin, In re*, Rap. Jud. Quebec, 12 C. S. 186.

Accommodation maker—Indorser as principal debtor—Note for his accommodation not entitled to notice, see *Carlton v. White*, 99 Ga. 384, 27 S. E. 704; *Mayer v. Thomas*, 97 Ga. 772, 25 S. E. 761; *McFetrich v. Woodrow*, 67 N. H. 174, 38 Atl. 18; *Witherow v. Slayback*, 158 N. Y. 647, 53 N. E. 681; *Beale v. Parrish*, 20 N. Y. 407. See *National Bank v. Bradley*, 117 N. C. 526, 23 S. E. 455.

Notice is case of collateral security, see the following cases:

United States.—*Rhett v. Poe*, 2 How. (U. S.) 457.

Iowa.—*Kennedy v. Rosier*, 71 Iowa 671, 33 N. W. 226.

Maryland.—*Williams v. Baltimore National Bank*, 70 Md. 343, 17 Atl. 382.

Missouri.—*Wright v. Andrews*, 70 Mo. 86, 35 Am. Rep. 308. Holding that if the payment of the note is fully secured by money appropriated and pledged therefor, notice is unnecessary.

Pennsylvania.—*Holmes v. Briggs*,

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131 Pa. 233, 47 Leg. Int. 188, 25 W. N. C. 255, 20 Pitts. L. J. N. S. 301, 18 Atl. 928, 18 Wash. L. Rep. 310.

Notice unnecessary where note non-negotiable (*San Diego Bank v. Babcock*, 94 Cal. 96, 29 Pac. 415), unless circumstances evidence that signature deemed an indorsement of negotiable paper. *Haber v. Brown*, 101 Cal. 445, 35 Pac. 1035.

That insolvency of maker does not excuse failure to give notice, see *Phipps v. Harding*, 70 Fed. 468, 34 U. S. App. 148, 17 C. C. A. 203, 30 L. R. A. 513; *Moore v. Alexander*, 68 N. Y. Supp. 888, 33 Misc. 613, aff'd 71 N. Y. Supp. 420, 63 App. Div. 100. See *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653.

That insolvency of drawee and acceptor does not excuse failure to give notice, see *National Bank v. Bradley*, 117 N. C. 526, 23 S. E. 455; *Hawley v. Jette*, 10 Oreg. 31, 45 Am. Rep. 129.

¹⁷³ *French v. Bank of Columbia*, 4 Cranch (U. S.) 141.

¹⁷⁴ *Orr v. Maginnis*, 7 East 359.

¹⁷⁵ *Glasgow, Harrison v. Copeland*, 8 Mo. 268. See *Manning v. Lyon*, 24 N. Y. Supp. 265, 54 N. Y. St. R. 6.

¹⁷⁶ *Taylor v. Bank of Illinois*, 7 T. B. Mon. (Ky.) 577.

to draw,¹⁷⁷ and has no reasonable belief or expectation, or right to expect or require that the instrument will be honored.¹⁷⁸

§ 571. **Same subject.**—If a bill is payable upon certain conditions and the drawer prevents their fulfillment he forfeits his right to notice;¹⁷⁹ and if the drawer has discharged the maker by a release he is not entitled to notice.¹⁸⁰ Again, it is held that, in an action brought by the holder of a domestic bill discounted at a bank, it need not be shown, in order to render the drawer liable, that notice of dishonor was given him; and that, in the case of the drawer of such a bill, the injury sustained by him determines the extent of his release and liability, his contract, with this exception, being similar to or in the nature of one of suretyship.¹⁸¹ In an English case the following facts appear. In pursuance of a contract for the supply of bunker coal, made between the owners of a steamship, as buyers, and the agents of the suppliers of the coal at Colombo, as sellers, the defendant, the master of the steamship, drew a bill of exchange on the owners of the vessel in favor of the suppliers, concluding with the words "value received on three hundred tons of coal and disbursements * * * supplied to my vessel to enable her to complete this voyage from Melbourne to Hull, for which I hold my vessel, owners, and freight responsible." The bill was duly accepted in London, but on presentation for payment at maturity on a Saturday was dishonored. The plaintiffs, holders of the bill, learned, through their bankers on Monday, that the bill was not paid, and, having communicated with the agents of the suppliers of the coal, ascertained that the vessel had arrived in the Tyne; but not knowing definitely the whereabouts of the vessel they made further inquiries without obtaining further information, and on the following Thursday sent the defendant notice of dishonor by registered letter, addressing him as master of the vessel at Newcastle-on-Tyne, and that letter was actually delivered by the post-office on board the vessel and reached the master the second following day: It was held that the defendant was liable as drawer, for the wording of the bill did not by implication relieve him of that lia-

¹⁷⁷ Dickens v. Beal, 10 Pet. (U. S.) 572; Rhett v. Poe, 2 How. (U. S.) 457.

¹⁷⁸ Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283. See Blendermann v. Price, 50 N. J. L. 296, 12 Atl. 775, 11 Cent. Rep. 349. See § 523 herein.

¹⁷⁹ Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283.

¹⁸⁰ Burke v. McKay, 2 How. (U. S.) 66. Compare Ray v. Smith, 17 Wall. (U. S.) 411.

¹⁸¹ Bank of Richland v. Nicholson, 120 Ga. 622, 48 S. E. 240.

bility; it was also held that he was not discharged by reason of the delay in giving notice of dishonor, as the special circumstances excused that delay within the meaning of the Bills of Exchange Act, 1882.¹⁸² Notice to an indorser is not excused by the fact of destruction by fire of the place of business of the bank holding the note for collection and that its business was carried on only in a tentative way in a temporary structure.¹⁸³

§ 572. Delay in giving notice—Excuses—Circumstances beyond holder's control.—Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.¹⁸⁴ The cessation of mails and commercial intercourse between two states by reason of the blockade of one of the places by authority of one of the belligerents during a civil war constitutes a sufficient excuse for the omission of due and regular notice of the dishonor of a bill of exchange drawn by a firm in one place on one in the other and the question then remains whether such notice is given in a due and reasonable time after the removal of the impediment.¹⁸⁵

§ 573. Waiver of notice.—Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.¹⁸⁶ Oral or written statements or circum-

¹⁸² *The Elmvile* (1904), Prob. Div. 319, 73 L. J. P. 104, 91 L. T. R. N. S. 151. *Gorell Barnes*, J. Bills of Exch. Act 1882 (45 and 46 Vict., c. 61). §§ 48, 49, sub-s. 12; § 50, sub-s. 1.

¹⁸³ *Merchants' State Bank v. State Bank*, 94 Wis. 444, 69 N. W. 170, 14 Bkg. L. J. 80, held not an unavoidable calamity.

¹⁸⁴ *Negot. Inst. Law*, § 184; *Bills of Exch. Act*, § 50, Appendix herein.

¹⁸⁵ *House v. Adams & Co.*, 48 Pa. St. 261, considering *Patience v. Townley*, 3 Smith's Rep. 224; *Hop-*

kirk v. Page, 2 Brockenbroughs 20. See, also, § 536 herein.

¹⁸⁶ *Negot. Inst. Law*, §§ 180, 181; *Bills of Exch. Act*, § 50, Appendix herein. See §§ 511, 513, 524, 525, 536–541 herein.

Waiver of notice may be express or implied or inferred from circumstances. *Murphy v. Citizens' Savings Bank*, 22 Ky. L. Rep. 1872, 62 S. W. 1028. See *Dunham v. De-raismes*, 52 N. Y. Supp. 871, 31 App. Div. 627, 51 N. Y. Supp. 1097, 29 App. Div. 432, the latter rev'g 50 N. Y. Supp. 742, 22 Misc. 568.

stances may be of such a character as to constitute a waiver of notice.¹⁸⁷ So waiver of presentment waives notice.¹⁸⁸ But it may be stated that ordinarily the statements, conversations, claimed admissions, acts or circumstances relied on to establish a waiver of notice must clearly and unequivocally show such waiver, otherwise the indorser will not be held to have waived his rights to notice.¹⁸⁹ So an acknowledgment of liability must, to operate as a waiver, be made with knowledge by the indorser of the laches in failing to give no-

Waiver of notice on express terms on note; how construed. See *Lockwood v. Bock*, 50 Minn. 142, 52 N. W. 391.

Notice may be waived by terms of note. *State, Parks v. Hughes*, 19 Ind. App. 266.

Waiver of notice embodied in note binds indorser.

District of Columbia.—*Portsmouth Savings Bank v. Wilson*, (App. D. C.), 22 Wash. L. Rep. 817. Binds maker and indorser.

Georgia.—*Woodward v. Lowry*, 74 Ga. 148.

Iowa.—*Iowa Valley State Bank v. Sigstad*, 96 Iowa 491, 65 N. W. 407. See *Phillips v. Dippo*, 93 Iowa 35, 61 N. W. 216.

Minnesota.—See *Bryant v. Lord*, 19 Minn. 396.

Missouri.—*Jacobs v. Gibson*, 77 Mo. App. 244, 2 Mo. App. Rep'r 6.

Texas.—*Leeds v. Hamilton Paint & G. Co.* (Tex. Civ. App.), 35 S. W. 77. See *Smith v. Pickham*, 8 Tex. Civ. App. 326.

Indorsement of waiver of notice binds indorser.

Alabama.—*Montgomery v. Crowthwait*, 90 Ala. 553, 12 L. R. A. 140, 8 So. 498.

California.—*Farmers' Exchange Bank v. Altura Gold Mill & Mining Co.*, 129 Cal. 263, 61 Pac. 1077; *Savings Bank v. Fisher* (Cal.), 41 Pac. 490.

Illinois.—*Dunningan v. Stevens*,

122 Ill. 396, 11 West. Rep. 371, 13 N. E. 651.

Kansas.—*Davis v. Eppler*, 38 Kan. 629, 16 Pac. 793.

Washington.—*Loveday v. Anderson*, 18 Wash. 322, 51 Pac. 463, 15 Bkg. L. J. 100.

That no new consideration necessary for waiver by indorser, see *Lockwood v. Bock*, 50 Minn. 142, 52 N. W. 391; *Delsman v. Friedlander*, 40 Oreg. 33, 66 Pac. 297. See § 538 herein.

¹⁸⁷ *Markland v. McDaniel*, 51 Kan. 350, 32 Pac. 1114, 20 L. R. A. 96; *Seldner v. Mt. Jackson National Bank*, 66 Md. 488, 8 Atl. 262, 6 Cent. Rep. 478.

¹⁸⁸ *Furth v. Baxter*, 24 Wash. 608, 64 Pac. 798.

¹⁸⁹ *California*.—*Wright v. Liesenfeld*, 93 Cal. 90, 28 Pac. 849.

Massachusetts.—*Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103.

New York.—*Congress Brewing Co. v. Habenicht*, 82 N. Y. Supp. 481, 83 App. Div. 141, 13 N. Y. Ann. Cas. 144; *Porter v. Thom*, 57 N. Y. Supp. 479, 40 App. Div. 34, aff'd 167 N. Y. 584, 60 N. E. 1119.

Rhode Island.—*Whittier v. Collins*, 15 R. I. 44, 23 Atl. 39, 1 N. Eng. 135.

Tennessee.—*Rosson v. Carroll*, 90 Tenn. 90, 16 S. W. 66, 43 Alb. L. J. 493.

Canada.—*Britton v. Milsom*, 19 Ont. App. 96.

tice.¹⁹⁰ And it is held that merely taking or requiring security is not a waiver.¹⁹¹ But it is decided that notice to an indorser is waived by him by giving his note for his debt in a case where he had transferred the note of a third person as collateral security.¹⁹² Notice of dishonor to the drawer is waived where he gives an order to the drawees not to pay the bill if presented but it constitutes no excuse for non-presentment for payment.¹⁹³ Again, a valid, absolute and unconditional promise to pay, subsequently and clearly made, with a full knowledge of the holder's laches and of all material facts constitutes a waiver of such want of notice.¹⁹⁴ Where a second or renewal note was indorsed and sent before maturity to the maker of the first note by a party who was one of the accommodation indorsers and payees thereof and the maker had inserted his name as one of the payees and had discounted the second note and thereby had taken up the first note after maturity, and until that time the discounting bank was without knowledge of the fact of indorsement of the second note, it was held that such in-

¹⁹⁰ *Rosson v. Carroll*, 90 Tenn. 90, 16 S. W. 66, 43 Alb. L. J. 493.

¹⁹¹ *Whittier v. Collins*, 15 R. I. 44, 23 Atl. 39, 1 N. Eng. 135; *Selby v. Brinkley* (Tenn.), 17 S. W. 479.

¹⁹² *Johnson-Berger & Co. v. Downing*, 76 Ark. 128, 88 S. W. 825.

¹⁹³ *Hill v. Heap*, 1 Dowl. & Ry. 57.

¹⁹⁴ *United States*.—*Yeager v. Farwell*, 13 Wall. (U. S.) 6; *Donaldson v. Means*, 4 Dall. (U. S.) 109.

Alabama.—*Alabama National Bank v. Rivers*, 116 Ala. 1, 22 So. 580. See *White v. Keith*, 97 Ala. 668, 12 So. 611.

Iowa.—*Davis v. Miller*, 88 Iowa 114, 55 N. W. 89.

Maryland.—*Schwartz v. Wilmer*, 90 Md. 136, 44 Atl. 1059. See *Seldner v. Mt. Jackson National Bank*, 66 Md. 488, 6 Cent. Rep. 478, 8 Atl. 262.

Massachusetts.—*Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103; *Hobbs v. Straine*, 149 Mass. 212, 21 N. E. 365.

Minnesota.—*Amor v. Stoeckle*, 76 Minn. 180, 78 N. W. 1046, 16 Bkg. L. J. 407.

Missouri.—*State Bank v. Bartle*, 114 Mo. 276, 21 S. W. 816.

Montana.—*Quaintance v. Goodrow*, 16 Mont. 376, 41 Pac. 76.

New York.—*Linthicum v. Caswell*, 160 N. Y. 702, 57 N. E. 1115, aff'g 46 N. Y. Supp. 610, 19 App. Div. 541.

North Carolina.—*Shaw v. McNeill*, 95 N. C. 535.

Pennsylvania.—*Sieger v. Allentown Second National Bank*, 132 Pa. 307, 19 Atl. 217, 2 Bkg. L. J. 335; *Oxnard v. Varnum*, 111 Pa. St. 193, 2 Atl. 224, 2 Cent. Rep. 53.

Rhode Island.—*Souther v. McKenna*, 20 R. I. 645, 15 Bkg. L. J. 541, 40 Atl. 736.

Tennessee.—*People's National Bank v. Dibrell*, 91 Tenn. 301, 18 S. W. 626.

Indorser's knowledge that effect of want of notice was to release him does not change rule. *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103.

No waiver where offer conditional and not accepted. *Isbell v. Lewis*, 98 Ala. 550, 13 So. 335.

dorser had not waived notice of dishonor of the first note by indorsing before its maturity.¹⁹⁵ But there may be a waiver of notice by extending the time of payment or a request for such extension.¹⁹⁶

¹⁹⁵ *First National Bank of Brooklyn v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445. In this case the court said: "Prior to the negotiable instruments law, the decisions in this state were to the effect that demand and notice were unnecessary where the indorser was himself the principal debtor, where he had taken a general assignment of the maker's property, where the indorser had expressly or by implication waived demand and notice, and where the failure to make demand and give notice to the indorser could not possibly operate to his injury. *Mechanics' Bank of New York v. Griswold*, 7 Wend. 166; *Commercial Bank of Albany v. Hughes*, 17 Wend. 94; *Sheldon v. Horton*, 43 N. Y. 93, 3 Am. Rep. 669; *Ross v. Hurd*, 71 N. Y. 14, 27 Am. Rep. 1; *Cady v. Bradshaw*, 116 N. Y. 188, 22 N. E. 371, 5 L. R. A. 557; *National Hudson River Bank v. Reynolds*, 57 Hun 307, 10

N. Y. Supp. 669; *Smith v. Miller*, 52 N. Y. 545. Waiver, however, will not be implied from doubtful or equivocal acts or language (*Ross v. Hurd* and *Cady v. Bradshaw*, supra), and injury will be presumed until it is made to appear that no damage could have resulted (*Commercial Bank of Albany v. Hughes* and *Smith v. Miller*, supra); and where excuse for non-presentment and failure to give notice is relied upon, the facts furnishing such excuse must be alleged and proved (*Clift v. Rodgers*, 25 Hun 39)."

¹⁹⁶ *Glaze v. Ferguson*, 48 Kan. 157, 29 Pac. 396; *Cady v. Bradshaw*, 116 N. Y. 188, 26 N. Y. St. R. 518, 22 N. E. 371, 2 Bkg. L. J. 84, 5 L. R. A. 557; *McMonigal v. Brown*, 45 Ohio St. 499, 15 N. E. 860, 14 West. Rep. 147. See *Bassenhorst v. Wilby*, 45 Ohio St. 333, 13 N. E. 75, 11 West. Rep. 274; *Burnham H. M. & Co. v. McCormick*, 18 Utah 42, 55 Pac. 77.

CHAPTER XXVI.

CHECKS.

Sec.	Sec.
574. Presentment—Reasonable time—Diligence.	582. Necessary that drawer sustain actual loss or injury from laches in presentment.
575. Same subject continued.	583. Where drawee becomes insolvent or bankrupt—Collection through bank.
576. Same subject continued—Mail—Collection through bank.	584. Surety.
577. When presentment is made.	585. Indorser.
578. Substituted check—Presentment—Want of diligence.	586. Reasonable expectation that check will be honored—Want of funds.
579. Substituted presentment by copy or description.	587. Protest.
580. Substituted checks—Local custom of banks.	588. Notice of non-payment.
581. Effect of certification—Operation of check as assignment or lien.	589. Waiver of presentment for payment.

§ 574. **Presentment—Reasonable time—Diligence.**—A check should be presented within a reasonable time after its issue. What constitutes such time must depend upon the attendant circumstances of the particular case, principally such as the nature and purpose of the check, locality, distance, the relations of the parties, the mode and time of receiving the check, the nearness of a place for depositing or receiving mail, the regularity or infrequency of mails, and various other circumstances difficult to enumerate.¹ This rule especially applies

¹ *Tomlin v. Thornton*, 99 Ga. 585, 27 S. E. 147; *Parker v. Reddick*, 65 Miss. 249, 3 So. 575, 7 Am. St. Rep. 646; *Grange v. Reigh*, 93 Wis. 552, 67 N. W. 1130, 13 Bkg. L. J. 564; *Gifford v. Hardell*, 88 Wis. 538, 60 N. W. 1064, 43 Am. St. Rep. 925, 12 Bkg. L. J. 29; *Legare v. Arcand*, 9 Quebec, Rap. Jud. 122.

See the following cases:

Alabama.—*Morris v. Eufaula National Bank*, 122 Ala. 580, 25 So. 499.

Illinois.—*Industrial Bank v. Bowes*, 165 Ill. 70, 46 N. E. 10; *Northwestern Iron and Metal Co. v. National Bank*, 70 Ill. App. 245.

Iowa.—*Northwestern Coal Co. v. Bowman*, 69 Iowa 150.

Massachusetts.—*Shawmut National Bank v. Manson*, 168 Mass. 425, 47 N. E. 196, 14 Bkg. L. J. 378.

Michigan.—*Holmes v. Roe*, 62 Mich. 199, 28 N. W. 664.

Missouri.—*Farmers' National Bank v. Dreyfus*, 82 Mo. App. 399.

where the person to whom the check is given warns the drawer that the bank may suspend payment.² If no time of payment is specified the check is deemed payable on demand and the rule as to presentment in a reasonable time applies.³ The question of diligence in making presentment of a customer's bank check rests upon the circumstances and the dispatch requisite should be consistent therewith as well as with that used in commercial transactions.⁴ And ordinarily a check should not be unreasonably delayed in its presentment and due diligence should be exercised.⁵ It is immaterial, in so far as the question of negligence is concerned, whether a check is sent by a direct or indirect route where, by allowing the full time for mailing, it reaches the proper place as soon in the latter case as in the first.⁶ It is decided in a federal case that the doctrine of reasonable time does not impose any obligation upon the holder in the matter of presentment, in so far as the drawer is concerned, in the absence of injury, or loss of the fund by the drawee's insolvency.^{6*}

§ 575. **Same subject, continued.**—It is held in a case in Arkansas that it is necessary that a check be presented for payment within a reasonable time which depends upon attendant circumstances. This is held to be dependent upon the location of the bank, if in the same place with the payee then the next following business day constitutes reasonable time; or in cases of different localities, then the day after

New York.—Carroll v. Sweet, 128 N. Y. 19, 37 N. Y. St. Rep. 868, 27 N. E. 763, rev'g 25 N. Y. St. 356, 5 N. Y. Supp. 572, 57 Supr. 100; Murphy v. Levy, 50 N. Y. Supp. 682, 23 Misc. 147.

Pennsylvania.—Willis v. Finley, 173 Pa. 28, 27 Pitts. L. J. N. S. 33, 34 Atl. 213.

Vermont.—Gregg v. Beane, 69 Vt. 22, 37 Atl. 248, 14 Bkg. L. J. 319.

Canada.—Dion v. Lachance, Rap. Jud. Quebec, 14 C. S. 77.

See § 582 herein; Negot. Inst. Law, §§ 4, 321, 322; Bills of Exch. Act, § 74, Appendix herein.

² Legare v. Arcand, 9 Quebec Rapp. Jud. 122.

³ Parker v. Reddick, 65 Miss. 242, 3 So. 575, 7 Am. St. Rep. 646.

⁴ Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105, 69 N. W. 765, 14 Bkg. L. J. 139.

⁵ Farmers' National Bank v. Dreyfus, 82 Mo. App. 399. See Nebraska National Bank v. Logan, 35 Neb. 182, 52 N. W. 808, 7 Bkg. L. J. 144; Donlon v. Davidson, 39 N. Y. Supp. 1020, 7 App. Div. 461; Dion v. Lachance, Rap. Jud. Quebec, 14 C. S. 77.

⁶ First National Bank v. Buckhannon Bank, 80 Md. 475, 12 Bkg. L. J. 193, 27 L. R. A. 332, 31 Atl. 302. Compare Anderson v. Rodgers, 53 Kan. 542, 11 Bkg. L. J. 87, 36 Pac. 1067, 27 L. R. A. 248.

^{6*} Andrews v. Bradley, 102 Fed. 54. See §§ 496, 498, 505-508 herein.

it is received at the place where the bank is located. And a delay of five days, excluding Sunday, in presenting a check for payment is sufficient to discharge the drawer when there is no excuse for delay, and presentation in reasonable time is not waived.⁷ It is declared in a Connecticut case that the rule undoubtedly is, that it is the duty of the holder of a check, payable at a bank, on demand, to present it for payment within a reasonable time, and if not paid to give notice of non-payment to the drawer, and if the drawer had funds in the bank sufficient for its payment, which were lost in consequence of the holder's neglect, he will be exonerated from liability. But according to recent authorities this rule does not apply to a case where the drawer has sustained no loss or injury, by the neglect of the holder. Were it otherwise the drawer would profit by a neglect which did him no injury."⁸ The negotiable instrument statute of Iowa classifies a bank check in the ordinary form as a bill of exchange payable on demand. That enactment also provides that it is sufficient to charge the indorser of a bill of exchange payable on demand that presentation to the drawee and demand of payment shall be sufficient if made within a reasonable time after its issue or after the last negotiation of such bill. It is further enacted that in determining what is a reasonable time within the statute regard must be had to the nature of the instrument, the usage of the trade or business, if any, with respect to such instruments, and the facts of the particular case. Contrary to the requirement for notice to the indorser of the dishonor of a check or bill upon presentation for payment, the holder of the indorsed paper is not held to any fixed or invariable limit of time in which to make such presentment and demand. He is required to act with reasonable promptness and diligence, taking into consideration the nature of the instrument, the usages of the business world and the peculiar facts, if any, attending the particular transaction, and also the usage of banks presumed to be known to those dealing with them.⁹ Again, it is said by the court in a Kansas case that: "It is the law that checks are payable instantly on demand, but it is not the law that payment of a check must be demanded instantly. Granting that a check has some features of a bill of exchange, under the statutes of this state it need not be presented until the day after it is given, if the party receiving

⁷ *Burns v. Yocum* (Ark. 1906), 98 S. W. 956.

⁸ *Hoyt v. Seeley*, 18 Conn. 352, 360, per Waite, J.

⁹ *Plover Savings Bk. v. Moodie* (Iowa 1906), 110 N. W. 29; Code Supp. 1902, §§ 3060-a71, 3060-a103, 3060-a185, 3060-a193.

it and the bank upon which it is drawn are in the same place. If they are not in the same place, it is only necessary that the check be put in course of collection within the time otherwise allowed for presentation. It cannot be said to be due until demand for payment is made. If not forwarded and presented within the time allowed by the rules of commercial law, the drawer must show the delay caused him to suffer loss, before he can defeat recovery by a *bona fide* holder. The same rule holds regarding protest and notice of non-payment."¹⁰

§ 576. Same subject continued—Mail—Collection through bank.—The following important points are decided in a West Virginia case¹¹ which holds that: (1) A person receiving a check, on a fund in the hands of a bank, for the amount of a demand against the drawer thereof, is bound to exercise reasonable diligence in making presentment thereof for payment, if he wishes to avoid risk of loss by insolvency of the drawee. (2) If the payee of the check and the drawee reside, or have their places of business in the same city or town, presentment must be made before the expiration of business hours of the day next after the day of the receipt thereof.¹² (3) If the person receiving a check and the

¹⁰Cox v. Citizens' State Bank (Kan. 1906), 85 Pac. 762.

¹¹Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017.

¹²Where parties in same place. See Morris v. Eufaula Bank, 122 Ala. 580, 25 So. 499 (on first secular day after check received, citing a number of cases); Holmes v. Roe, 62 Mich. 199, 28 N. W. 864 (must be presented same day, or at latest the following day); Grange v. Reigh, 93 Wis. 552, 13 Bkg. L. J. 564, 67 N. W. 1130 (must be presented at latest on day following receipt of check); Gregg v. Beane, 69 Vt. 22, 37 Atl. 348, 14 Bkg. L. J. 319.

If a check is received at the town or city where the bank at which it is payable is located it must be presented the following day or the drawer will not be liable. Edmisten

v. Herpolsheimer, 66 Neb. 94, 92 N. W. 138, 59 L. R. A. 934.

As to the business or banking hours, see Niblack v. Park National Bank, 169 Ill. 317, 30 Chic. Leg. News 103, 48 N. E. 438, 15 Bkg. L. J. 33, rev'g 67 Ill. App. 583; Northwestern Iron & M. Co. v. National Bank of Illinois, 70 Ill. App. 245; Madderom v. Heath & M. Mfg. Co., 35 Ill. App. 588; McDonald v. Mosher, 23 Ill. App. 206; Murphy v. Levy, 50 N. Y. Supp. 682, 23 Misc. 147; Loux v. Fox, 171 Pa. 68, 37 W. W. C. 278, 12 Bkg. L. J. 667, 33 Atl. 190; Grange v. Reigh, 93 Wis. 552, 67 N. W. 1130, 13 Bkg. L. J. 564; Lloyd v. Osborne, 92 Wis. 93, 65 N. W. 859, 13 Bkg. L. J. 177.

It is not necessary in order to constitute due diligence that a check should be presented outside of business hours, unless custom or special circumstances warrant a change

bank on which it is drawn are in different places, it must be forwarded, for presentment, by mail or other usual mode of transmission, on the next day after the receipt thereof at the place in which the payee resides or does business, if reasonably and conveniently practicable; and, if it is not so practicable, then by the next mail or other similar means of conveyance, leaving after said date.¹³ But neither the payee nor his agent is required to transmit such check by the only or last mail of the day next after its receipt, if such mail closes or departs at an hour so early as to render it inconvenient for the holder to avail himself of it. What is an unreasonably early hour in such case depends upon all the circumstances of the transaction and situation of the parties; and, the facts being free from controversy and doubt, is a question of law for the court.¹⁴ (4) In the absence of any agreement to the contrary, and of any circumstance, known to the payee, making it imprudent to do so, he may indorse and deliver the check to a bank for collection; but this does not extend the time within

in such rule. *Temple v. Carroll* (Neb.), 105 N. W. 989.

Clearing house—A check should be presented or forwarded the day following its receipt, even though it is received after banking hours in a place where collection is made through a clearing house. *Edmisten v. Herpolsheimer*, 66 Neb. 94, 92 N. W. 138, 59 L. R. A. 934.

¹³ Where parties in different places, see *Northwestern Coal Co. v. Bowman*, 69 Iowa 150 (should forward by mail on day received or on next following day); *Holmes v. Roe*, 62 Mich. 199, 28 N. W. 864 (must be forwarded at last day after its receipt and then presented the next day after its then receipt); *Gregg v. Beane*, 69 Vt. 22, 37 Atl. 248, 14 Bkg. L. J. 319, 37 Atl. 248 (on next secular day after receipt); *Lloyd v. Osborne*, 92 Wis. 93, 65 N. W. 859, 13 Bkg. L. J. 177 (forwarded by last mail same day as its receipt and presented next following day when there received).

Check may be forwarded on day

following its receipt where the bank is not located in the same town or city. *Edmisten v. Herpolsheimer*, 66 Neb. 94, 92 N. W. 138, 59 L. R. A. 934.

¹⁴ Where a debtor residing in another town, a few miles distant, sends his creditor a check, such debtor is not discharged although the check is not forwarded for presentment either on the next day after its receipt or even on the third day thereafter, which was Saturday, and on that day at noon the bank stopped payment, it appearing that the postoffice nearest to the creditor's residence was three or four miles away and that the only mails to the debtor's town left early the next morning after the check was received and at the same time on the third day, so that if the creditor's agent had received the check on that day he would have been entitled to at least the whole of it in which to make presentment. *Cox v. Boone*, 8 W. Va. 500, 23 Am. Rep. 627.

which it must be forwarded for presentment. The bank, however, in such case, is not required to forward it on the next day after its receipt by the payee, if there be no reasonably convenient means of doing so, within the banking hours of that day.¹⁵ (5) Though the courts of that state cannot have judicial knowledge of the existence of any particular bank, or of any mode of business peculiar to a given bank, they will take judicial notice that, in all cities and towns of large population and extensive business, within their jurisdiction, banks exist, and of the fact that their operations are governed by reasonable rules and regulations, to which parties dealing with them or in commercial paper are deemed to have subjected themselves. But courts cannot take judicial notice of the business hours of any particular bank, although the courts of that state judicially know that ordinarily banks in the cities and larger towns of the state do not open their doors for business at an earlier hour than nine o'clock in the morning. (6) The parties to a check drawn on a bank and sent to a distant place to be forwarded for presentation, are deemed in law to have acted with knowledge of the usual diligent method of making such presentment through a bank at the place to which it is sent, and to have agreed to suffer any reasonable delay incident to such mode of presentment. In such case, the drawer, by allowing his funds to remain in the drawee's bank, and the payee, by accepting the check, evince belief in the solvency of the bank, and the former voluntarily takes the risk of its solvency during the reasonable period necessary for presentment of the check in the usual manner. (7) The drawer, in delivering a check to an agent of the payee, having no authority to indorse it, at the place of business of the drawer, impliedly agrees to allow such additional time for presentment as may be necessary for the transmission of the check to the principal of the agent.¹⁶ It was

¹⁵ Check deposited in bank for collection and duty of bank, see *Morris v. Eufaula Bank*, 122 Ala. 580, 25 So. 499; *Horingfort v. Vehman*, 2 Ohio Dec. 151; *Rosenthal v. Ehrlicher*, 154 Pa. 396, 32 W. N. C. 221, 26 Atl. 435; *Gregg v. Beane*, 69 Vt. 22, 37 Atl. 248, 14 Bkg. L. J. 319. See §§ 516-518, 583 herein.

¹⁶ The court, per Poffenbarger, J., said: Presentation of a "check for payment at the bank on which it is drawn must be made within a rea-

sonable time, and what is a reasonable time depends upon the situation of the parties with reference to one another and with reference to the bank, and all other material facts and circumstances entering into the transaction. When the drawee and payee are in the same town or city presentation must be made not later than the next day after the reception of the check unless there is some understanding or agreement to the contrary or

also declared that: "In some respects the rights of the parties to a check, drawn by an individual on a bank, are governed by the princi-

some circumstance intervenes or is connected with the transaction sufficient to vary the rule; but it is sufficient to present it at any time on the next day within business hours. *Alexander v. Birchfield*, 1 Car. & Marsh 75 (41 E. C. L. 47). In that case *Tindall, C. J.*, said: 'The only way in which I can state the rule to you is this, that, if a party receive a check on a particular day, he may present it at any time during banking hours on the following day to that on which he received it.' See, also, to the same effect, *Moule v. Brown*, 4 Bing. N. C. 266 (33 E. C. L. 347); *Cox v. Boone*, 8 W. Va. 500; *Simpson v. Ins. Co.*, 44 Cal. 139; *Cawein v. Brewinski*, 6 Bush. (Ky.) 457; *Schoolfield v. Moon*, 9 Heisk. (Tenn.) 171; *Boddington v. Schlencker*, 4 Barn. & A. 752; *Holmes v. Roe*, 62 Mich. 199; *Lloyd v. Osborne*, 92 Wis. 93, 5 Am. & Eng. Ency. Law 1042. But when the person receiving the check is at a place different from that of the place of business of the drawee, additional time is allowed. The person receiving it need not forward it for presentment on the day of its reception, but may do so on the next day thereafter, and the person to whom it is forwarded for presentation need not present it on the day of reception, but may do so on the next day after he receives it. In this case two extra days are allowed, while in the other but one is allowed. 5 Am. & Eng. Law 1042; *Moule v. Brown*, 4 Bing. N. C. 266; *Holmes v. Roe*, 62 Mich. 199; *Prideaux v. Criddle*, L. R. 4 E. B. 455; *Griffin v. Kemp*, 46 Ind. 172, 176;

Burkhalter v. Bank, 42 N. Y. 538; *Parsons on Notes and Bills*, 72. The reason for this indulgence is well stated by *Story on Bills*, section 290, in discussing the law of notice of dishonor and protest, in which the principle is generally held to be the same. He says: 'In the first place, then, it is not by our law necessary in any case to give notice, either by post or otherwise, on the very day on which the dishonor and protest took place, although the holder is at liberty to do so at his option. He is always allowed by law a whole day for this purpose, and is not compellable to lay aside all other business to devote himself to that particular purpose. For it would be most inconvenient and unreasonable to require such strictness, as it might interfere with other business and duties quite as pressing and important; and therefore it is sufficient, if he sends notice by the post or otherwise by the next day.' The same reason which suffices to give two days, one for reception and the other for presentation, when the payee and drawee are at the same place, justifies the general rule, allowing four days when they are at different places. * * * Enough has been stated to clearly demonstrate that the utmost diligence possible is not required. The payee is bound to exercise only reasonable diligence and need not do that which is contrary to, or variant from, the ordinary and prudent mode of transacting business. But the law does seem to require such action, within reasonable limitations, determined by considerations of convenience,

ples applicable to the parties to an inland bill of exchange; but not in all respects. Notice of dishonor and non-payment of a check, and diligence in the presentation thereof, are required only when it is necessary to protect the drawer from loss by reason of the failure of the drawee, holding funds of the drawer sufficient to pay the check. Presumably the check is drawn upon funds in the hands of the drawee belonging to the drawer, and amounts to an appropriation thereof in favor of the payee on the check, and he owes to the drawer the duty of exercising a certain amount of diligence to obtain payment in order to prevent a loss to the drawer by reason of failure of the bank. In other words, if he fails to perform such duty, the loss falls upon himself and he is barred by law of any right to recover against the maker of the check. If, by delay in presentation, a loss occurs, the payee or holder is deemed to have extended credit to the bank, and must suffer the consequences."¹⁷

§ 577. When presentment is made.—Presentment of check for payment is made when the holder or his agent produces and exhibits it to the proper official or agent of the bank so that he may have an opportunity to see that it is signed by the depositor, that it is so dated as to be payable at the time when it is presented, that it is properly filled out, that the party presenting it has the legal title to it by indorsement or otherwise, and that the indorsement, if any, is genuine.¹⁸

but not of leisure, as is calculated, in view of the possibilities of loss, by delay, to prevent it. Hence, the two-day rule, allowed for forwarding notices or paper from presentment, is subject to this qualification, namely, that it must be sent by the mail of the second day. If there be more than one mail on that day, it need not go by the first, but, if there be but one, it must go by it, unless it leave or closes at an unreasonably early hour. The whole of the second day is not allowed, unless the last mail of that day goes at the close of business. To this point the American authorities seem to be unanimous." Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 80, 81, 82, 52 S. E. 1017.

¹⁷ Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 80, 52 L. E. 1017, per Poffenberger, J., citing Cox v. Boone, 8 W. Va. 500; Compton v. Gilman, 19 W. Va. 312; Pursell v. Allemong & Son, 22 Grat. 739, 5 Am. & Eng. Ency. Law 1030; Parsons on Notes and Bills, Vol. II, pp. 58, 59; Bank v. Bank, 10 Wall. 380.

¹⁸ Peabody v. Citizens' State Bank of St. Charles (Minn. 1906), 108 N. W. 272, 274. Language of Elliott, J., citing Crawford v. West Side Bank, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152; Waring v. Betts, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890. The court also says in the principal case: "The legal relation between a bank and a depos-

§ 578. Substituted checks—Presentment—Want of diligence.—

The utmost diligence is required in making presentment of a substituted check given to a collecting bank by the drawee bank upon surrender of the original check by such collecting bank.¹⁹ Where a substituted check was taken before noon of a business day closing at three o'clock in the afternoon, and such check could have been collected within twenty minutes, and it was not presented for payment at all, but on the following day an attempt was made to collect it through the clearing house, and the drawer failed at the hour of two-forty-five in the afternoon of that day and the check was thrown out, it was held that no diligence in collecting it appeared.²⁰ "The rule fixing the

itor is in most respects that of debtor and creditor. The title to the specific money deposited passes to the bank, which becomes indebted to the depositor in the amount of the deposit. The bank is then obliged to pay, when a demand is properly made. The well-understood customs of the business enter into and become a part of the contract. The obligation of the bank is to a certain extent conditional. It is not like other debtors, obliged to seek its creditor and pay him wherever found. There is an implied limitation as to the time and place. It must pay in money at its banking house upon demand during the customary hours of business. 'This being the understanding upon which the deposit is made, it is parcel of the bank's contract to repay—that is, a condition precedent to its duty to repay—that the depositor shall call upon it to do so at its banking house, and there is no default of the bank until such call is made.' *Branch v. Dawson*, 33 Minn. 399, 23 N. W. 552; *Harrison v. Nicollet National Bank*, 41 Minn. 488, 43 N. W. 336, 5 L. R. A. 746, 16 Am. St. Rep. 718."

Verbal demand good without physical presence of check—Demand as owner's agent. See *Garthwaite v.*

Bank of Tulare, 134 Cal. 237, 66 Pac. 326, a case of forged indorsement.

¹⁹ *Anderson v. Gill*, 79 Md. 312, 22 Wash. L. Rep. 569, 29 Atl. 527, 25 L. R. A. 200.

²⁰ *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048. The following additional points were decided in the above case. (1) Title to Check Indorsed and deposited. If the payee of a check drawn on a bank in a city other than that of his residence indorse it and deposit it in his home bank in the usual and ordinary manner, and without any agreement or understanding in reference to the transaction other than such as the law implies, the check becomes the property of the indorsee. (2) Dishonor of such check. Ownership not affected. The fact that the indorsee may have the right to charge the check to the depositor's account if it should be dishonored after due diligence has been exercised to collect it, does not affect the character of the transfer or render the bank any the less the owner of the check. (3) Indorsement to correspondent—Guaranty—Deposit—Title. If a bank holding title to a check under the circumstances stated indorse it to the order of its correspondent in

close of business hours of the next secular day as a reasonable time within which a check may be presented, so as to hold the drawer when drawn on a bank in the same place where it is delivered, has relation only to the contract and liability of the parties to the instrument, and does not apply to a check given by the drawee to the payee, or to the agent of the payee, of the original check, upon its surrender. * * * The holder of a substituted check taken upon the surrender of the original check to the drawee thereof must use such diligence in presenting it for payment as a prudent man would under like conditions use. This imposes no hardship upon the person who voluntarily accepts the drawee's check instead of cash. If he has had ample and abundant time to convert the drawee's check into money, and still omits to do so, he obviously has not used due diligence, and the results of such negligence should not be visited upon the original drawer, who was in no way responsible therefor. Whether a delay to present

the city where the drawee bank is located, with a guaranty of the previous indorsement, and forward it with a deposit slip attached for credit as a deposit to such correspondent, who accepts it on the terms proposed by the indorsement and the deposit slip and undertakes to collect it, the title to the check, no further facts appearing, vests in the second indorsee. (4) Acceptance by correspondent of drawer's check in lieu of cash. If a bank holding title to a check under the circumstances stated in the last paragraph presents it for payment on the day of its receipt to the drawee, who then has funds of the drawer on deposit to meet it and who is ready to pay it in money, but, instead of taking cash, surrenders the check for the drawee's own check on another bank, it must use the utmost diligence to collect the second check or bear any loss which may be occasioned by the delay in case the drawer should become insolvent. (5) Insolvency of first drawee—Second presentment—Discharge of parties. Under circumstances of the

character indicated in the last paragraph the presentment for payment of the first check and the substitution of the second check in lieu of payment in money, fixes the rights of the parties; and after the insolvency of the drawee of the first check has occurred the negligent holder cannot charge the drawer and indorsers with liability by repossessing itself of the instrument, presenting it for payment a second time, and protesting it for non-payment; and this is true even although the first presentment might have been rightfully delayed, for a longer period of time than that during which the drawee remained solvent. (6) Second check—Mistake—Recovery by Drawer. Under the facts in this case a drawer whose check was not collected because of the negligence of an indorsee is equitably entitled to recover from the payee, on the ground of mistake, the amount of a second check, issued on account of the supposed dishonor of the first one and duly paid.

the drawee's check till the close of business hours is due diligence cannot be asserted as an invariable rule. In some instances it might be, whilst in others it would manifestly not be. * * * That a higher degree of diligence is demanded under facts like those before us, than that which obtains between the parties to the instrument is obvious, because, as we have said, the drawer of the original check must be held to have contemplated that when presented it would be paid in money only, and the payee and drawee have no right, except at their own peril, to substitute some other mode of settlement which results in injury to the drawer. * * * We hold, then, that when the payee of a check, or his agent, takes from the drawee, who has ample funds of the drawer, a check of the drawee on some other bank or banker, instead of money, he, the payee, or his agent, must use the utmost diligence to present the substituted check for payment."^{20*} But where no degree of diligence could have obtained payment of a substituted check no liability is created as to the drawer of the original check.²¹

§ 579. Substituted presentment by copy or description.—Where the holder of a check learns that its attempted presentment by mail has failed and that it is lost, at least for the purposes of immediate presentment, and he has the opportunity so to do, he owes the duty to at once make substituted presentment and demand by means of a copy or sufficient description of the check, and in case of non-payment to give notice to the indorser.²²

§ 580. Substituted checks—Local custom of banks.—A local custom of a bank to take up checks, drawn upon them by their depositors, with their own checks on other banks will not excuse holders from exercising the utmost diligence in collecting the substituted checks.²³

§ 581. Effect of certification—Operation of check as assignment or lien.—Where a check is certified by the bank on which it is drawn

^{20*} *Anderson v. Gill*, 79 Md. 312, 302, 27 C. R. A. 332, 12 Bkg. L. quoted in *Noble v. Doughton*, 72 Kan. 336, 355, 83 Pac. 1048.

²² *Aebi v. Bank of Evansville*, 124

²¹ *First National Bank v. Buckhannon Bank*, 80 Md. 475, 31 Atl. Rep. 324.

²³ *Noble v. Doughton*, 72 Kan. 336, 83 Pac. 1048.

the certificate is equivalent to an acceptance.²⁴ By the law merchant of this country, the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the drawee's hands and that they have been set apart for its satisfaction and that they shall be so applied whenever the check is presented for payment. It constitutes an undertaking not only that the check is then good but that it will continue good. Such an agreement is as binding and obligatory upon banks as their notes of circulation, or any other valid obligation. The purpose of certifying a check as regards both parties is to enable the holder to use it as money.²⁵ Certification of a check also guarantees the genuineness of

²⁴ *Negot. Inst. Law*, § 323, Appendix herein.

As to certification and effect thereof, see, generally:

United States.—*Espy v. National Bank*, 18 Wall. (U. S.) 605.

Illinois.—*Drovers' National Bank v. Anglo-American Packing Co.*, 117 Ill. 100, 57 Am. Rep. 855, 7 N. E. 601; *Jackson Paper Mfg. Co. v. Commercial National Bank*, 99 Ill. App. 108, rev'd 199 Ill. 151, 59 L. R. A. 657, 65 N. E. 136; *Wright v. MacCarty*, 92 Ill. App. 120; *American Trust & Savings Bank v. Crowe*, 82 Ill. App. 537; *Strauss v. American Exchange National Bank*, 72 Ill. App. 314.

Massachusetts.—*Minot v. Ross*, 156 Mass. 458, 32 Am. St. Rep. 472, 31 N. E. 489, 16 L. R. A. 510.

Missouri.—*Muth v. St. Louis Trust Co.*, 82 Mo. App. 596.

Nebraska.—*Farmer's Bank v. Dunbar*, 32 Neb. 487.

New Hampshire.—*Barnet v. Smith*, 31 N. H. 256.

New York.—*Goshen National Bank v. Bingham*, 118 N. Y. 349, 23 N. E. 180, 16 Am. St. Rep. 765, 7 L. R. A. 595; *Lynch v. First National Bank*, 107 N. Y. 179, 11 N. Y. St. R. 389, 27 Week. D. 328, 13 N. E. 775; *Crawford v. West Side Bank*, 100 N. Y. 50, aff'g 49 Supr. Ct. 68; *Clews v. Bank of New York*,

89 N. Y. 418; *National Bank of Commerce v. National Mechanic's Bank*, 55 N. Y. 211, 14 Am. Rep. 232; *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 28 N. Y. 425, 16 Am. Dec. 678; *Schlesinger v. Kurztroh*, 94 N. Y. Supp. 442, 47 Misc. 634; *Meuer v. Phoenix National Bank*, 86 N. Y. Supp. 701, 42 Misc. 341, aff'd 88 N. J. Supp. 83, 94 App. Div. 331; *Herman Furniture and Plumber's Cabinet Works v. German Exchange Bank*, 87 N. Y. Supp. 462; *People v. St. Nicholas Bank*, 77 Hun 157.

Texas.—*Henrietta National Bank v. State Bank*, 80 Tex. 648.

Canada.—*La Banque Jacques-Cartier v. La Corporation de Limoulin*, 17 Rap. Jud. Quebec, C. S. 211; *Legare v. Arcand*, 9 Quebec Rap. Jud. 122.

²⁵ *Merchants' National Bank v. State National Bank*, 10 Wall. (U. S.) 47, per Swayne, J.

"The certification of a check, if written out, would contain a statement that the drawer had funds sufficient to meet it in the bank applicable to its payment, and an agreement on behalf of the bank that these funds should be retained and paid upon the check whenever it was presented." *Cooke v. State National Bank of Boston*, 52 N. Y.

96, 11 Am. Rep. 667; Thompson's Nat. Bank Cases, 698, 711, per Church, Ch. J.

Cancellation of certification, see Dillaway v. Northwestern National Bank, 82 Ill. App. 71.

Evidence of acceptance as cash—Entry in pass book of certified check, see Gaden v. Newfoundland Savings Bank (1899), App. Cas. 281, 68 L. J. P. C. 57, 80 Law T. N. S. 329.

Effect of banker's oral agreement to accept checks. Drawers' want of funds; third person's agreement to supply them, see Leach v. Hill, 106 Iowa 171, 76 N. W. 667.

Cashier's authority to certify—Same, when drawer has no funds. "The cashier has a right by virtue of his office to make this certificate, when the drawer has funds. He is the custodian of the bank and of the books; he receives money and gives vouchers therefor; and whether upon receiving a check he pays it in money or gives the holder a certificate of deposit or draft or a certificate that he will retain sufficient of the money standing to the drawer's credit to pay it when presented, he is in either case acting within the line of his duty and within the scope of the authority which necessarily attaches to his office. Whether the bank might not restrict this authority, so as to affect the rights of persons having notice, is not material. It is sufficient that the public have a right to regard his authority as coextensive with these duties, and that such authority is inherent in the office. This is substantially conceded by the learned counsel for the appellants, but they insist that the cashier has no power to make the certificate when the drawer has no funds. I agree that he has not, as

between him and the bank, and the liability of the bank is not based upon his power to bind them by such a contract without funds, but upon the ground that the bank cannot dispute the fact that there are funds, and hence the contract is enforced as though there were funds to meet it. It follows that a *bona fide* holder only can enforce the liability against the bank, where the certificate is given in the absence of funds. The bank having placed the cashier in the position which implies this inherent authority, those who deal with the bank have a right to infer that he possesses it, and although the exercise of it in a given case may not be warranted on account of the existence or non-existence of some extrinsic fact peculiarly within its official knowledge, yet the bank is responsible instead of an innocent party, upon every principle of reason and morality. This principle applies to the ordinary relation of principal and agent, and, *a fortiori*, when the employment concerns the general public, involving extensive commercial transactions. Farmers' & Mechanics' Bank of Kent County, Maryland v. Butchers' & Drovers' Bank, 16 N. Y. 125 (aff'g 4 Duer. 219); Schuyler's Case, 34 N. Y. 30. *Ultra vires* cannot be alleged for telling the truth, even by bank officers, nor can they insist upon a falsehood to the injury of one who has confided in their veracity. The import of a certification and the liability of the bank upon the principle here indicated legally result from the nature of the agreement and the application of well-settled rules of law and do not depend upon usage or custom. Whether it is competent for banks, by usage or express agreement, to extend their liabilities so

the signature.²⁶ But where there was a fraudulent alteration of the date, signature, and amount, and the drawee bank thereafter certifies the check and pays the amount thereof to another bank, recovery may be had by the former against the latter for money so paid.²⁷ If the parties to a check, certified as "good," reside in the same town it must also be presented for payment within business hours of the day after it is drawn.²⁸ It is held in New York that as between the drawer and

as to include cases where certificates are issued without funds, to the knowledge of the holder, it is unnecessary to determine. *Selden, J.*, in 16 N. Y. 125, 128, expressed the opinion that banks have no power to loan their credit in that form. It is clear, however, that where such a certificate is made without funds, by a cashier in fraud of the rights of the bank, no one but a *bona fide* holder can enforce it." *Cooke v. State National Bank of Boston*, 52 N. Y. 96, 11 Am. Rep. 667; *Thompson's Nat. Bank Cases* 698, 711, per *Church, Ch. J.*

As to cashier's powers in general, see:

United States.—*Martin v. Webb*, 110 U. S. 7; *Merchants' National Bank v. State National Bank*, 10 Wall. (U. S.) 604. *United States Bank v. Dunn*, 6 Pet. (U. S.) 51; *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64; *Farmers' & M. National Bank v. Smith*, 77 Fed. 129, 40 U. S. App. 690, 23 C. C. A. 80, 14 Bkg. L. J. 69.

Iowa.—*Iowa State Savings Bank v. Black*, 91 Iowa 490.

Maine.—*Franklin Bank v. Steward*, 37 Me. 519.

Maryland.—*Weckler v. First National Bank*, 42 Md. 581.

Massachusetts.—*Jewett v. West Somerville Cooperative Bank*, 173 Mass. 54, 52 N. E. 1085.

Michigan.—*First National Bank v. Stone*, 106 Mich. 367, 2 Det. L. N. 463, 12 Bkg. L. J. 681, 64 N. W. 487.

Minnesota.—*Ft. Dearborn National Bank v. Seymour*, 71 Minn. 81, 73 N. W. 724.

New Hampshire.—*Hanson v. Heard*, 69 N. H. 190, 38 Atl. 788.

New York.—*Wiley v. First National Bank*, 47 N. Y. 546; *Barnes v. Ontario Bank*, 19 N. Y. 156.

South Carolina.—*Pollock v. Carolina Interstate Bldg. & L. Assoc.*, 51 S. C. 420, 29 S. E. 77, 64 Am. St. Rep. 683, 8 Am. & Eng. Corp. Cas. N. S. 157.

Wisconsin.—*Houghton v. First National Bank*, 26 Wis. 663, 7 Am. Rep. 107.

²⁶ *Security Bank v. National Bank of the Republic*, 67 N. Y. 458, 23 Am. Rep. 129.

²⁷ *National Bank of Commerce v. National Mechanics' Banking Association*, 55 N. Y. 211, 14 Am. Rep. 232, and note 237. See *Security National Bank v. National Bank of the Republic*, 67 N. Y. 438, 23 Am. Rep. 129; *Marine National Bank v. National City Bank*, 59 N. Y. 67, 17 Am. Rep. 305 and note 314.

Certification for greater amount than deposit, see *Dillaway v. Northwestern National Bank*, 82 Ill. App. 71.

²⁸ *Andrews v. German National Bank*, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300.

Right to correct such a certification, see *Second National Bank of Baltimore v. Western National Bank of Baltimore*, 51 Md. 128, 34 Am. Rep. 300.

the holder, a certification of the check operates as payment and discharges the former's liability in case of the subsequent insolvency of the drawee, even though presentment for payment is made in the afternoon of the day of certification.²⁹ In a Tennessee case it is decided that it is immaterial, in so far as the liability of the certifying bank is concerned, whether it had sufficient funds of the drawer or not.³⁰ Again, under the negotiable instruments law of New York, where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.³¹ So, under a Tennessee decision, certification at the instance of the holder discharges the drawer's liability on the check, as it operates as a payment of the debt.³² And if the drawee, before delivery of a check to the holder, certifies it at the indorser's request, the indorser is not thereby released.³³ But where the certification is made at the drawer's request before delivery of the check, and presentment is not made before suspension of the bank, the latter is liable only to the holder in due course and not to the drawer, so that a set-off by the drawer against a debt to the bank is precluded.³⁴ And a promise to accept and pay a check, made by the drawee to the drawer, is not a sufficient ground of liability as to the holder where it does not appear that reliance was placed by the holder upon such promise when he took the check.³⁵ The understanding of merchants and bankers as to the effect of a certification is not provable by extrinsic evidence.³⁶ Again, the negotiable instruments law of New York also provides that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable

²⁹ First National Bank of Jersey City v. Leach, 52 N. Y. 350, 11 Am. Rep. 708.

³⁰ French v. Irwin, 4 Baxt. (Tenn.) 401, 27 Am. Rep. 769. See quotation from opinion of Church, Ch. J., in Cooke v. State Nat. Bk. of Boston given in note 25 to this section.

³¹ Negot. Inst. Law, § 324, Appendix herein. See Meuer v. Phenix National Bank, 88 N. Y. Supp. 83, 94 App. Div. 331.

³² French v. Irwin, 4 Baxt. (Tenn.) 401, 27 Am. Rep. 769.

³³ Mutual National Bank v. Rutge, 28 La. Ann. 933, 26 Am. Rep. 126.

³⁴ Schlesinger v. Kurzrok, 94 N. Y. Supp. 442, 47 Misc. 634.

As to certification at drawer's request, see also Metropolitan National Bank v. Jones, 137 Ill. 634, 31 Am. St. Rep. 403, 27 N. E. 533, 12 L. R. A. 492; Born v. First National Bank, 123 Ind. 78, 18 Am. St. Rep. 312, 24 N. E. 123, 7 L. R. A. 442; Cullinan v. Union Surety & Guaranty Co., 80 N. Y. Supp. 58, 79 App. Div. 409.

³⁵ Carr v. National Security Bank, 107 Mass. 45, 9 Am. Rep. 6.

³⁶ Security Bank v. National Bank of Republic, 67 N. Y. 458, 23 Am. Rep. 129.

to the holder, unless it accepts or certifies the check.³⁷ So, under a decision in that state, no part of the debt is transferred or assigned by a check, nor is any lien at law or in equity created thereby, nor can the holder derive any benefit from the bank's agreement to pay their customers' checks to the extent of the deposit to their credit, as no obligation rests upon the bank to pay checks in any particular order.³⁸

§ 582. Necessary that drawer sustain actual loss or injury from laches in presentment.—Unless actual loss or injury is sustained by the drawer through laches in presentment of a check he is liable, in so far as the holder is concerned, as delay in presentment is immaterial where the drawer is not injured, and he is discharged from liability to the extent of the loss so sustained.³⁹

³⁷ *Negot. Inst. Law*, § 325.

³⁸ *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 82, 7 Am. Rep. 314.

Examine also the following cases:

United States.—*Florence Mining Co. v. Brown*, 124 U. S. 385, 31 L. Ed. 424, 8 Sup. Ct. 531.

Colorado.—*Colorado National Bank of Denver v. Boettcher*, 4 Colo. 185, 40 Am. Rep. 142.

Illinois.—*Brown v. Schintz*, 98 Ill. App. 452, 459, *aff'd* 202 Ill. 509, 67 N. E. 172.

Indiana.—*Harrison v. Wright*, 100 Ind. 515, 58 Am. Rep. 805.

New York.—*First National Bank of Union Mills v. Clark*, 134 N. Y. 368, 48 N. Y. St. R. 283, 32 N. E. 38, *aff'g* 30 N. Y. St. R. 1021, 9 N. Y. Supp. 952; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 36 N. Y. St. Rep. 277, 26 N. E. 816, *rev'g* 54 Hun 272, 27 N. Y. St. Rep. 1, 7 N. Y. Supp. 380; *Lynch v. First National Bank*, 107 N. Y. 179, 11 N. Y. St. R. 389, 27 Week. D. 328, 13 N. E. 775; *Jordan v. National Shoe & Leather Bank*, 74 N. Y. 467, 30 Am. Rep. 319.

Tennessee.—*Akin v. Jones*, 93 Tenn. 353, 42 Am. St. Rep. 921, 27 S. W. 669, 25 L. R. A. 523.

But compare *Wyman v. Ft. Dearborn National Bank*, 181 Ill. 279, 72 Am. St. Rep. 259, 48 L. R. A. 565; *Gage Hotel Co. v. Union National Bank*, 171 Ill. 531, 63 Am. St. Rep. 270, 39 L. R. A. 479, 49 N. E. 420; *Metropolitan National Bank v. Jones*, 137 Ill. 634, 12 L. R. A. 492, 27 N. E. 533, 31 Am. St. Rep. 403; *Farmers' Bank & Trust Co. v. Newland*, 97 Ky. 464, 31 S. W. 38; *Fonner v. Smith*, 31 Neb. 107, 11 L. R. A. 528, 47 N. W. 632, 28 Am. St. Rep. 510; *Raesser v. National Exchange Bank*, 112 Wis. 591, 88 N. W. 618.

³⁹ *United States*.—*Bull v. Kasson*, *First National Bank*, 123 U. S. 105, 31 L. Ed. 97; *Bowen v. Needles National Bank (U. S. C. C.)*, 87 Fed. 430.

Georgia.—*Merritt v. Gate City National Bank*, 100 Ga. 147, 38 L. R. A. 749.

Illinois.—*Industrial Bank v. Bowes*, 165 Ill. 70, 46 N. E. 10, *rev'g* 64 Ill. App. 300, 1 Chic. L. J. Wkly. 455; *Howes v. Austin*, 35 Ill. 396; *Marshall v. Freeman*, 52 Ill. App. 42.

Indiana.—See *Henshaw v. Root*, 60 Ind. 220.

§ 583. **Where drawee becomes insolvent or bankrupt—Collection through bank.**—A delay of one day in presenting a check, during which time the drawee fails, may constitute laches.⁴⁰ If a check is given for the amount of a draft by the firm on which it is drawn, and such firm does business in the same city as the party to whom such check is given, it should be presented on the day on which it is received; and where the drawer had funds in the bank on which the check was drawn, and the check passed through another bank in which it was deposited and did not reach the drawer's bank until after failure, the party sending the draft was held to be released from his indebtedness.⁴¹ And where a person sent a check to another in part payment of his indebtedness and it was duly mailed and should have been received the following day and it would have been honored if presented in a reasonable time after its receipt, but such presentment was not made because of the negligence of the party to whom the check was forwarded, and the amount thereof was lost by reason of the bank's failure, and the check was not returned to the sender, the latter's claim against the party receiving the check is not waived by the presentment of the sender's claim for his deposit to the trustee of the insolvent bank.⁴² Under a Wisconsin decision where the drawers of a bank check drew out all their funds before failure of the bank but the holder had negligently delayed presentment until after such failure, the facts that the check would have been honored if it had

Maryland.—See *Exchange Bank v. Sutton Bank*, 78 Md. 577, 23 L. R. A. 173.

Missouri.—*Nelson v. Kastle*, 105 Mo. App. 187, 79 S. W. 730; *Herider v. Phoenix Loan Assoc.*, 82 Mo. App. 427; *Long Bros. v. Eckert*, 73 Mo. App. 445.

Virginia.—See *Blair v. Wilson*, 28 Gratt. (Va.) 165.

West Virginia.—*Compton v. Gilman*, 19 W. Va. 312, 42 Am. Rep. 776.

Examine *Andrews v. Bradley*, 102 Fed. 54; *Carroll v. Sweet*, 128 N. Y. 19, 37 N. Y. St. R. 868, 27 N. E. 763, 13 L. R. A. 43, rev'g 5 N. Y. Supp. 572, 25 N. Y. St. R. 356, 57 Supr. Ct. 100. See *Negot. Inst. Law*, § 322.

Damages.—When a bank check is wrongfully protested the drawer may recover temperate compensatory damages without alleging and proving special damages. The right to recover such damages is not confined to a trader in the restricted sense in which the term is used in the bankruptcy laws, but extends to any person who is engaged in business and whose credit is thus necessarily injured. *Peabody v. Citizens' State Bk. of St. Charles* (Minn. 1906), 108 N. W. 272.

⁴⁰ *Smith v. Miller*, 43 N. Y. 171.

⁴¹ *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 690.

⁴² *Pink Front Bankrupt Store v. G. A. Mistrot & Co.* (Tex. Civ. App.), 90 S. W. 55.

been promptly presented and that the drawers were compelled to pay the bank's assignee in bankruptcy the money which they had drawn out will not prevent recovery by holder of the paper from the drawers.⁴³ If the drawer uses a National bank check, but erases only part of the name describing or designating such bank and writes above it the name of a private banker, and the check is purchased two days thereafter from the party to whom the check was given, and the purchaser, who knew the private banker and had done some banking with him, delays presentment until after the drawee has failed, no recovery can be had of the drawer.⁴⁴ But if, through the drawer's acts, the holder has not lost his remedy against the drawer of a check, given him in settlement of an account for merchandise, such holder is still liable for the price of the goods, although the bank had failed before presentment, which had been delayed.⁴⁵ If a check, deposited by the

⁴³ *Kinyon v. Stanton*, 44 Wis. 479, 28 Am. Rep. 601.

⁴⁴ *Cork v. Bacon*, 45 Wis. 192, 30 Am. Rep. 712.

⁴⁵ *Williams v. Brown*, 80 N. Y. Supp. 247, 80 App. Div. 628, 82 App. Div. 353.

As to laches in presentment and insolvency of bank, see further the following cases:

Alabama.—*Watt v. Gans*, 114 Ala. 264, 21 So. 1011 (no recovery by holder from drawer); *Industrial Trust T. & Sav. Co. v. Weakley* 103 Ala. 458, 15 So. 854 (no recovery against drawer).

Georgia.—*Tomlin v. Thornton*, 99 Ga. 585, 27 S. E. 147 (payee cannot recover from drawer).

Illinois.—*Balkwill v. Bridgeport Wood Finishing Co.*, 62 Ill. App. 663, 1 Chic. L. J. Wkly. 102 (where payee not guilty of negligence).

Iowa.—*Hamlin v. Simpson*, 105 Iowa 125, 44 L. R. A. 397, 74 N. W. 906, 15 Bkg. L. J. 343 (drawer was injured by laches and was released).

Kansas.—*Anderson v. Rodgers*, 53 Kan. 542, 36 Pac. 1067, 27 L. R. A. 248, 11 Bkg. L. J. 87 (payee assumes

risk of insolvency and loss by unreasonable delay).

Michigan.—*Hamilton v. Winona Salt & L. Co.*, 95 Mich. 436, 54 N. W. 903 (holder not entitled to recover where negligent, even though promise is made by drawer that he will pay, but the latter had then no knowledge of the laches).

New York.—*Williams v. Brown*, 65 N. Y. Supp. 1049, 53 App. Div. 486 (debt discharged by the laches); *Martin v. Home Bank*, 52 N. Y. Supp. 464, 30 App. Div. 498, aff'd 160 N. Y. 190, 54 N. E. 717 (drawer and indorser discharged by the laches); *Grant v. McNutt*, 33 N. Y. Supp. 62, 66 N. Y. St. R. 719, 12 Misc. 20 (when drawer not discharged); *Carroll v. Sweet*, 37 N. Y. St. R. 868, 27 N. E. 763 (delay and consequent loss discharges indorser who had transferred check for antecedent debt, but only to amount of check).

Pennsylvania.—*Wagner v. Crook*, 167 Pa. 259, 31 Atl. 576, 12 Bkg. L. J. 255 (drawer's non-liability not changed by sending duplicate check, on false statement that original lost,

holder with a bank for collection, is not presented in proper time and not until after the failure of the drawee bank, and the delay and loss are consequent upon forwarding it by an indirect route for presentment the holder is precluded recovery from the drawer.⁴⁶

where latter received too late); *National State Bank v. Weil*, 141 Pa. 457, 21 Atl. 661, 4 Bkg. L. J. 331 (in absence of excusing circumstances, payee or transferee assumes risk of delay).

Vermont.—*Gregg v. Beane*, 69 Vt. 22, 37 Atl. 248, 14 Bkg. L. J. 319 (question of diligence and relative rights of drawer and payee where drawee suspends).

Wisconsin.—*Lloyd v. Osborn*, 92 Wis. 93, 13 Bkg. L. J. 177, 65 N. W. 859 (when payee not precluded recovery against maker—excuses).

⁴⁶ *Watt v. Gans*, 114 Ala. 264, 21 So. 1011.

Collection through bank—Rights, duties and liabilities, see the following decisions:

United States.—*Commercial National Bank v. Armstrong*, 148 U. S. 50, 37 L. Ed. 363; *Holder v. Western German Bank*, 132 Fed. 187, aff'd 136 Fed. 90, 68 C. C. A. 554; *First National Bank v. Wilmington & W. R. Co.*, 77 Fed. 401, 42 U. S. App. 232, 23 C. C. A. 200.

Alabama.—*Farley National Bank v. Pollock & Bernheimer* (Ala.), 39 So. 612; *Jefferson County Savings Bank v. Hendrix* (Ala.), 39 So. 295, 1 L. R. A. N. S. 246; *Josiah Morris & Co. v. Alabama Carbon Co.*, 139 Ala. 620, 36 So. 764.

Arkansas.—*Kuder v. Greene* 72 Ark. 504, 82 S. W. 836.

Colorado.—*Manhattan Life Ins. Co. v. First National Bank* (Colo. App.), 80 Pac. 467.

Georgia.—*Tomlin v. Thornton*, 99 Ga. 585, 27 S. E. 147; *Georgia Na-*

tional Bank v. Henderson, 46 Ga. 487, 12 Am. Rep. 490.

Illinois.—*Bank of Commerce v. Miller*, 105 Ill. App. 224.

Indiana.—*First National Bank of Crown Point v. First National Bank of Richmond*, 76 Ind. 561, 40 Am. Rep. 261.

Iowa.—*Guelich v. National State Bank of Burlington*, 56 Iowa 434, 41 Am. Rep. 110.

Kansas.—*Anderson v. Rodgers*, 53 Kan. 542, 36 N. W. 1067, 27 L. R. A. 248; *Stockton v. Montgomery*, 9 Kan. App. 104, 57 Pac. 1059, 16 Bkg. L. J. 496.

Kentucky.—*Second National Bank v. Merchants' National Bank*, 23 Ky. L. Rep. 1255, 55 L. R. A. 273, 65 S. W. 4; *Long v. Bank of Commerce*, 18 Ky. L. Rep. 922, 38 S. W. 886.

Maryland.—*Anderson v. Gill*, 79 Md. 312, 25 L. R. A. 200, 29 Atl. 527, 22 Wash. L. Rep. 569.

Minnesota.—*Minneapolis Sash & D. Co. v. Metropolitan Bank*, 76 Minn. 136, 44 L. R. A. 504, 78 N. W. 780, 16 Bkg. L. J. 399.

Mississippi.—*Continental National Bank v. First National Bank* 84 Miss. 103, 36 So. 189; *Third National Bank of Louisville v. Vicksburg Bank*, 61 Miss. 112, 48 Am. Rep. 78.

Missouri.—*National Bank of Commerce v. American Exchange Bank*, 151 Mo. 320, 16 Bkg. L. J. 448, 52 S. W. 265.

Nebraska.—*Western Wheeled Scraper Co. v. Sadilep*, 50 Neb. 105, 69 N. W. 765, 14 Bkg. L. J. 139.

New York.—*Bank of America v.*

§ 584. **Surety.**—It is held that the neglect to present a check and demand payment within a reasonable time does not release a surety from liability, as a presumption exists that he has knowledge that it is not to be used in the usual manner, but an exception exists where he also shows that the time has been extended to the principal debtor without his assent or specified limitation to himself.⁴⁷

§ 585. **Indorser.**—An indorser of a check is not liable where presentment is not made in a reasonable time.⁴⁸ Where the payee of a check becomes chargeable as an indorser only, such check must be presented for payment within a reasonable time. This applies in a case where a check upon another bank is indorsed by the payee and deposited in the bank in which he keeps an account, and the bank accepts it and credits the amount as cash on the depositor's account to be checked against as he sees fit, as such facts indicate a completed trans-

Waydell, 92 N. Y. Supp. 666, 103 App. Div. 25, 94 N. Y. Supp. 135, 104 App. Div. 620; *National Revere Bank v. National Bank of the Republic*, 66 N. Y. Supp. 662, aff'd 172 N. Y. 102, 64 N. E. 799; *Williams v. Brown*, 65 N. Y. Supp. 1049, 53 App. Div. 486; *Martin v. Home Bank*, 52 N. Y. Supp. 464, 30 App. Div. 498, aff'd 60 N. Y. 190, 54 N. E. 717; *Briggs v. Central National Bank of City of New York*, 89 N. Y. 182, 42 Am. Rep. 285; *Ayrault v. Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489.

Oregon.—*Kershaw v. Ladd*, 34 Oreg. 375, 56 Pac. 402, 44 L. R. A. 236, 16 Bkg. L. J. 273.

Pennsylvania.—*Morris v. First National Bank*, 201 Pa. 158, 50 Atl. 1000; *Wagner v. Crook*, 167 Pa. 259, 31 Atl. 576, 12 Bkg. L. J. 225.

South Carolina.—*Gregg v. Bank of Columbia*, 72 S. C. 458, 52 S. E. 195.

Tennessee.—*Bank of Louisville v. First National Bank of Knoxville*, 8 Baxt. (Tenn.) 101, 35 Am. Rep. 691.

⁴⁷ *Newman v. Kaufman*, 28 La. Ann. 865, 26 Am. Rep. 114.

⁴⁸ *Aebi v. Bank of Evansville*, 124 Wis. 65, 102 N. W. 329; *Wis. Laws 1899, c. 356, §§ 1684-2, p. 746, id., p. 717, c. 356, § 1678-11; Fritz v. Kennedy*, 119 Iowa 628, 93 N. W. 603.

When indorsers bound, when not, see the following cases:

Iowa.—*Hough v. Gearen*, 110 Iowa 240, 81 N. W. 463.

Mississippi.—*Parker v. Reddick*, 65 Miss. 242, 7 Am. St. Rep. 646, 3 So. 575.

Nebraska.—*Nebraska National Bank v. Logan*, 29 Neb. 278, 3 Bkg. L. J. 107, 45 N. W. 459.

New York.—*Cuminsky v. Klemier*, 68 N. Y. Supp. 776, 34 Misc. 181; *Carroll v. Sweet*, 30 N. Y. Supp. 204, 61 N. Y. St. Rep. 673, 9 Misc. 382, 37 N. Y. St. R. 868, 27 N. E. 763.

Tennessee.—*Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785.

Wisconsin.—*Gifford v. Hardell*, 88 Wis. 538, 43 Am. St. Rep. 925, 60 N. W. 1064, 12 Bkg. L. J. 29.

fer of the check by which the bank accepting it becomes the owner thereof and not a mere agent to collect, and the payee becomes chargeable only as indorser.⁴⁹ In order to charge an indorser upon a check or inland bill of exchange payable on demand, presentment must be made by the holder within a reasonable time after it comes into his possession. Where such reasonable time is not fixed by statute, then, in the absence of special circumstances of excuse, it is limited to the next business day, or if the bank upon which the check is drawn is at another place the check must be forwarded to the place of payment on the next business day, and presented at latest upon the day following its receipt at the place of payment.⁵⁰

⁴⁹ *Aebi v. Bank of Evansville*, 124 Wis. 65, 102 N. W. 329, 109 Am. St. Rep. 324.

⁵⁰ *Aebi v. Bank of Evansville*, 124 Wis. 73, 102 N. W. 329, 109 Am. St. Rep. 324.

Check—Rights, duties and liabilities of indorsee and indorser and effect of certification of the drawee bank. Where the dispute was between the indorsee and the indorser of a check in a recent Michigan case the court, per McAlvay, J., said: "The following rules of the law merchant fixing the rights, duties and liabilities of indorsee and indorser each to the other, and the effect of certification by the drawee bank upon such rights, duties and liabilities are well settled. The undertaking of the indorser of a check is that, if not paid on presentation within a reasonable time he will pay it, provided he is properly notified. Such reasonable time for presentation and demand for payment is admitted to be within the day following the indorsement. The indorsee, as between himself and the indorser, undertakes to demand payment within the day following the indorsement, and, if payment is not made, to give due notice of dishonor. This is his sole duty, and he does anything else at his

peril. 2 Dan. Neg. Inst., par. 1601; *People v. Cromwell*, 102 N. Y. 477, 7 N. E. 413. The fact that there are no funds in the account against which the check is drawn does not relieve the holder from presentation and notice of dishonor to the indorser, unless it appears that the indorser knew it. 2 Dan. Neg. Inst., par. 1596; 1 Morse Banking, par. 262 (8). Nor are the rights of the indorser changed because he suffered no apparent damage by reason of failure to demand payment and give notice of dishonor to him within the required time. *Mohawk Bank v. Boderick*, 13 Wend. (N. Y.) 133, 27 Am. Dec. 192; *Tiedeman, Com. Paper*, § 442; *Gough v. Staats*, 13 Wend. (N. Y.) 549; *First Nat. Bank v. Miller*, 37 Neb. 500, 55 N. W. 1064, 40 Am. St. Rep. 499. The certification of a check by a bank that it is 'good' 'is similar to accepting of a bill, for he (the banker) admits hereby assets, and makes himself liable to pay.' Lord Mansfield, in *Robson v. Bennett*, 2 Taunt. 389. 'By the law merchant of this country the certificate of the bank that the check is good is equivalent to acceptance; it implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfac-

§ 586. Reasonable expectation that check will be honored—Want of funds.—Presentment of a check is unnecessary where the drawer has no funds and no reasonable expectation that the paper will be honored.⁵¹ And it is held that the drawer's want of funds at the time of drawing the check or his subsequent withdrawal thereof before presentment made dispenses with notice of dishonor to him, notwithstanding want of diligence in making demand.⁵² It is declared that it is not necessary that the drawer of a bill should have funds in the hands of the drawee, since if he has not a check would be a fraud.⁵³

tion, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of depositor, or any other obligation it can assume.' Mr. Justice Swayne in *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 19 L. Ed. 1008. Where the check is drawn against funds the certification, if procured by the payee or indorsee, discharges both maker and indorser, because equivalent to payment. 2 Dan. Neg. Inst., par. 1604; *Metropolitan Bank v. Jones*, 137 Ill. 634, 27 N. E. 533, 12 L. R. A. 492, 31 Am. St. Rep. 403. The important question in the case at bar is whether certification of a check on presentation by the indorsee, though there are no funds, is equivalent to payment. As a general proposition we think it is as to both the maker and indorser. 2 Dan. Neg. Inst., par. 1604, and cases cited. The rules of the law merchant are inflexible and arbitrary, and necessarily so. An indorser may always insist that the conditions requisite to make his undertaking enforceable shall be strictly complied with; namely, presentation for payment and notice of dishonor. As to the indorsee the certifying bank is bound by estoppel where he has

changed his position or parted with value on the strength of the certification. *Brooklyn Trust Co. v. Toler*, 138 N. Y. 675, 34 N. E. 515. In this case the plaintiff parted with no value before certification, but relying upon the certification transferred \$50,000 to New York. We find then as between the plaintiff and the bank there was a new and enforceable contract created by the certification of the check. Ordinarily there would be no question but that such condition released the indorsers." *First National Bank v. Currie* (Mich. 1907), 110 N. W. 499. The court distinguishes *Irving Bank v. Wetherald*, 36 N. Y. 335.

⁵¹ *Beauregard v. Knowlton*, 156 Mass. 395, 31 N. E. 389.

⁵² *Fletcher v. Pierson*, 69 Ind. 281, 35 Am. Rep. 214.

Examine the following cases:

Illinois.—*Thom v. Sinsheimer*, 66 Ill. App. 555, 1 Chic. L. J. 693.

Indiana.—*Culver v. Marks*, 122 Ind. 554, 7 L. R. A. 489, 23 N. E. 1086.

Iowa.—*Hamlin v. Simpson*, 105 Iowa 125, 15 Bkg. L. J. 343, 74 N. W. 906, 44 L. R. A. 397.

New York.—*Carroll v. Sweet*, 37 N. Y. St. R. 868, 27 N. E. 763.

Oregon.—*First National Bank v. Linn County National Bank*, 30 Oreg. 296, 47 Pac. 614.

⁵³ *Merchants' National Bank v. State National Bank*, 10 Wall. (U.

§ 587. **Protest.**—Formal protest of a check is held to be unnecessary to charge the indorser, such check being considered as an inland bill;⁵⁴ although there may be a formal protest under a statutory provision.⁵⁵

§ 588. **Notice of non-payment.**—It is held that demand, refusal to pay, and notice of non-payment are necessary to render the drawer liable where he has not stopped payment of the check.⁵⁶

§ 589. **Waiver of presentment for payment.**—The drawer's statements and acts may be such as to constitute a waiver of presentment for payment.⁵⁷

S.) 47, per Swayne, J., citing *Boehm v. Sterling*, 7 Tenn. 430; *Keen v. Beard*, 8 C. B. N. S. 373; *Serle v. Norton*, 2 Mood. & Rob. 404n; *Alexander v. Berchfield*, 7 Mann. & Gran. 1067; *Grant on Banking* 89, 90.

⁵⁴ *Wood River Bank v. Omaha First National Bank*, 36 Neb. 708, 55 N. W. 239, 9 Bkg. L. J. 11; *La Banque Jacques Cartier v. La Cor-*

poration de Limoilon, 17 Rap. Jud. Quebec, C. S. 211. See § 528 herein as to inland bills.

⁵⁵ *German National Bank v. Beatrice National Bank*, 63 Neb. 246, 88 N. W. 480.

⁵⁶ *Ross v. Saron*, 93 N. Y. Supp. 553. See *Garthwaite v. Bank of Tulare*, 134 Cal. 237, 66 Pac. 326.

⁵⁷ *Compton v. Gilman*, 19 W. Va. 312, 42 Am. Rep. 776.

CHAPTER XXVII.

SET-OFF, RECOUPMENT AND COUNTERCLAIM.

Subdivision I. General rule as to..... §§ 590-617

Subdivision II. Availability in respect to parties and
holders other than maker or drawer §§ 618-640

Subdivision I.

GENERAL RULE AS TO.

- | Sec. | Sec. |
|--|--|
| 590. What law governs. | 602. Same subject—In action by an innocent holder. |
| 591. What essential to allowance of a set-off. | 603. Money paid to clear land of incumbrance. |
| 592. Right to set off—Must have been acquired prior to commencement of suit. | 604. Of bank deposits—Rule as to. |
| 593. Where claim or demand acquired subsequent to transfer. | 605. In action by depositor to recover bank deposit. |
| 594. Where claimed set-off was acquired after notice of assignment. | 606. Of bill or note. |
| 595. A mere contingent liability is not available. | 607. Same subject—Essentials to availability. |
| 596. What may be set off generally—Particular claims or demands. | 608. Same subject—Essentials to availability, continued. |
| 597. Set-off of damages recoverable in an action of tort. | 609. Same subject—Where a fraud on plaintiff. |
| 598. Same subject, continued—Application of rule. | 610. Same subject—As affected by statutes or laches. |
| 599. Damages arising <i>ex contractu</i> and under same contract. | 611. Same subject—Want of title to notes will preclude. |
| 600. Damages arising <i>ex contractu</i> but under different contract. | 612. Of bills or notes of bank. |
| 601. Damages for breach of warranty or covenant. | 613. Where collateral has been given. |
| | 614. Usurious interest—Rule as to recoupment of. |
| | 615. Same subject—Right as affected by federal statutes. |
| | 616. Right of set-off generally as affected by statutes. |
| | 617. Waiver of right to set off. |

§ 590. What law governs.—Resort must be had to the law of the forum, and not to that of the place in which commercial paper was executed, for the purpose of determining the availability of a set-off

in an action thereon.¹ "Set-off is a mode of defense, essentially, not a part connected with the remedy, which, according to the well-settled and universal doctrine, is governed by the law of the forum, and not by the *lex loci contractus*. The forms of remedies, the modes of proceeding and the execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted."²

§ 591. **What essential to allowance of a set-off.**—Where a defendant seeks to avail himself of a set-off, it is decided that it is essential to its allowance that the demand or claim be one which is due between the same parties and in the same right.³ So, in an action against the maker of a promissory note, he cannot plead as a set-off an amount due from the plaintiff to a society, of whose funds the defendant, as an officer, is custodian.⁴ And equities between the parties to a note arising from other and independent transactions between them, are held not available against the note in the hands of an assignee.⁵ So, in an action by an indorsee against the drawee of a bill of exchange, it was decided that a demand due from the payee to a partnership of which the defendant was a member, if available as a set-off in any case, was not so available without proof that the other partners consented to such use of the claim and that plaintiff had knowledge of their consent.⁶ But where the claim sued on, as in the case of a note, and the one set up in the answer are liquidated demands, it is not necessary to enable defendant to set the latter up against the demand sued on that there should have been an agreement to that effect.⁷

¹ Mineral Point R. Co. v. Barron, 83 Ill. 365; Bank of Gallipolis v. Trimble, 6 B. Mon. (Ky.) 599; Gibbs v. Howard, 2 N. H. 296; Second National Bank v. Hemingray, 31 Ohio St. 168. But see Bliss v. Houghton, 13 N. H. 126.

² Bank of Gallipolis v. Trimble, 6 B. Mon. (Ky.) 599, per Breck, J.

³ Alabama.—Manning v. Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67.

Indiana.—Proctor v. Cole, 104 Ind. 373, 3 N. E. 106; Parks v. Zeek, 53 Ind. 221.

Mississippi.—Walker v. Hall, 66 Miss. 390, 6 So. 318.

North Carolina.—Roberts v. Jones, 1 Murph. (N. C.) 353.

Pennsylvania.—Union National Bank v. Cannonburgh Iron Co. (Pa. Sup.), 6 Atl. 577, 23 Cent. Law J. 526.

See, also, Holland v. Makepeace, 8 Mass. 418.

⁴ Lewis v. Pickering, 58 Neb. 63, 78 N. W. 368.

⁵ Ryan v. Chew, 13 Iowa 589; Shipman v. Robbins, 10 Iowa 208; Caldwell v. Cook, 5 Litt. (Ky.) 180; Bowman v. Halstead, 2 A. K. Marsh. (Ky.) 200, 12 Am. Dec. 380.

⁶ Manning v. Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67.

⁷ Ruzeoski v. Wilrodt (Tex. Civ. App. 1906), 94 S. W. 142.

§ 592. **Right to set-off—Must have been acquired prior to commencement of suit.**—One of the essentials to the right of a person to avail himself of a set-off in an action against him on commercial paper, is that the claim or demand which he seeks to set off should have been acquired by him prior to the commencement of the suit, for if it appear that it was acquired subsequent thereto, he cannot, as a general rule, avail himself of the same.⁸ So it is held in an early case in New Hampshire that if the defendant, after plaintiff's writ is made out and placed in an officer's hands, on the same day and before service, take by indorsement the promissory note of the plaintiff, it cannot be allowed as a set-off.⁹ And where a person had possession of a sealed note before suit was brought against him, but it was not transferred to him until after suit was brought, it was held that he could not set it off against the plaintiff, though the assignment to him was dated back before the writ was issued.¹⁰ And this rule has been held to apply, though the plaintiff was an indorsee after maturity.¹¹ But it has been decided that, in a suit against a firm, it is proper, on a bill in equity by the firm sued, to set off the note of a partner of the debtor firm made to the plaintiff, by whom it was sold and assigned to a third person, who transferred it to the defendants, where it was alleged that the maker of such note and the plaintiff suing at law

⁸ *Illinois*.—*Kelly v. Garrett*, 1 Gilman (Ill.) 649.

Indiana.—*Hadley v. Wray*, 76 Ind. 476.

Minnesota.—*Northern Trust Co. v. Hiltgen*, 62 Minn. 361, 64 N. W. 909.

Missouri.—*Frazier v. Gilson*, 7 Mo. 271.

New York.—*Jefferson Co. Bank v. Chapman*, 19 Johns. (N. Y.) 322.

Pennsylvania.—*Speers v. Sterrett*, 29 Pa. St. 192.

South Carolina.—*Godley v. Barnes*, 13 Rich. (S. C.) 161.

Compare *Aldrich v. Campbell*, 4 Gray (Mass.) 284; *Gaines v. Salmon*, 16 Tex. 311.

⁹ *Hardy v. Corliss*, 21 N. H. 356.

¹⁰ *Bishop v. Tucker*, 4 Rich. L. (S. C.) 178.

¹¹ *Wood v. Bush*, 72 Cal. 22, 13 Pac.

627. The court said: "The complaint shows that the promissory note, upon which the action is brought, was indorsed to plaintiff after maturity. This entitled defendant to set up against it any defense which he could have interposed against the assignor, and which existed at the time or before notice of the assignment. The institution of the action was notice of the assignment of the note, and yet defendant seeks to set up as against plaintiff a defensive counterclaim against the assignor, which, according to his sworn statement, 'has arisen since the commencement of this action, and since the former answer of defendant was filed. This he cannot be permitted to do.' Per Searls, C.

were insolvent, the court declaring that the firm assigning the note were liable upon their indorsement, and being insolvent, a court of equity would allow such set-off.¹²

§ 593. Where claim or demand acquired subsequent to transfer.—In actions on commercial paper it has also been generally determined that it is essential to the availability of a set-off that it should have been acquired by the defendant prior to the transfer. And this is held to be true, even though the action be by a purchaser after maturity.¹³ There are, however, some cases in which it is decided that the maker of a note may, in an action against him by the indorsee or assignee, avail himself of the right to set off any claim or demand which existed against the payee prior to notice of the transfer or assignment.¹⁴ But in one of the states in which it was so decided it was also held that in an action on a note which is payable to bearer the maker cannot, as against the holder thereof, avail himself of such a set-off where it does not appear that the maker gave notice thereof to the purchaser.¹⁵

§ 594. Where claimed set-off was acquired after notice of assignment.—It is a generally accepted rule that where a maker of commercial paper has received notice of an assignment or transfer thereof to a *bona fide* holder, he can not, in an action on such paper, avail himself, as against such holder, of a right to set off any claim or demand against the payee, indorser or assignor which was acquired subsequent to the notice of assignment or transfer.¹⁶ So, in an action upon a note brought by the payee, for the use of his assignee against the maker—the note having been assigned, but not indorsed, after

¹² Hall v. Kimball, 77 Ill. 161.

¹³ United States.—Fossitt v. Bell, Fed. Cas. No. 4958 (4 McLean 427).
Alabama.—Crayton v. Clark, 11 Ala. 787.

Indiana.—Weader v. Bank, 126 Ind. 111, 25 N. E. 887; Johnson v. Amana Lodge, 92 Ind. 150.

Massachusetts.—Backus v. Spaulding, 129 Mass. 234.

Minnesota.—Linn v. Rugg, 19 Minn. 181 (Gil. 145).

Mississippi.—Northern Bank v. Kyle, 7 How. (Miss.) 360.

Nebraska.—Davis v. Neligh, 7 Neb. 84.

New Hampshire.—Bliss v. Houghton, 13 N. H. 126.

New York.—Fumiss v. Gilchrist, 1 Sandf. (N. Y.) 53.

Vermont.—Sherwood v. Francis, 11 Vt. 204; Parker v. Kendall, 3 Vt. 540.

Virginia.—Davis v. Miller, 14 Gratt. (Va.) 1.

¹⁴ Stewart v. Anderson, 6 Cranch (U. S.) 203; King v. Conn, 25 Ind. 425; Martin v. Trobridge, 1 Vt. 477.

¹⁵ Parker v. Kendall, 3 Vt. 540.

due—and it not appearing that the payee was insolvent when he made the assignment, it has been decided that the maker cannot set off money paid by him as surety for the payee, after he received notice of the assignment, although the money paid was upon a liability entered into before the assignment, but which had not been reduced into a judgment against the surety before notice of the assignment was given.¹⁷ And it is decided in an early case that a demand for unliquidated damages, arising from a breach of covenant of title, may be set off in equity against a note founded on an independent consideration, when the vendor is dead and his estate insolvent, but to make it available as a set-off against an equitable assignee of the note it must be shown to have accrued before notice of the assignment.¹⁸ And where a note held by a bank debtor against a third person was transferred by the holder to the bank as collateral security and a surety who had paid the debt to the bank took from it an assignment of such note, it was decided, in an action on the note by the surety, that the maker could not set off a demand against the payee, or principal debtor, which had been acquired subsequent to the notice of the transfer to the bank, and that the assignment to the surety related back to the time when the note was transferred to the bank, and clothed the assignee with the rights then held by the bank, against which subsequent equities could not be asserted.¹⁹

¹⁶ *United States*.—*Harrisburg Trust Co. v. Shufeldt*, 31 C. C. A. 190, 87 Fed. 669, under 2 Hill's Code Wash., § 806.

Alabama.—*Manning v. Maroney*, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67; *Wray v. Furniss*, 27 Ala. 471; *Crayton v. Clark*, 11 Ala. 787.

California.—*Wood v. Brush*, 72 Cal. 224, 13 Pac. 627.

Indiana.—*Johnson v. Amana Lodge*, No. 82, Independent Order of Odd Fellows, 92 Ind. 150; *Goldthwaite v. Bradford*, 36 Ind. 149.

Kentucky.—*Small v. Browder*, 11 B. Mon. (Ky.) 212; *Wathen v. Chamberlain*, 8 Dana (Ky.) 164; *Hunt v. Martin*, 2 Litt. (Ky.) 82.

Louisiana.—*Norwood v. Pettis*, 10 La. Ann. 259.

Massachusetts.—*Backus v. Spaulding*, 129 Mass. 234.

Pennsylvania.—*Phillips v. Bank of Lewiston*, 18 Pa. St. (6 Harris) 394.

Virginia.—*Ritchie v. Moore*, 5 Munf. (Va.) 388, 7 Am. Dec. 688.

¹⁷ *Follett v. Buyer*, 4 Ohio St. 586. The court said: "The general principle, that, as against a *bona fide* assignee, there can be no set off of demands upon the assignor, acquired after notice of the assignment, and that a court of law is fully competent to protect the assignee, is certainly well established." Per Thurman, J., citing *Pancoast v. Ruffin*, 1 Ohio 381; *Weakly v. Hall*, 13 Ohio 174.

¹⁸ *Wray's Adm'r's v. Furniss*, 27 Ala. 471.

¹⁹ *Lewis v. Faber*, 65 Ala. 460.

§ 595. **A mere contingent liability is not available.**—It is a general rule of pleading that no matter of defense arising after action brought can be properly pleaded in bar of the action generally. It follows, therefore, that where a defendant seeks to avail himself of a set-off, the claim or demand relied upon for that purpose must be one in respect to which he could have maintained an action thereon at the time of the commencement of the suit against him, and that he cannot avail himself of a liability which is merely contingent and has not become fixed.²⁰ So it has been decided that in an action upon promissory notes, other notes indorsed by the plaintiff and held by the defendant, which did not mature until after the suit was brought, cannot be set off against the notes in suit.²¹ It has, however, been decided that where a joint undertaking has been entered into, but before the maturity or payment one of the co-obligors makes an assignment for the benefit of his creditors, and the other afterwards pays the joint debt, the latter may, in an action against him by the assignees of a note executed by him to the assignor, his co-obligor, set off the latter's aliquot part of the joint debt, though it was declared in this case that the rule would probably be different if the action were by an assignee for value.²²

§ 596. **What may be set off generally—Particular claims or demands.**—In an action on a note it has been decided that the defendant may avail himself of a set-off arising from an agreement entered into for a valid consideration to pay to the defendant the debt of a third person owing to him.²³ And where services have been rendered by the defendant to the plaintiff, a bill therefor has been held to be a proper matter of set-off.²⁴ And it has also been decided that where a person has been induced to execute a note by false representations of the payee, damages resulting from such false representations may be set off in an action on the note.²⁵ So it has been held that a defendant may so avail himself of an open account which has been transferred to him by a third party.²⁶ And the defendant may, in

²⁰ Wood v. Steele, 65 Ala. 436;

Houghton v. Houghton, 37 Me. 72;

Hauston v. Fellows, 27 Vt. 634;

Lamb v. Pannell, 28 W. Va. 663.

²¹ Hotchkiss v. Roehm, 181 Pa. St.

65, 37 Atl. 119.

²² Chenault v. Bush, 84 Ky. 528, 2

S. W. 160.

²³ Graves v. Shulman, 59 Ala. 406.

²⁴ Briggs v. Moore, 14 Ala. 433.

²⁵ Strickland v. Graybill, 97 Va. 602, 34 S. E. 475.

²⁶ Blount v. Rick, 107 Ind. 238, 5 N. E. 898, 8 N. E. 108; Ashby v.

Carr, 40 Miss. 64.

some cases, be entitled to a judgment in his favor for the amount of the set-off in excess of the claim of the plaintiff.²⁷ But in the case of a certified check it has been held that the banker upon whom it is drawn cannot set off against such check when it is presented the amount of an indebtedness to him from the holder of the instrument.²⁸ And where a note is given for the purchase price of a machine the maker cannot avail himself of the breach of a subsequent promise of an agent of the seller to repair the same.²⁹ Again in an action by a bank upon a note given to it, it has been decided that the defendant cannot avail himself by way of set-off of stock of the bank.³⁰

§ 597. **Set-off of damages recoverable in an action of tort.**—It is a general rule that in an action upon commercial paper the defendant cannot avail himself of a set-off of damages which are recoverable in an action of tort.³¹ So where the defendant alleged that the notes were given in consideration of the purchase price of plaintiff's interest in partnership property and that before the maturity of the notes plaintiff entered the partnership premises and forcibly took possession of the business and property of said partnership and had since retained possession, and it was contended by the defendant that the alleged tortious acts of the plaintiff were equivalent to and should be treated as a total failure of the consideration for which the notes were given, the court held that such tortious act grew out of a separate transaction and that damages arising from such act could not be recouped by way of equitable defense.³²

²⁷ Tuck v. Tuck, 5 Mees. & W. 109; *kansas City v. Hasie*, 57 Kan. 754, 48 Pac. 22.

²⁸ Brown v. Leckie, 43 Ill. 497.

²⁹ Buntain v. Dutton, 21 Ill. 190.

³⁰ Harper v. Calhoun, 7 How. (Miss.) 203. See, also, Whittington v. Farmers' Bank, 5 Har. & J. (Md.) 489.

³¹ *United States*.—Central Ohio R. Co. v. Thompson, 2 Bond (U. S.) 296, Fed. Cas. No. 2550.

Alabama.—Pulliam v. Owen, 25 Ala. 492.

Illinois.—Lyon v. Bryant, 54 Ill. App. 331.

Indiana.—Blue v. Capital Nat. Bank, 145 Ind. 518, 43 N. E. 655.

Kansas.—First Nat. Bank of Ar-

Maine.—Winthrop Sav. Bank v. Jackson, 67 Me. 570.

Missouri.—Brake v. Corning, 19 Mo. 125.

Texas.—Riddle v. McKinney, 67 Tex. 29, 2 S. W. 748.

Virginia.—Harrison v. Wortham, 8 Leigh. (Va.) 296.

Wisconsin.—See Anderson v. Johnson, 106 Wis. 218, 82 N. W. 177.

But compare Cato v. Phillips, 28 Tex. 101.

³² Roth v. Reiter, 213 Pa. St. 400, 65 Atl. 932. The court, per Elkin, J., said: "It is conceded in this case, and it is the law, that in an action

§ 598. **Same subject, continued—Application of rule.**—In an action upon a promissory note for borrowed money damages caused by a slander upon the credit of the maker cannot be made the subject of a counterclaim.³³ And where property is pledged as collateral security to a note it is decided that damages arising from the negligence of the plaintiff in its care and custody of the land are not a subject of recoupment.³⁴ Likewise unliquidated damages arising from negligence of the plaintiffs in a matter in which they acted as agents of the defendant is not a subject of set-off.³⁵ Nor can unliquidated damages caused by the act of the plaintiff in selling property of the defendant, in violation of a trust, for less than its value, be pleaded by the defendant in an action against him on a promissory note given for the purchase of other property..³⁶ But it has been decided that the demand for the amount of a note received for collection and converted is not unliquidated damages, and is subject of set-off.³⁷ And it has been decided in an action of debt that an unliquidated demand for damages for conversion of goods may be used as a set-off against a non-resident.³⁸

§ 599. **Damages arising ex contractu and under same contract.**—

In an action upon a bill or note damages arising from the same contract in which the instrument sued on was given and which result from a failure of consideration or a non-performance of the obligations of the contract are, as a general rule, available as a set-off.³⁹ So it is

on a contract, unliquidated damages arising out of a tort independent of, and disconnected with the transaction sued on, cannot be recouped by way of equitable defense. This rule of law needs no citation of authorities to support it. It is, however, earnestly contended that the defendant in the present case had a right to recoup the damages arising from the alleged tortious act against the amount of the notes, because said tortious act was directly connected with the transaction in consideration of which the notes were given. The appellee asserts that the tortious act complained of grew out of a separate transaction, and the court below has so found in the following language: 'It appears pos-

sible that there was a tort committed against the maker of this note by the plaintiff in this case but it was not a part of this transaction and therefore cannot be used to extinguish this indebtedness.' "

³³ *Blue v. Capital Nat. Bank*, 145 Ind. 518, 43 N. E. 655.

³⁴ *Winthrop Sav. Bank v. Jackson*, 67 Me. 570.

³⁵ *Brake v. Corning*, 19 Mo. 125.

³⁶ *Riddle v. McKinney*, 67 Tex. 29, 2 S. W. 748.

³⁷ *Gunn's Adm'r v. Todd*, 21 Mo. 303.

³⁸ *Abernathy & Pinegar v. Myer-Bridges Coffee & Spice Co.* (Ky. C. A. 1907), 100 S. W. 862.

³⁹ *Alabama*.—*Foster v. Bush*, 104 Ala. 662, 16 So. 625.

declared in a late case in Wisconsin that damages arising from fraud, mistake, partial failure of consideration, or non-performance of some of the contract obligations may, in an action on a note given to evidence the consideration, be counterclaimed by way of recoupment, such practice being established to avoid circuity of action and multiplicity of suits when such a claim can be adjusted without depriving any of the parties of their substantial rights.⁴⁰ So in a recent case in Texas it has been decided that though a counterclaim to a note sued on is for unliquidated damages yet it is properly considered where it arises out of the same transaction in which the note declared on was executed.⁴¹ So, where notes were given for an interest in a partnership business it was decided in an action on the notes that damages arising by reason of misstatement in the inventories on the basis of which the sale was made were available as a counterclaim.⁴²

§ 600. Damages arising ex contractu but under different contract.—

A defendant cannot, in an action on a bill or note, set off unliquidated

California.—Snow v. Holmes, 71 Cal. 142, 11 Pac. 856.

Maryland.—Haman v. Bannon, 71 Md. 424, 18 Atl. 862.

Massachusetts.—Magee Furnace Co. v. Boston Soapstone Furnace Co., 124 Mass. 409; Stacy v. Kemp, 97 Mass. 166.

Rhode Island.—Hill v. Southwick, 9 R. I. 299.

Pennsylvania.—Hubler v. Tamney, 5 Watts (Pa.) 51.

Texas.—Tyson v. Jackson Bros. (Tex. Civ. App. 1905), 90 S. W. 930.

⁴⁰ Steckbauer v. Leykom (Wis. 1907), 110 N. W. 217.

⁴¹ Tyson v. Jackson Bros. (Tex. Civ. App. 1905), 90 S. W. 930.

⁴² Steckbauer v. Leykom (Wis. 1907), 110 N. W. 217. The court, per Siebecker, J., said in this case: "If the statements of the inventory were in fact untrue, though the party making them at the time believed them true, it is a legal wrong for which relief is awarded, upon the ground that the party making them must be held to respond for

the injury done in assuming to know and to represent as facts things which did not actually exist, but on which the other party relied to his damage in making the purchase. Its operation is in the nature of a constructive fraud. We are not clear whether the trial court regarded the evidence in this light or whether the stipulation of the parties was held to be an agreement that there was a partial failure of consideration, and that an allowance of damages on the basis of the items stipulated was to be made defendants by way of reduction of plaintiff's claim. However that may be, we are of the opinion that under the evidence and facts stipulated, the court was justified in proceeding upon either theory. Which ever one was followed would lead to the same result, namely, that defendants were entitled to a reduction of the loss they sustained by reason of the errors in the inventory."

damages which arise *ex contractu* but under a contract other than that in which the instrument sued on was given.⁴³ So where an action was brought on a promissory note which was secured by a mortgage of land it was held that the defendant could not recoup damages which had been sustained by him as a result of the mortgagor's negligence in procuring insurance upon a house covered by the mortgage, under an agreement made subsequent to the mortgage.⁴⁴ The court said that the agreement as to insurance was not "an agreement made at the time the note was given, and was not a part of the same transaction. It was a subsequent independent contract. The answer sets up, therefore, as a defense to the note, that the plaintiff has broken another contract which he entered into with the defendant, by which he has sustained damages. The defendant has no right to recoup such damages, but his remedy, if he has any, is by a cross action."⁴⁵ And where an action was brought for a breach of a contract to deliver cans and the defendant set up as a counterclaim a note which it held against the plaintiff it was decided that only so much of said note should be allowed as a counterclaim as represented the cost of cans which had been delivered under the contract out of which the suit arose, and which was the foundation of plaintiff's claim.⁴⁶ It has, however, been decided that in equity a defendant, who has acquired, prior to notice of transfer, a claim for unliquidated damages which arose out of another contract may avail himself of the same by way of set-off.⁴⁷

§ 601. **Damages for breach of warranty or covenant.**—In an action upon a promissory note given in payment for personal property

⁴³ *United States*.—*Armstrong v. Brown*, 1 Wash. C. C. (U. S.) 43, Fed. Cas. No. 542.

Alabama.—*McCord v. Williams*, 2 Ala. 71.

Georgia.—*Griffin v. Lawton*, 54 Ga. 104.

Illinois.—*Clause v. Press Co.*, 118 Ill. 612, 9 N. E. 201.

Indiana.—*West v. Hayes*, 104 Ind. 251, 3 N. E. 932; *Smith v. Smith*, 1 Ind. 476.

Massachusetts.—*Loring v. Otis*, 7 Gray (Mass.) 563; *Pitts v. Holmes*, 10 Cush. (Mass.) 92.

Missouri.—*Pratt v. Menkins*, 18 Mo. 158; *Mahan v. Ross*, 18 Mo. 121.

Tennessee.—*Bolinger v. Gordon*, 11 Humph. (Tenn.) 61; *Moore v. Weir*, 3 Sneed (Tenn.) 46.

West Virginia.—*McSmith v. Feamster*, 4 W. Va. 673.

But see *Phillips v. Lawrence*, 6 Watts & S. (Pa.) 150; *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. 15.

⁴⁴ *Brighton Five Cent Savings Bank v. Sawyer*, 132 Mass. 185.

⁴⁵ *Per Morton, J.*, citing *Sawyer v. Wiswell*, 9 Allen (Mass.) 39; *Bartlett v. Farrington*, 120 Mass. 284.

⁴⁶ *California Canneries Co. v. Pacific Sheet Metal Co.*, 144 Fed. 886.

⁴⁷ *Wray v. Furniss*, 27 Ala. 471.

the maker of such note may introduce evidence of a breach of warranty in respect to such property and damages for such breach may be allowed by way of recoupment or set-off.⁴⁸ And though a person executes notes in payment for personal property with a knowledge of a breach of warranty in respect thereto, yet if they are executed in reliance upon assurances by the vendor that the defect will be remedied, the former may, in an action on the notes, avail himself of the damages arising from such breach as a set-off, where the vendor has not fulfilled his promise to remedy the defect. Thus it has been so held where machinery was sold with a warranty in respect thereto and after its delivery the agents of the seller came to the purchaser and asked him to execute notes therefor as contemplated by the order on which the machinery was sent out, which the purchaser after refusing because the machinery was not such as was required by the warranty, finally did on the understanding and promise of the agents that the machinery should be made to operate as it was warranted to do, which promise was not performed.⁴⁹ And it has been decided that in an action by a mortgagee against a mortgagor upon a note and mortgage given for the purchase money of the premises, the mortgagor may, as a defense, set up a counterclaim for damages by reason of the fraud of the mortgagee, in concealing from him material facts as to the condition and extent of the premises.⁵⁰ But it is decided in another case that, in an

⁴⁸ *Alabama*.—Weaver v. Shropshire, 42 Ala. 230.

Illinois.—Wheelock v. Barkeley, 138 Ill. 153, 27 N. E. 942.

Indiana.—Mills v. Rosenbaum, 103 Ind. 152, 2 N. E. 313.

Massachusetts.—Wentworth v. Dows, 117 Mass. 14.

Minnesota.—Rugland v. Thompson, 48 Minn. 539, 51 N. W. 604.

New York.—Loring v. Morrison, 15 N. Y. App. Div. 498, 44 N. Y. Supp. 526.

Tennessee.—Phoenix Iron Works v. Rhea (Tenn. Ch. App.), 38 S. W. 1079.

Compare Stockton Savings & L. Soc. v. Giddings, 96 Cal. 84, 30 Pac. 1016.

⁴⁹ *Aultman & Taylor Co. v. Hefner*, 67 Tex. 54. The court said: "The

title passed to him with a warranty for his protection, and if there was a breach of that warranty he might have either of two remedies: First, after running and accepting the machinery he would be entitled to maintain an action for damages, in which he might recover not only a sum equal to the difference between the value of the defective thing and one of its kind not defective, but in which he might also recover any such sum as, under the rules of law, he might be entitled to as consequential damage. Second, when sued for the purchase money he may set up the defective quality of the thing warranted in diminution of the price." Per Stayton, J.

⁵⁰ *Pierce v. Tiersch*, 40 Ohio St. 168; citing *Baughman v. Gould*, 45

action upon a note given for the price of land, the defendant cannot be allowed to prove, by way of recoupment in damages, that the plaintiff made false representations as to the quality and productiveness of the soil, and the number of acres contained within boundaries which were truly pointed out, by which the defendant was deceived and thereby induced to make the purchase.⁵¹ And in an early case in Ohio it is decided that in that state the covenant against incumbrances is a real covenant running with the land and is not broken until eviction and that where promissory notes were given in part payment of real estate, conveyed by a deed containing the covenants of warranty and freedom from incumbrances, and at the time the land was mortgaged for more than its value, one to whom the notes were transferred before maturity for value, but with full notice of these facts, may recover against the maker of the notes, although, after the indorsement, an eviction occurred by the sale of the land upon foreclosure under the prior incumbrance.⁵² The right to set off damages arising from a breach of warranty is held not to be one of which a guarantor or surety may avail himself.⁵³

§ 602. Same subject—In action by an innocent holder.—In an action by a *bona fide* holder of a bill or note the maker cannot avail himself of a set-off of damages arising from a breach of warranty or covenant on the part of the payee.⁵⁴ It is, however, decided that where a note is not negotiable by the law merchant, there may, in an action against the maker, be a set-off of damages arising from a breach of warranty, even though the plaintiff is a *bona fide* holder or assignee of the instrument.⁵⁵

§ 603. Money paid to clear land of incumbrance.—Where the maker of a note given for the purchase price of land conveyed by a warranty deed has been obliged to pay a sum of money in order to

Mich. 481; *Allen v. Shackleton*, 15 Ohio St. 145.

⁵¹ *Gordon v. Parmelee*, 2 Allen (Mass.) 212.

⁵² *Stiles v. Hobbs*, 2 Disn. (Ohio) 571.

⁵³ *Mabie v. Johnson*, 8 Hun (N. Y.) 309; *Hiner v. Newton*, 30 Wis. 640; *Osborne v. Bryce*, 23 Fed. 171. But see, *Gillespie v. Torrence*, 25 N. Y.

306, as against an insolvent principal.

⁵⁴ *Gridley v. Tucker*, 1 Freem. Ch. (Miss.) 209; *Blair v. Reed*, 20 Tex.

310. Compare *Holman v. Creagmiles*, 14 Ind. 177.

⁵⁵ *National Bank of Commerce v. Feeney*, 12 So. Dak. 156, 80 N. W. 186.

free the land from an incumbrance, he may set off the amount so paid against the payee or an assignee with notice.⁵⁶ So in a suit by the assignee against the maker of a promissory note given as the last payment on real estate conveyed by warranty deed, it was held that the purchaser, who had paid all the consideration money except the note in suit, was properly allowed to recoup an amount which he had been compelled to pay to discharge an incumbrance not excepted from the warranty, being a note secured by mortgage on said real estate, other notes secured by the same mortgage being so excepted in the deed.⁵⁷ And it has also been decided that where several notes have been so given, damages arising from a breach of warranty may be apportioned pro rata against the different notes instead of setting them off against one, so that a surety thereon will be exonerated.⁵⁸ But where several promissory notes are given for the contract price of personal property it is decided that, in an action upon one of such notes, it will be presumed that the notes unpaid have not been transferred and are still in the hands of the payee, and that though the defendant may in such action recoup damages for a breach of warranty, yet if such damages are in excess of the amount of the note in suit, it is error to render a judgment for such excess.⁵⁹

§ 604. **Of bank deposits—Rule as to.**—Where a person who has funds deposited in a bank executes his note to that bank and the bank subsequently becomes insolvent before the maturity of the note, the maker may, in an action against him thereon, set off against the note the amount of his deposit.⁶⁰ So it is said in this connection in a case

⁵⁶ *Holley v. Younge*, 27 Ala. 203; *Packwood v. Gridley*, 39 Ill. 388; *Davis v. Bean*, 114 Mass. 358; *Drew v. Towle*, 27 N. H. 412.

⁵⁷ *Stilwell v. Chappell*, 30 Ind. 72.

⁵⁸ *Franklin Bank v. Cooper*, 36 Me. 221.

⁵⁹ *Aultman v. Hetherington*, 42 Wis. 622; *Aultman v. Jett*, 42 Wis. 488.

⁶⁰ *United States*.—*Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059.

Illinois.—*McCagg v. Woodman*, 28 Ill. 84.

Kentucky.—*Finnell v. Nesbit*, 16 B. Mon. (Ky.) 351.

Michigan.—*Thompson v. Union Trust Co.*, 130 Mich. 508, 90 N. W. 294; *Stone v. Dodge*, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280.

Minnesota.—*Becker v. Seymour*, 71 Minn. 394, 73 N. W. 1096.

Missouri.—*Smith v. Spengler*, 83 Mo. 408.

New Jersey.—*Van Wagoner v. Paterson Gas Light Co.*, 23 N. J. L. 283.

New York.—*Smith v. Fox*, 48 N. Y. 674; *Smith v. Kelton*, 43 N. Y. 419; *Jones v. Robinson*, 6 Bosw. 627; *Bank y. Tartter*, 4 Abb. N. C. 215; *In re*, Receiver of Middle District Bank, 1 Paige 585, 19 Am. Dec. 452;

in Michigan: "It is well settled that, in a suit by a receiver of an insolvent bank upon a note or obligation due the bank, the defendant will be allowed to set off his deposit or a certificate of deposit held by him at the time of the suspension of the bank."⁶¹ So it has been decided by the United States Supreme Court that a customer of a national bank, who in good faith borrows money of the bank and gives his note therefor and deposits the amount borrowed to be drawn against, any balance to be applied to the payment of the note when due, has an equitable, but not a legal, right in case of the insolvency and dissolution of the bank and the appointment of a receiver before the maturity of the note to have the balance to his credit at the time of the insolvency applied to the payment of his indebtedness on the note.⁶² It has, however, been decided that in order to render a set-off of an account or deposit available the defendant must have acquired the same by assignment or otherwise prior to the insolvency of the bank.⁶³

§ 605. In action by depositor to recover bank deposit.—A bank obtaining commercial paper as indorsee, whether for collection or as owner, before an assignment by the maker for the benefit of creditors, may set off the amount thereof in a suit brought by the assignee to recover the maker's balance on deposit.⁶⁴ And where a depositor brings

Miller v. Receiver, 1 Paige 444; *McLaren v. Pennington*, 1 Paige 102.

Pennsylvania.—*Skiles v. Houston*, 110 Pa. St. 254, 2 Atl. 30; *Jordan v. Sharlock*, 84 Pa. St. 366, 24 Am. Rep. 98.

Rhode Island.—*Clarke v. Hawkins*, 5 R. I. 219.

England.—See *Dickson v. Evans*, 6 Term. R. 57.

Admissibility of evidence as to bank deposit at time of maturity of note. In an action by a bank against an indorser of a note payable to the bank it has been held proper in a recent case in New York to exclude evidence to show that the maker had, subsequent to the maturity of the note, a sufficient deposit in the plaintiff bank to pay it, which the plaintiff failed to appropriate for that purpose. *Far Rockaway Bank v. Norton*, 186 N. Y. 484, 79 N. E. 709,

citing *National Bank of Newburgh v. Smith*, 63 N. Y. 271, 23 Am. Rep. 48, as "a conclusive authority to the effect that, in the absence of any direction or agreement to that effect, it was optional with the plaintiff whether it would apply the money or not upon the note in suit, and that it was under no positive legal obligation to do so."

⁶¹ *Stone v. Dodge*, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280, per McGrath, J., quoted in *Thompson v. Union Trust Co.*, 130 Mich. 508, 90 N. W. 294.

⁶² *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059, cited in *Thompson v. Union Trust Co.*, 130 Mich. 508, 90 N. W. 294.

⁶³ *Higgins v. Worthington*, 90 Hun (N. Y.) 436, 35 N. Y. Supp. 815.

⁶⁴ *Penn Bank v. Farmers' Deposit Nat. Bank*, 130 Pa. St. 209, 20 Atl.

an action against a bank to recover his deposit it has been decided that a judgment which has been obtained by the bank against the depositor on a note made by the latter to the former is available as a set-off.⁶⁵

§ 606. **Of bill or note.**—In an action upon commercial paper the defendant may in many cases avail himself of a bill or note, executed by the plaintiff, as a set-off against the latter.⁶⁶ So it has been decided that the maker of a note may, in an action against him by the assignee, avail himself by way of set-off of a note of the assignor which he purchased before notice of the assignment, though after knowledge of the assignor's death.⁶⁷ And where a note was not due at time of notice of the assignment of the note upon which suit was brought, it was held that it was nevertheless available as a set-off where it became due before the note sued on.⁶⁸ Again it is held that the maker of a note, which is held as collateral for a sum in excess of the amount secured, is entitled to a set-off of such excess against the payee.⁶⁹ Where, however, it appears that there has been a failure of the consideration for a note, and defendant had knowledge of this fact at the time he purchased the instrument, it is not available as a set-off.⁷⁰ And in those cases where an indorsement is essential in order to render a transfer of a note effective so that the transferee may maintain an action thereon in his own name, it has been decided that one to whom

150; *Farmers' Deposit Bank v. Penn Bank*, 123 Pa. St. 283, 16 Atl. 761, 2 L. R. A. 273. See, also, *Kentucky Flour Co. v. Merchants' Nat. Bank*, 90 Ky. 225, 13 S. W. 910, 9 L. R. A. 108.

⁶⁵ *Marsh v. Bank*, 34 Barb. (N. Y.) 298; *Ford's Adm'r v. Thorton*, 3 Leigh (Va.) 695.

⁶⁶ *United States*.—*Stettinus v. Myer*, 4 Cranch C. C. (U. S.) 349, Fed. Cas. No. 13385.

Alabama.—*Gary v. James*, 7 Ala. 640.

Connecticut.—*Bunnell v. Butler*, 23 Conn. 65.

Indiana.—*Bedford Bank v. Acoam*, 125 Ind. 584, 25 N. E. 713, 21 Am. St. Rep. 258, 9 L. R. A. 560.

Kentucky.—*Otwell v. Cook*, 9 B. Mon. (Ky.) 357.

Massachusetts.—*Backus v. Spaulding*, 116 Mass. 418.

New York.—*Rice v. Grange*, 131 N. Y. 149, 30 N. E. 46; *Geffchen v. Slingerland*, 1 Bosw. (N. Y.) 449.

Pennsylvania.—*Penn. Bank v. Farmer's Nat. Bank*, 130 Pa. St. 209, 20 Atl. 150; *Rider v. Johnson*, 20 Pa. St. (8 Harris) 190.

Tennessee.—*Fields v. Camey*, 4 Baxt. (Tenn.) 137.

⁶⁷ *King v. Conn*, 25 Ind. 425.

⁶⁸ *Stewart v. Anderson*, 6 Cranch (U. S.) 203, 3 L. Ed. 199.

⁶⁹ *Jones v. Hawkins*, 17 Ind. 550; *Lacroix v. Derbigny*, 18 La. Ann. 27; *Moody v. Towle*, 5 Greenl. (Me.) 415.

⁷⁰ *Messmore v. Larson*, 86 Ill. 278.

a note has been transferred by delivery merely, without any indorsement, is not entitled to a set-off of such note in an action against him on paper which he executed.⁷¹ In this connection it is also decided in Massachusetts that a certificate of deposit is not a note and that it is not subject to a set-off of a note of the payee in the hands of the defendant.⁷²

§ 607. **Same subject—Essentials to availability.**—Though a defendant may, in an action against him on commercial paper which he has executed, set off a bill or note which he holds against the plaintiff, yet it is held to be an essential to the availability of such a set-off that the bill or note should be due.⁷³ And it is also decided that it must have become due before the action against the defendant was commenced,⁷⁴ and that it is not available where it became due subsequent to that date, though before plea was filed.⁷⁵ In the application of these rules it is held in some earlier cases where a bill was offered as a set-off to a note that, though both the plaintiff and the acceptor of the bill were insolvent, it would not be allowed as a set-off, it not being due.⁷⁶ And in this connection it has been decided in a late case in New York, under the code provision of that state permitting the assignee of any claim or demand to enforce the same in his own name “subject to any defense or counterclaim existing against the transferer” prior to notice of transfer and under the further provision of the code that where an action is brought on a contract other than a negotiable note or bill of exchange any claim or demand existing in favor of the defendant prior to notice of the assignment and against the party to, or an assignee of, the contract shall be allowable as a counterclaim, that, in an action on an assigned claim the defendant cannot set up as a counterclaim a note to him from the assignor of the plaintiff where such note was not due when the claim was as-

⁷¹ *Ayres v. McConnel*, 15 Ill. 230; 553; *McAlpin v. Wingard*, 2 Rich. Stickney v. Clement, 7 Gray (Mass.) Law (S. C.) 547; *Evans v. Prosser*, 2 Term Rep. 186; *Braithwaite v. Coleman*, 4 Nev. & M. 654; *Richards v. James*, 2 Exch. 471; *Gledstane's Case*, 1 Ch. App. 538. Compare *Griffin v. Chubb*, 16 Tex. 219.

⁷² *Shute v. Bank*, 136 Mass. 487.

⁷³ *Citizens' Saving Bank v. Vaughan*, 115 Mich. 156, 73 N. W. 143; *Ross v. Johnson*, 1 Handy (Ohio) 388.

⁷⁴ *Spaulding v. Backus*, 122 Mass.

⁷⁵ *Deale v. Krofft*, 4 Cranch C. C. (U. S.) 448, Fed. Cas. No. 3698.

⁷⁶ *Lockwood v. Beckwith*, 6 Mich. 168; *United States Trust Co. v. Harris*, 2 Bosw. (N. Y.) 75.

signed.⁷⁷ But in a recent case in Massachusetts it has been decided that courts proceeding according to the common law with jurisdiction of the subject-matter and of the parties may in some cases after verdict continue cases until a defendant can obtain judgment on his claim which for any sufficient reason could not have been pleaded in the suit, so that ultimately such set-off can be made. Thus it was so held in a recent case where a holder of certain notes brought an action thereon for the benefit of a decedent's estate and the defendant held valid outstanding notes against the estate, the solvency of which was doubtful, and he was unable to enforce the notes by reason of a special statute of limitations.⁷⁸ So in a case in Iowa it is decided that in an action against a bank to recover the amount of a deposit, the bank is entitled to set off a note which is owing to it by the depositor, though such note is not due, where it appears that the depositor is insolvent.⁷⁹

§ 608. Same subject—Essentials to availability, continued.—Another essential to the availability of notes as a set-off is that they should be due in the same right. Thus where a suit is brought by a person in his representative capacity it is held that a note which was executed to him in his individual capacity is not available.⁸⁰ Again where a person seeks to avail himself of a set-off, the claim or demand upon which he relies should, to be available, be one upon which he could maintain a suit. So a set-off of a bill or note will not be allowed where it appears that the instrument was transferred to the defendant for the purpose of using it as a set-off, it being understood that it was to be returned to the indorser or accounted for to him.⁸¹ Notes, to be so available, should also be those which are confined to transactions between the same parties.⁸² And a note will not be allowed as a set-off where it is shown that it is held by the defendant and another jointly.⁸³

⁷⁷ *Michigan Savings Bank v. Miller*, 110 App. Div. (N. Y.) 670, 96 N. Y. Supp. 568, decided under Code Civil Proc., §§ 1909, 502, subd. 1.

⁷⁸ *Jump v. Leon* (Mass., 1906), 78 N. E. 532.

⁷⁹ *Thomas v. Exchange Bank*, 99 Iowa 202, 68 N. W. 780. See § 605 herein as to set-off in action by depositor to recover bank deposit.

⁸⁰ *Roberts v. Jones*, 1 Murph. (N. C.) 353.

⁸¹ *Atkins v. Knoght*, 46 Ala. 539; *McDade v. Mead*, 18 Ala. 214; *Adams v. McGrew*, 2 Ala. 675; *Proctor v. Cole*, 104 Ind. 373, 4 N. E. 303; *McGowan v. Budlong*, 79 Pa. St. 470.

⁸² *Holland v. Makepeace*, 8 Mass. 418.

⁸³ *Proctor v. Cole*, 104 Ind. 373, 4 N. E. 303.

§ 609. **Same subject—Where a fraud on plaintiff.**—A defendant will not be allowed to avail himself of a claim or demand as a set-off where it would operate as a fraud on the plaintiff. Thus the rule has been applied where two persons who were each indebted to the other each gave his individual notes to the other for the full amount of his indebtedness and one of them assigned one of his notes to a third party and subsequently failed and in an action by the assignee against the maker of the note the latter pleaded as a set-off one of the notes of the assignor.⁸⁴

§ 610. **Same subject—As affected by statute or laches.**—The right of a person to set off a bill or note may be affected by statute. So where it is provided by statute that the claims of creditors shall be satisfied prior to those of a member of an insolvent firm it is decided that in an action against a special partner to recover a balance due from him to the partnership on his account with it, he is not entitled to set off a note which he holds against the firm.⁸⁵ So the statute of limitations may operate to prevent a defendant from availing himself of the right to set off a bill or note.⁸⁶ And in this connection it has been decided that the right may be barred, though the note itself is not barred.⁸⁷ Laches on the part of a defendant may also operate to preclude a set-off of a bill or note, where the laches are of such a character as would prevent a recovery upon the instrument.⁸⁸

§ 611. **Same subject—Want of title to notes will preclude.**—Where, in an action against a person, notes are pleaded by him as a set-off, it may be shown, for the purpose of defeating his right to the set-off claimed, that there is a want of title thereto in him.⁸⁹

§ 612. **Of bills or notes of bank.**—This right to set off a bill or note has been allowed in the case of an action by a bank upon commercial paper, it being held that the defendant may be entitled to a set-off of bills or notes which have been issued by the bank,⁹⁰ except in those

⁸⁴ *Barbaroux v. Barker*, 4 Metc. (Ky.) 47.

⁸⁵ *Savage v. Carney* (Tenn.), 47 S. W. 571.

⁸⁶ *Harwell v. Steel*, 17 Ala. 373; *Lyon v. Petty*, 65 Cal. 322, 4 Pac. 103.

⁸⁷ *Nason v. McCulloch*, 31 Me. 158.

⁸⁸ *Lyon v. Petty*, 65 Cal. 322, 4 Pac. 103.

⁸⁹ *Reilly v. Rucker*, 16 Ind. 303.

⁹⁰ *Coxe v. Bank*, 8 N. J. L. 172;

Bank of Niagara v. McCracken, 18 Johns. (N. Y.) 493; *Niagara Bank v. Roosevelt*, 9 Cow. (N. Y.) 409; *Blunt v. Windley*, 68 N. C. 1; *Ra-*

cases where it appears that the notes did not mature or were not purchased until after the bank had become insolvent, it being held under such circumstances that they were not so available.⁹¹ And this right of set-off has been held to exist in an action upon a note which was transferred by the bank after it became insolvent.⁹²

§ 613. **Where collateral has been given.**—Where collateral has been given as security for the payment of a note in a suit upon the note the debtor may plead as a counterclaim or set-off the actual value of any of such collateral which the creditor has converted to his own use or the value of any such security which he has released, dissipated or diverted from the purpose for which he held it.⁹³ So where the maker of a note pledged other notes with the payee as collateral security and these notes were repledged by the latter as collateral security on a loan made to him, it was held that such act of the payee amounted to a conversion and that in an action by the administrator of the payee of the principal note, it appearing that the notes given as collateral could not be produced, the maker was entitled to a judgment against the estate of the deceased for the difference between the value of the collateral notes and the sum due from her.⁹⁴ On the other hand, in an action by the maker of a note for its conversion and also the conversion of collateral given to secure it, it has been held that the defendant may set up by way of counterclaim the fact that such note was not paid at its maturity and ask for an allowance as a set-off of the amount of the note with interest.⁹⁵ And it has been held that where, by the negligence of the pledgee, the collection of collateral securities has been lost by the operation of the statute of limitations, and such statutory defense has become perfect, the pledgor may, by a counterclaim, recover the value of his collateral, even though it be not known that his debtor will, when sued on such collateral,

cine Co. Bank v. Keep, 13 Wis. 209.
Compare Hallowell & Augusta Bank v. Howard, 13 Mass. 235.

⁹¹ *Eastern Bank v. Capron*, 22 Conn. 639; *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13; *Clarke v. Hawkins*, 5 R. I. 219; *Farmer's Bank v. Willis*, 7 W. Va. 31. But see *Morse v. Chapman*, 24 Ga. 249.

⁹² *Merchants' Exchange Bank v. Fuldner*, 92 Wis. 415, 66 N. W. 691.

⁹³ *Hawley v. Brownstone*, 123 Cal. 643, 56 Pac. 468; *Jennings v. Moore*, 189 Mass. 197, 75 N. E. 214; *Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 806; *Carson v. Buckstaff*, 57 Neb. 262, 77 N. W. 670.

⁹⁴ *Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 806.

⁹⁵ *Empire Dairy Feed Co. v. Chat-ham National Bank*, 30 App. Div. (N. Y.) 476, 52 N. Y. Supp. 387.

plead the statute in defense.⁹⁶ And it has been held in this connection that a defendant may set off a note held by him and which is secured by collateral without delivering up the collateral.⁹⁷ Again, it has been decided that where an action is brought on a debt the defendant may set up by way of counterclaim bills due from the plaintiffs of which the defendant is an indorsee and holder and that this right is not defeated by the fact that the defendant holds collateral security from a third party.⁹⁸

§ 614. Usurious interest—Rule as to recoupment of.—Where usurious interest has been paid on a note it has been decided that the taking and receiving of such interest is available as a defense by way of set-off in an action brought on the instrument, by the payee or an assignee with notice.⁹⁹ And it is also held to be so available in an action upon a renewal of a note.¹⁰⁰ The right of a party to set off a payment of usury is held not to be affected by the fact that the amount so paid cannot be recovered in a separate action.¹⁰¹ And in some states the rule prevails that usury can only be recouped.¹⁰³ Nor is the right

⁹⁶ *Hawley Brothers Hardware Co. v. Brownstone*, 123 Cal. 643, 56 Pac. 468; citing *First National Bank v. O'Connell*, 84 Iowa 377, 35 Am. St. Rep. 313; *McQueen's Appeal*, 104 Pa. St. 596, 49 Am. Rep. 592; *Miller v. Gettysburg Bank*, 8 Watts (Pa.) 192, note 34 Am. Dec. 451.

⁹⁷ *Wallace v. Finnegan*, 14 Mich. 170.

⁹⁸ *McKinnon v. Armstrong Bros. & Co.*, L. R. 2 App. Cas. 531, wherein it is said by Lord Blackburn: "I think the law is tersely and accurately expressed by Lord Ormidale in the court below. He says 'I can neither find authority, nor see any good reason for holding, that the circumstance of a party having a collateral security for his debt is destructive of his right of compensation or set-off, supposing it to be otherwise well founded.'"

⁹⁹ *Georgia*.—*Wilkinson v. Wooten*, 59 Ga. 584.

Illinois.—*House v. Davis*, 60 Ill. 367.

Indiana.—*Bemmon v. Whitman*, 75 Ind. 318.

Kansas.—*First National Bank v. Turner*, 3 Kan. App. 352, 42 Pac. 936.

Michigan.—*Craig v. Butler*, 9 Mich. 21.

New York.—*Caponigri v. Altieri*, 48 N. Y. Supp. 808.

Pennsylvania.—*Thomas v. Shoemaker*, 6 Watts and S. (Pa.) 179.

Vermont.—*Lewis v. Jewett*, 51 Vt. 378.

¹⁰⁰ *McGee v. Long*, 83 Ga. 156, 9 S. E. 1107; *Harris v. Bressler*, 119 Ill. 467, 10 N. E. 188; *Morrison v. State Bank*, 3 Kan. App. 201, 43 Pac. 441; *Knapp v. Briggs*, 2 Allen (Mass.) 551.

¹⁰¹ *Mitchell v. Lyon*, 77 Ill. 525; compare *Sims v. Squires*, 80 Ind. 42.

¹⁰³ *Halcraft v. Mellott*, 57 Ind. 549; *Craig v. Butler*, 9 Mich. 21.

of a defendant to avail himself of a set-off of this character defeated by the statute of limitations.¹⁰⁴ But where a surety pays a debt of the principal upon the request of the latter, who stands by and permits him to make such payment in ignorance of the fact that it is tainted with usury, the principal will not be permitted, in an action against him by the surety on an obligation subsequently given by the former to the latter to secure him for making such payment, to avail himself of a set-off of the usury contained in the original debt. Nor can the principal, in an action by the surety on a note paid by the latter, set off against such note usurious interest which was previously paid by him to the creditor and of which the surety had no notice or knowledge.¹⁰⁵ Again, where several acceptances are given by joint makers for portions of the original obligation which contained usury, it is held that in an action on the acceptances so given there can only be a pro rata set-off of the usury which was paid by them jointly.¹⁰⁶ Usury, to be available as a set-off, must attend the same contract. So where a party indorsed a note for the balance due on a usurious account between the maker and the payee, and he subsequently took up such note and gave his own to the payee therefor, it was decided in an action against him on his own note he could not deduct the original usury.¹⁰⁷ And an usurious payment made on a note will not be available as a set-off in an action upon another note, though the parties to the action and to the notes are the same.¹⁰⁸

§ 615. **Same subject—Right as affected by federal statutes.**—It is a general rule that where a new right or offense is created by a statute which provides a specific remedy or punishment therefor the provisions of such statute are alone applicable and exclusive of any other remedy or punishment. So it has been decided that the provisions of the federal statutes specifying the remedy where payments of usurious interest have been made to national banks are exclusive and that in an action upon a note there cannot be a set-off of the interest or the penalty provided for therein.¹⁰⁹ But where a claim for usurious in-

¹⁰⁴ *Union National Bank v. Fraser*, 63 Miss. 231.

¹⁰⁵ *Blakely v. Adams*, 113 Ky. 398, 68 S. W. 473.

¹⁰⁶ *Deposit Bank v. Robertson*, 17 Ky. Law R. 1252, 34 S. W. 23.

¹⁰⁷ *Craig v. Butler*, 9 Mich. 21.

¹⁰⁸ *Ewing v. Griswold*, 43 Vt. 400; *Barnet v. Bank*, 98 U. S. 555.

¹⁰⁹ *Haseltine v. Cent. Nat. Bank*, 183 U. S. 132, 22 Sup. Ct. 50, 46 L. Ed. 118; *Stephens v. Monongahela Bank*, 111 U. S. 197; *Driesbach v. Nat. Bank*, 104 U. S. 52; *Barnet v. Bank*, 98 U. S. 555; *Danforth v. Bank*, 1 C. C. A. 62, 48 Fed. 271; *Lloyd v. First Nat. Bank*, 5 Kan. App. 512, 47 Pac. 575; *Nat. Bank*

terest has been reduced to a judgment it has been decided that the provisions of the statute do not apply and that the judgment is available as a set-off.¹¹⁰

§ 616. **Right of set-off generally as affected by statute.**—Statutes have been passed in several states in regard to the right of set-off either specifying what is so available in actions generally or having reference particularly to actions upon commercial paper. Where statutes of this character are in existence recourse thereto should be had in order to determine what may be available in actions upon such paper. So in some states it has been provided that, except where paper is negotiable, set-offs against the payee may also be available against an assignee or indorsee until notice of transfer.¹¹¹ Again an exception has been made in the case of bona fide holders of such paper before maturity.¹¹² In Mississippi it has been held that, under the statute of that state, there may, in an action on an indorsed bill or note, be a set-off of a claim or demand which was acquired prior to notice of the transfer.¹¹³ So in New York it has been decided under the code of Civil Procedure permitting a counterclaim to be interposed if it be "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action,"¹¹⁴ that it is not essential in an action upon contract that the counterclaim should also be a cause of action upon contract, provided it arises out of the contract or transaction set forth in the complaint or is connected with the cause of action, and it may therefore be a cause of action sounding in tort.¹¹⁵ And it has been declared in a case in Florida that under the statutes

of *Fayette Co. v. Dushane*, 96 Pa. St. 340 (overruling *Lucas v. The Bank*, 28 P. F. Smith 228; *Overhalt v. The Bank*, 1 Norris (Pa.) 490; *Comanche Nat. Bank v. Dabney et al.* (Tex. Civ. App.), 44 S. W. 413. But see *Montgomery v. Albion Nat. Bank*, 50 Neb. 652, 70 N. W. 239; *Lanham v. First Nat. Bank*, 46 Neb. 663, 65 N. W. 786; *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381, 64 N. W. 1073; *National Bank of Auburn v. Lewis*, 75 N. Y. 516, 31 Am. Rep. 484 (reversing 10 Hun. (N. Y.) 468); *National Bank of*

Madison v. Davis, 8 Biss. (U. S.) 100, Fed. Cas. No. 10,038.

¹¹⁰ *Lloyd v. First National Bank*, 5 Kan. App. 512, 47 Pac. 575.

¹¹¹ *Vann v. Marbury*, 100 Ala. 438, 14 So. 273; *Brown v. Scott*, 87 Ala. 453, 6 So. 384; *Prather v. Weissiger*, 10 Bush. (Ky.) 117; *Bank v. Wood*, 142 Mass. 563, 8 N. E. 753.

¹¹² *Drexler v. Smith*, 30 Fed. 754.

¹¹³ *Brown v. Bank*, 62 Miss. 754; *Phipps v. Shegogg*, 30 Miss. 241.

¹¹⁴ § 501 Code Civ. Proc

¹¹⁵ *Kneeland v. Pennell*, 96 N. Y. Supp. 403.

of that state¹¹⁶ all debts and demands naturally existing between the parties at the commencement of the action are proper subjects of set-off, but independent demands in no way connected with the transaction which forms the basis and constitutes the cause of action of plaintiff and not mutually existing between the parties to the action at the time of the commencement thereof, can not be set off in an action on a note.¹¹⁷ The right of a person to set off a claim against a note or bill may also be prevented by the operation of the statute of limitations.¹¹⁸ It is, however, decided in this connection that if the right is not barred at the time of the commencement of the action, a set-off will be available though the period specified by the statute may have elapsed before the answer was filed in which it was set up.¹¹⁹

§ 617. **Waiver of right to set-off.**—The right of a party to avail himself of a set-off may be waived by him. So it is decided that if upon notice of the assignment of a note being given to the maker, he promises to pay the note to the assignee, this will, in law, amount to a waiver of all right to the maker to plead in offset to the note any demand, which may have accrued to him against the payee prior to the assignment, such a promise being declared not to be a mere *nudum pactum*.¹²⁰ And a party may also be precluded from availing himself of a set-off where he has knowledge that a person is about to purchase a note but does not give the intending purchaser any notice thereof.¹²¹ But the failure of a defendant to avail himself of a right to a set-off prior to a verdict or judgment against him does not necessarily operate as a waiver of such right or estop him from subsequently availing

¹¹⁶ § 1069 Rev. Stat. 1892, § 1461 Gen. Stat. 1906.

¹¹⁷ Hooker v. Forrester (Fla., 1907), 43 So. 241.

¹¹⁸ Shields v. Stark (Tex. Civ. App.), 51 S. W. 540.

¹¹⁹ Walker v. Fearhake, 22 Tex. Civ. App. 61, 52 S. W. 629.

¹²⁰ Stiles v. Farrar, 18 Vt. 444. The court said: "This promise, if binding upon the defendant, does, in the judgment of the court, amount to an acquiescence in the assignment and a waiver of all right or claim in the defendant to interpose an offset to the note. King v. Fowler,

16 Mass. 398. But it is objected that there was no consideration for the promise, that it was a mere *nudum pactum*, and therefore not obligatory upon the defendant. This objection is not well founded. It is settled by numerous adjudged cases that the assignment of a debt for a valuable consideration, with notice to the debtor, is a sufficient consideration to sustain an express promise to pay the debt." Per Kellogg, J. See Wiggin v. Damrell, 4 N. H. 69.

¹²¹ King v. Fowler, 16 Mass. 397. See Allee v. Little, 5 N. H. 277.

himself thereof.¹²² So where the payee of a due bill, at the time of his bringing suit thereon and rendition of the verdict, was solvent, but subsequently became insolvent, it was decided that a court of equity would restrain the collection of the judgment and compel the allowance of any set-off which the judgment debtor might have against the judgment creditor, though such set-off existed when suit was brought and judgment rendered, where it appeared that the right thereto was not litigated in that suit.¹²³

Subdivision II.

AVAILABILITY IN RESPECT TO PARTICULAR PARTIES AND HOLDERS OTHER THAN MAKER OR DRAWER.

Sec.	Sec.
618. Availability in respect to parties generally.	630. Same subject—Where party sues in his sole right—Set-off of joint liability.
619. Acceptor.	631. Same subject—Right as affected by statute.
620. Administrators and executors.	632. Same subject—Principal and surety.
621. Agents and brokers.	633. Same subject—Joint and several note.
622. Agents continued—Collecting banks.	634. Partners.
623. Assignees and indorsees—What available generally.	635. Purchasers after maturity.
624. Assignees and indorsees—What available generally continued.	636. Purchasers after maturity—Continued.
625. Assignees and indorsees—Statute as to set-off against indorsees.	637. Purchasers after maturity—Set-off arising out of other transactions.
626. Bankrupts and insolvents.	638. State—No right of set-off against.
627. <i>Bona fide</i> purchasers—General rule as to.	639. Sureties.
628. Husband and wife.	640. Sureties—Set-off of damages due to principal.
629. Joint creditors and debtors.	

§ 618. **Availability in respect to parties generally.**—Where an action is brought upon a note in the name of the payee, if it appears that a third person is beneficially interested in the debt, any defense or set-off which the defendant may have against such third person

¹²² See *Baskerville v. Brown*, 2 Burrows 1229.

¹²³ *Chicago, Danville & Vincennes R. R. Co. v. Field*, 86 Ill. 270.

will be available, though the action is brought in the name of the one who has the legal title to the note.¹²⁴ So where a note is executed to a person as guardian of an insane person and a suit is commenced upon the note by the guardian in his own name it has been decided that the defendant may plead by way of set-off a debt due him from the insane ward.¹²⁵ And where a factor, acting for the principal, but concealing the principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal, and the purchaser of goods from one who represents himself as the owner, but who is in reality a mere agent, where there are no circumstances which would indicate to a reasonable man that the agency existed, or which would induce him to make inquiry, may set-off the note of such agent, held by him, in an action by the principal for the purchase price of the goods.¹²⁶ Again, where a note is made to one "as assignee" it has been decided that in an action upon such instrument against the maker the latter will be entitled to a set-off of a claim assigned to him for rent during the time the payee was carrying on the assigned business.¹²⁷ And where an action was brought on an account for the use of another it was held that a note by the plaintiff to the one for whose use the suit was brought and which the defendant acquired before notice of the assignment was available as a set-off.¹²⁸ But in an action upon a sealed note drawn by the defendant and payable to the plaintiff as "agent of the creditors" of

¹²⁴ *Farwell v. Tyler*, 5 Clarke (Iowa) 535; *Ward v. Martin*, 3 Mo. 19.

¹²⁵ *Nickerson v. Gilliam*, 29 Mo. 456. The court said: "It is always admissible in an action by or against a trustee to plead a set-off of money due to or from the *cestui que trust*. It is made the duty of the guardian to prosecute and defend all actions instituted by or against his insane ward. His relation to the ward is a fiduciary one, and he is to all intents and purposes a trustee, having, subject to the supervision of the courts, the entire control and management of his ward's estate. Now, although the statement in the note of the fiduciary character of the plain-

tiff is not conclusive evidence of the fact, or that a trust attaches with respect to the note, yet the plaintiff admits the fact of guardianship, and if the defendant can show that the transaction upon which the suit is founded was one in which the ward had the beneficial interest, as that the note was given, for example, for property of the ward, as the answer states, why may not the defendant have the benefit of his set-off without being driven to another action to recover it, when the result would have been the same?" Per Ewing, J.

¹²⁶ *Pollacek v. Scholl*, 51 App. Div. (N. Y.) 319, 64 N. Y. Supp. 979.

¹²⁷ *Tierney v. Peerless Shoe Co.*, 68 N. Y. Supp. 392, 33 Misc. R. 803.

¹²⁸ *Smith v. Ewer*, 22 Pa. St. 116.

a third person, it has been held that the defendants cannot set off a sealed bill drawn by such third person in favor of the plaintiff and assigned to them before the commencement of the suit.¹²⁹ Again in an action by the indorser of a note against prior indorsers it is held that there cannot be a set-off against him of an indebtedness due from him to a corporation which was not a party to the note.¹³⁰ And where a note is made payable in a bank, it is decided that the maker thereby authorizes the bank to advance on his credit to the owner of the note the sum expressed on its face and that it would be a fraud upon the bank to set up off-sets against this note in consequence of any transactions between the parties.¹³⁰

§ 619. **Acceptor.**—The acceptor of a bill cannot inquire into the consideration between the drawer and payee or between the latter and a subsequent indorsee, and in an action by such indorsee against the acceptor the latter cannot avail himself as a set-off of a debt due from the indorsee to the indorser or payee. And likewise in an action by the payee an acceptor cannot set up a debt due from the latter to the drawer.¹³² And in an action by the holder of a certified check against the banker upon whom it is drawn the latter cannot set off a debt due to him from such holder.¹³³ But in a case in Kentucky in which it appeared that the drawer of a bill had died insolvent, it was decided in an action by the indorser who had paid the bill against the acceptor, who alleged that he had accepted such bill for the sole benefit of the drawer of the bill, who had died insolvent, that a plea of set-off of an indebtedness due from the indorser to the estate of the drawer should be allowed.¹³⁴

§ 620. **Administrators and executors.**—In an action brought by an executor in his own name upon a note given to him as executor for a debt due to the testator at the time of his decease it has been decided that the defendant cannot set off a demand which existed against the testator at the time of his death.¹³⁵ And it has been held that where an estate is notoriously insolvent, a note which was not

¹²⁹ Stryker v. Beekman, 8 N. J. L. 209.

¹³⁰ Russ v. Sadler, 197 Pa. St. 51, 46 Atl. 903.

¹³¹ Mandeville v. Union Bank of Georgetown, 9 Cranch (U. S.) 9, 3 L. ed. 639.

¹³² Smith v. Adams, 14 La. Ann. 409.

¹³³ Brown v. Leckie, 43 Ill. 497.

¹³⁴ Bowman v. Wright, 7 Bush (Ky.) 375.

¹³⁵ Merritt v. Seaman, 6 N. Y. 168.

due at the time of the testator's death cannot be set off against an action brought by the administrator to recover a bank deposit, though in this case it was held that if the estate were solvent, the fact that the note was not so due would not defeat the right where it became due before suit was commenced.¹³⁶ So in an action by an administrator a defendant is not entitled to set off a note which was purchased by him after the testator died insolvent.¹³⁷ Nor, in an action by an administrator against one for a debt which was due the intestate before his death, can the defendant set off the amount of a payment made by him as surety for the intestate after his death.¹³⁸ And where a note was given to an executor for the purchase of the deceased's interests in a partnership, it was decided in an action on the note against the maker that the latter could not set up a prior partnership account which was already barred by statute.¹³⁹ Again, where an action is brought by an administrator to recover for property which was purchased from him in his representative capacity it is decided that the defendant is not entitled to set off a note made to him by the testator, as to allow such a set-off would operate to give the defendant a preference and priority over the creditors of the estate.¹⁴⁰ So where lands belonging to an estate were sold by the administrator

¹³⁶ *Bosler v. Exchange Bank*, 4 Pa. St. 32, wherein it was said by the court: "A set-off is allowed in a suit brought either by or against executors or administrators, and the fact that the debt proposed to be set off was not due at the time of the death of the testator or intestate, would make no difference if due when suit was commenced, and the estate be solvent. But is a set-off allowable when the estate is notoriously insolvent? We think not, for the simple reason that it would disturb the course of administration. At the death of the testator or intestate the executor or administrator is the trustee for the creditors, whose right to the assets at that time becomes fixed and determined. Nothing that the executor or administrator can do can alter the course of distribution. If the estate be solvent, the creditors are entitled to

receive their whole debt; if otherwise they have a vested right to a *pro rata* dividend. It is an answerable objection to the decision of the court, that what they assert will be that one creditor may receive the whole amount of his debt, whereas other creditors will receive a *pro rata* only, lessened by the sum which he has been permitted to set-off; this we conceive is not in accordance with justice, for equality is equity, nor consistent with authority." Per Rogers, J.

¹³⁷ *Irons v. Sayles*, 5 R. I. 264.

¹³⁸ *Union v. Union's admr.*, 8 Grat. (Va.) 1.

¹³⁹ *Grew v. Burditt*, 9 Rich. (Mass.) 265.

¹⁴⁰ *Bizzell v. Stone*, 12 Ark. 378; *Bales v. Hyman*, 57 Miss. 330; *Mills v. Lumpkin*, 1 Kelly (Ga.) 511; *Ransom v. McClees*, 64 N. C. 17.

and a note therefor was given to him it was held that the defendant was not entitled to set off a claim which he purchased from the estate, expecting to use it as a set-off.¹⁴¹ But where a legatee borrowed from executors the money of their testator and gave his note to them for the amount of the loan, it was held that, in an action upon the note, brought by an assignee who took it after maturity, the defendant could set up as a counterclaim against such note the amount due him from the estate of the deceased.¹⁴²

§ 621. **Agents and brokers.**—In an action on a note payable to a person named or bearer, the production of the note by the plaintiff, not being the payee named, is held to be sufficient evidence of his title, although he is the general agent of the payee, who is alleged in the answer to be the payee of the note, and the holder of such a note takes it subject to no equities or right of set-off which the maker would have against the original payee.¹⁴³ And where a note

¹⁴¹ *Floyd v. Rust*, 58 Tex. 503.

¹⁴² *Whedlee v. Reddick*, 79 N. C. 521.

¹⁴³ *Pettee v. Prout*, 3 Gray (Mass.) 502. It was said in this case: "The plaintiff in this case brings his action as bearer of a note made by the defendant to the Cheshire Iron Works or bearer. He therefore claims as the holder of a negotiable promissory note, payable on time, and not dishonored; and if he establishes this title by proof he is entitled to the same privileges and immunities as an indorsee, having taken a note by indorsement in the course of business, before it has become due. He is not subject to any equities as between the promisor and the original payee, nor to the set-off of any debt, legal or equitable, which the promisor may afterwards acquire. *Wheeler v. Guild*, 20 Pick. (Mass.) 545. By giving a note payable to bearer at a future day, which is strictly a negotiable note, the defendant agreed to pay the amount to any person to whom it should be transferred, without

claiming to set off any demand which he then had or might have against the promisee. It is in this respect like mercantile notes (in use, we believe in some of the states where the law allows set-offs and other equitable defenses, even against indorsees of promissory notes) payable without defalcation, thereby meaning, by force of the contract itself, to bind the maker to pay the amount absolutely to the regular holder, and renouncing any benefit of set-off or other equitable defense against the payee. Then the other question is, as to the proof. Where the plaintiff brings the note declared upon in his own hand, and offers it in evidence, this is not only evidence that he is the bearer, but also raises a presumption of fact that he is the owner; and this will stand as proof of title, until other evidence is produced to control it. Ordinarily, such bearer, relying on the general presumption, has no means of proving the transfer of the note to himself. The defendant contends that, as the plaintiff was the general agent of

is made and delivered to a broker "for sale or advance" and it is purchased by one who pays therefor by advancing the amount by a credit given to the broker, the maker is not entitled in an action against him to a set-off of the amount of the claim alleged to be due from the holder to the broker.¹⁴⁴ And where bills are remitted by one party to another to be discounted and applied to a particular purpose, and the party transmitting them becomes bankrupt before the proceeds are received by the parties to whom they are sent, it has been decided that the latter will not be entitled to set off the debt of the former against his assignee.¹⁴⁵ But where the holder of a note that is made payable to himself or bearer puts it into the hands of an agent for collection, the fact that the action thereon is brought in the name of the agent does not preclude the maker from availing himself of any set-off which he might have against the principal, but he has the same right of set-off as if the action had been brought in the name of the principal.¹⁴⁶

§ 622. Agents continued—Collecting banks.—An indorsement "for collection" is held to convey no title to the paper, but is to be regarded as a notice to all persons subsequently dealing with the paper that the person indorsing it "for collection" did not part with the title or intend to transfer the ownership of the proceeds to another. The legal import and effect of such an indorsement is to notify the subsequent indorsee that the original indorser is the owner of the draft, that the one to whom it is indorsed "for collection" is merely his agent for collection and that a qualified title for this purpose only and no other is in such indorsee.¹⁴⁷ So where a bank to which a draft was indorsed "for collection" failed after again indorsing it to a third party who was to collect it, it was held that the collecting agent could not set off against the draft a balance against the bank to which it was originally indorsed "for collection."¹⁴⁸ But where a bank to

the corporation to whom the note was payable, and as such, had the custody of all their notes, his possession may have been the possession of the corporation. But we think this fact alone is not sufficient to rebut the general presumption." Per Shaw, J.

¹⁴⁴ Carman v. Harrison, 13 Pa. St. 158.

¹⁴⁵ Buchanan v. Findley, 9 Barn. & C. 738.

¹⁴⁶ Royce v. Barnes, 11 Metc. (Mass.) 276.

¹⁴⁷ Central Railroad Co. v. First National Bank of Lynchburg, 73 Ga. 383; Cecil Bank v. Farmers' Bank, 22 Md. 148.

¹⁴⁸ Central Railroad Co. v. First National Bank, 73 Ga. 383.

which a note is indorsed in blank subsequently indorses it to another bank "for collection and credit" without any notice that it does not belong to the former and there is a course of dealings between such banks by which there is a mutual crediting of proceeds of all papers sent to each by the other for collection, it has been determined that the bank to which it was so transmitted may have a lien thereon.¹⁴⁹

§ 623. **Assignees and indorseees—What available generally.**—Where an action is brought against the maker of a note by an assignee thereof it is held that a claim which the maker may have had against the payee before he received notice of the assignment is available by way of set-off against the assignee.¹⁵⁰ So where a note not payable to order was for a valuable consideration assigned to third persons, and an action brought for their benefit in the name of the payee, it was held that the maker might set-off a debt due to him at the time or the assignment from the payee.¹⁵¹ And an amount wrongfully withheld by the payee of mortgage coupon bonds has been held available as a set-off in an action by the assignee against the maker,¹⁵² as has also the amount of a time deposit made with the payee and which became due before notice of the assignment.¹⁵³ And where it appears that the assignee or indorsee of a note by whom an action thereon is brought holds the paper in trust for the payee the maker is entitled to a set-off of any claim or demand which would be available against the payee.¹⁵⁴ And this is the rule where an action is brought by a collecting agent to whom the note was indorsed.¹⁵⁵ So also where a note is assigned by the payee for the purpose of avoiding the pay-

¹⁴⁹ *Bank of Metropolis v. Bank of New England*, 1 How. (U. S.) 234; *Vickery v. Assoc.*, 21 Fed. 773. And see *Wood v. Bank*, 129 Mass. 358. Compare *Hackett v. Reynolds*, 114 Pa. St. 328, 6 Atl. 689.

¹⁵⁰ *Huber v. Egner*, 22 Ky. Law Rep. 1800, 61 S. W. 353; *Sanborn v. Little*, 3 N. H. 539.

¹⁵¹ *Sanborn v. Little*, 3 N. H. 539. The court said: "The interest of the assignee of a chose in action being merely equitable, he is to stand in the situation of the assignor, at the time of the assignment, and subject to every defense, which might have been set up against the assignment."

Per *Richardson, J.*, citing *Green v. Hatch*, 12 Mass. 195.

¹⁵² *Huber v. Egner*, 22 Ky. Law Rep. 1800, 61 S. W. 353.

¹⁵³ *Huber v. Egner*, 22 Ky. Law Rep. 1800, 61 S. W. 353.

¹⁵⁴ *Connecticut*.—*Hillhouse v. Adams*, 57 Conn. 152, 17 Atl. 698.

Indiana.—*Henry v. Scott*, 3 Ind. 412.

Minnesota.—*Felsenthal v. Hawks*, 50 Minn. 178, 52 N. W. 528.

Missouri.—*McDonald v. Harrison*, 12 Mo. 447.

England.—See *Thornton v. Maynard*, L. R. 10 C. P. 695.

¹⁵⁵ *Lewis v. Sheamen*, 28 Ind. 427.

ment of debts or obligations, it is held that the maker may avail himself of any set-off which he would have against the payee,¹⁵⁶ as is also the case where the assignment was made for the purpose of avoiding a set-off.¹⁵⁷ And if the surety for a debt pay the same before it is due it has been held that the payment will, after the debt has become due, be a legal set-off against his note payable to the principal and held by him or against such note in the hands of an assignee, if notice of the assignment was not given to the maker before the payment became a valid demand against the payee.¹⁵⁸ Again, where an accommodation indorser is sued alone upon the indorsement it is held that he has the same right as the maker to the benefit by way of set-off or rebatement of the forfeiture given by statute in case of usury.¹⁵⁹

§ 624. Assignees and indorseees—What available generally, continued.—It may be stated as a general rule that in an action by an indorsee or assignee against the maker the latter cannot avail himself of a set-off which he may have against an intermediate indorser or holder.¹⁶⁰ And it is decided that dividends which have accrued upon the bank stock of an insolvent and deceased stockholder are not available as a set-off to an indorsement of his which is held by the bank.¹⁶¹ And where a party who had borrowed money of an insurance company gave an unconditional note to a third party, by whom it was indorsed to the company for the accommodation of the maker, it was held in an action against the indorser by the company that there could not be a set-off of the claims of the maker against the company on the policy of insurance.¹⁶² And where a party has given several different obligations, some of which are held by the obligee and some by an assignee, and a right of set-off exists to some extent in favor of the debtor, but such right of set-off is general and not applicable by special agreement to any of the obligations in particular, it has been

¹⁵⁶ Eason v. Locherer, 42 Tex. 173.

¹⁵⁷ Young v. Rodes, 5 T. B. Mon. (Ky.) 489.

¹⁵⁸ Jackson v. Adamson, 7 Blackf. (Ind.) 597.

¹⁵⁹ National Bank of Auburn v. Lewis, 75 N. Y. 516, 31 Am. Rep. 484.

¹⁶⁰ Goldthwaite v. National Bank, 67 Ala. 549; McKenzie v. Hunt, 32 Ala. 494; Kennedy v. Manship, 1 Ala. 43; Stocking v. Toulmin, 3 Stew. & P. (Ala.) 35; Savage v.

Laclede Bank, 62 Miss. 586; Hooper v. Spicer, 2 Swan. (Tenn.) 494. Compare Baxter v. Little, 6 Metc. (Mass.) 7, 39 Am. Dec. 707; Harris v. Burwell, 65 N. C. 584.

See § 627 herein on *bona fide* holders.

¹⁶¹ Brent v. Bank, 2 Cranch C. C. (U. S.) 517, Fed. Cas. No. 1834.

¹⁶² St. Louis Perpetual Ins. Co. v. Homer, 9 Metc. (Mass.) 39.

held such set-off will not be available against any assignee while the original creditor still holds debt enough to extinguish the same, though if such set-off exceeds the sum remaining due to the original creditor the oldest assignee has the best equity.¹⁶³

§ 625. Assignees and indorsees—Statute as to set-off against indorsee.—Where it is provided by statute that in a suit by an indorsee against the worker of a promissory note payable on demand “any matter shall be deemed a legal defense, and may be given in evidence accordingly, which would be a legal defense to a suit on the same note, if brought by the promisee,” it has been decided that the maker of such a note is entitled in an action by an indorsee to set-off a judgment recovered by him against the promisee.¹⁶⁴

§ 626. Bankrupts and insolvents.¹⁶⁵ Where the holder of a note, who is a debtor of the maker and is insolvent, brings an action upon the note the maker will be permitted to set off a debt due to him from such holder.¹⁶⁶ And it has been decided that there may be a set-off of bills which were purchased after the insolvency of the drawer.¹⁶⁷ Again, where an assignment in insolvency was made by the principal debtor it was held that a surety who had, after such time, paid a note

¹⁶³ *Anderson v. Mason*, 6 Dana (Ky.) 217.

¹⁶⁴ *Lewis v. Brooks*, 9 Mete. (Mass.) 367, construing Mass. St. 1839, c. 121, § 1. The court said: “This statute is founded upon the principle of the law merchant, that he who takes a bill or note, after it is due, takes it subject to all the objections and equities to which it was liable in the hands of the person from whom he takes it; and the question is, whether the provision of the statute is to be restricted to a defense which is either payment or a technical bar to a recovery, or whether it is to receive a liberal construction, so that the defendant may avail himself of a defense in the nature of a set-off, which he could do if the original payee of the note was the plaintiff.

* * * We think that any matter which would constitute a defense, by way of set-off, where the payee is plaintiff, may also be given in evidence by the promisor of a note payable on demand, when an indorsee is plaintiff; and this, whether such defense be made by showing payment, or by way of set-off; and that the words ‘legal defense’ are not to be restricted to the case of payment or of a technical bar.” Per Hubbard, J.

¹⁶⁵ See U. S. Bankruptcy Act of 1898, § 68, 4 Anne, c. 17.

¹⁶⁶ *Bernstein v. Coburn*, 49 Neb. 734, 68 N. W. 1021.

¹⁶⁷ *Colyer v. Craig*, 11 B. Mon. (Ky.) 73; *McKinnon v. Armstrong*, L. R. 2 App. Cas. 531. But see *Oyster v. Short*, 177 Pa. St. 589, 35 Atl. 686.

which was protested before was entitled to set it off.¹⁶⁸ So where the payee of a note transferred it after he became bankrupt it was held that in an action against the two sureties by the indorsee there could be a set-off of a debt due to one of the sureties.¹⁶⁹ But it has been decided that where a bank cashier who is a debtor to the bank purchases a claim against it after its insolvency he is not entitled to set off such claim in an action against him on his note.¹⁷⁰ And it is also held that one who has purchased a note after maturity cannot set it off in an action against him by the assignee of an insolvent.¹⁷¹ So again where an action is brought against several makers of a note by the receiver of an insolvent bank it is held that notes which were made by the bank and a third party, which are held by one of the makers, and which were not due when the receiver was appointed are not available.¹⁷²

§ 627. **Bona fide purchasers—General rule as to.**—It is a general rule that where an action is brought against the maker of commercial paper by one who is a holder of such paper in due course, for value and without notice, such holder is not subject to a set-off which the maker may have against the payee of the instrument.¹⁷³ So a

¹⁶⁸ *Morrow v. Bright*, 20 Mo. 298.
But see *Nettles v. Huggins*, 8 Rich.
L. (S. C.) 273.

¹⁶⁹ *Bank of Mobile v. Poelnitz*, 61
Ala. 147. See also, *Colyer v. Craig*,
11 B. Mon. (Ky.) 73.

¹⁷⁰ *Dyer v. Sebrall*, 135 Cal. 597,
67 Pac. 1036.

¹⁷¹ *Northern Trust Co. v. Hiltgen*,
62 Minn. 361, 64 N. W. 909; *Anderson v. Van Alen*, 12 Johns. (N. Y.)
343; *Johnson v. Bloodgood*, 1 Johns.
Cas. (N. Y.) 51, 2 Caines 303.

¹⁷² *Balch v. Wilson*, 25 Minn. 299.

¹⁷³ *United States v. Oats v. Bank*,
100 U. S. 239; *Murphy v. Arkansas*
& L. Ld. & Improvement Co., 97
Fed. 723; *Drexler v. Smith*, 30 Fed.
754.

Alabama.—*Bostick v. Scruggs*, 50
Ala. 10; *Sawyer v. Hill*, 12 Ala. 575.

Indiana.—*Proctor v. Baldwin*, 82
Ind. 370.

Iowa.—*Council Bluffs Iron Works*
v. Cuppey, 41 Iowa 104.

Kansas.—*Fireman v. Blood*, 2
Kan. 496.

Kentucky.—*Bank of Martin v.*
Cassedy, 103 Ky. 363, 45 S. W. 110;
Carothers v. Richards, 17 Ky. Law
Rep. 42, 30 S. W. 211; *Stevens v.*
Gregg, 89 Ky. 461, 12 S. W. 775.

Louisiana.—*Pavey v. Stauffer*, 45
La. Ann. 353, 12 So. 512.

Massachusetts.—*Pettee v. Prout*,
3 Gray (Mass.) 502.

New Hampshire.—*Leavitt v. Pea-*
body, 62 N. H. 185.

New Jersey.—*Price v. Keen*, 40 N.
J. L. 332; *Cumberland Bank v.*
Hann, 18 N. J. L. 222; *Tillou v.*
Britton, 9 N. J. L. 120.

New York.—*Farmer's Bank of*
Saratoga Co. v. Maxwell, 32 N. Y.
579; *Van Duzer v. Howe*, 21 N. Y.
531; *Flour City National Bank v.*

set-off which the acceptor may have against the drawer of a bill is not, as a general rule, available against one who is such a holder.¹⁷⁴ Nor can the maker of a note, in an action against him by the payee for the use of a bona fide holder, avail himself as a set-off of any claim or demand which he may have against intermediate parties.¹⁷⁵ Nor is an accommodation indorser who has paid a note to a *bona fide* purchaser subject, in an action against the maker, to a set-off which the latter may have against the payee. And this is held to be the rule though the indorser may have had knowledge of such set-off at the time he indorsed the note.¹⁷⁶

§ 628. **Husband and wife.**—Where the husband has by law the right to treat commercial paper given to the wife during her coverture, as joint property or as several, and he chooses to treat a note so given as several in an action upon the note by him alone, it is held that it will be subject to a set-off of debts due from him, but not to a debt of his wife before marriage.¹⁷⁷ Again, in an action by a hus-

Trader's National Bank, 35 Hun. (N. Y.) 241; Barlow v. Myers, 3 Hun (N. Y.) 720, 6 Thomp. & C. 183, reversed in 64 N. Y. 41, 21 Am. Rep. 582; Petrie v. Miller, 57 App. Div. (N. Y.) 17, 67 N. Y. Supp. 1042; McGrath v. Pitkin, 56 N. Y. Supp. 398; Brookman v. Metcalf, 5 Bosw. (N. Y.) 429, aff'd 32 N. Y. 591; Gleason v. Moen, 2 Duer (N. Y.) 639; Smith v. Van Loan, 16 Wend. (N. Y.) 659; Hendricks v. Judah, 1 Johns. (N. Y.) 319.

North Carolina.—United States Bank v. McNair, 116 N. C. 550, 21 S. E. 389; Tredwell v. Blount, 86 N. C. 33; Blackner v. Phillips, 67 N. C. 340.

Ohio.—Loomis v. Eagle Bank of Rochester, 1 Disn. (Ohio) 285.

Pennsylvania.—Young v. Shriner, 80 Pa. St. (30 P. F. Smith) 463.

Texas.—Selkirk v. McCormick, 33 Tex. 136; Smith v. Turney, 32 Tex. 143.

Vermont.—Sherwood v. Francis, 11 Vt. 204.

Wisconsin.—Patterson v. Wright, 64 Wis. 289, 25 N. W. 10.

See as to bona fide holders generally, chaps. xx and xxi herein.

¹⁷⁴ *In re Agra & Masterman's Bank*, L. R. 2 Ch. App. 391.

¹⁷⁵ Sykes v. Lewis, 17 Ala. 261.

¹⁷⁶ Barker v. Parker, 10 Gray (Mass.) 339.

¹⁷⁷ Burroughs v. Moss, 10 Barn. & C. 558, wherein it was said: "The form of the security gave the husband a right to treat it as joint property or as several; and if he chose to treat it as several, he might deal with it as his own, and the consequences of his so treating it would be to let in by way of set-off to any claim by him any debts due from him. If on the other hand, he elected to treat it as a joint property of himself and his wife, in her right, he might let in debts due from her in her own right, but it is clear that both classes of debts could not be let in. It appears that in the present case he elected to

band and wife upon a note executed to her while she was unmarried, it has been decided that a claim which constitutes a liability of the husband only is not available as a set-off against the note.¹⁷⁸ And in an action upon a check against the drawer a claim or demand due to the latter's wife from the payee is not available as a set-off.¹⁷⁹ So where a note was made to a married women for money belonging to her before her marriage it was held that it could not be set off in an action against the husband where it was provided by statute that the personal property of a wife at the time of her marriage or acquired during coverture should remain hers as fully as if she were unmarried.¹⁸⁰ And a claim for medical services rendered to a deceased husband is chargeable to his estate and cannot be set off against a note owned by the wife.¹⁸¹ And where certain notes were transferred by the payee to his wife before maturity and the evidence failed to show that this was done to avoid a defense of an account for labor performed, goods furnished and money paid and the account had no necessary connection with the indebtedness sued on, it was decided, in an action on the notes by the payee's wife, that the court properly denied the application of the account on the notes by way of set-off.¹⁸² Again, it is held in an action by the pledgee of a note against the maker that the latter cannot set off a judgment held by him against the wife of the payee.¹⁸³ It has, however, been decided that where a note to the wife is merged in a judgment recovered in the name of the husband, a set-off against the husband will be available.¹⁸⁴

§ 629. **Joint creditors and debtors.**—It is a general rule where an action is brought by the joint payees of a note that, in the absence of some agreement or understanding of the parties rendering it available, there cannot be a set-off of an individual debt of one of the payees on the ground of a want of mutuality.¹⁸⁵ But the rule is otherwise

treat the note as his separate property, for he indorsed it over to the plaintiff. That mode of dealing with it leads to the same consequences as if the note had been given to him alone, and consequently the debt due from his wife before her marriage can not be set off." Per Bayley, J.

¹⁷⁸ *Smith v. Johnson*, 5 Harr. (Del.) 40; *Green v. Carson*, 4 Metc. (Ky) 76.

¹⁷⁹ *Dolph v. Rice*, 21 Wis. 590.

¹⁸⁰ *McCarty v. Mewhinney*, 8 Ind. 513.

¹⁸¹ *Hollandsworth v. Squires* (Tenn.), 56 S. W. 1044.

¹⁸² *Cripps v. Buffington* (Iowa 1906), 108 N. W. 231.

¹⁸³ *Shields v. Stark* (Tex. Civ. App.), 51 S. W. 540.

¹⁸⁴ *Gilmore v. Bailey*, 12 La. Ann. 562.

¹⁸⁵ *Hamill v. First Nat. Bank*, 14

where the parties have by an express or implied agreement made it available.¹⁸⁶ So where the joint holders of a mortgage bring an action of foreclosure, there cannot be a set-off of the note of one of them.¹⁸⁷ Again, in an action against a person upon his individual debt, it is decided that a joint note executed by him as principal and another as surety cannot be set off.¹⁸⁸ But where a note is held by two persons for one of them it is held that in an action by both of them upon the note an individual debt due to the maker from the one for whom the note is held may be set off.¹⁸⁹ Again, where an action is brought against the joint makers of a note, who are both principals, a set-off in favor of one of such makers is not, as a general rule, available.¹⁹⁰ And it has also been decided that such a set-off is not available in an action against two or more joint and several makers of a note.¹⁹¹

§ 630. Same subject—Where party sues in his sole right—Set-off of joint liability.—The maker of a note is not, in an action against him, entitled to set off a debt which is due to himself and another jointly.¹⁹² And in an action by one who sues in his sole right his liability jointly with another on a joint note is not available as a set-off.¹⁹³ It has, however, been determined that this rule does not apply where the co-maker is dead,¹⁹⁴ or where the co-maker was the

Colo. 1, 22 Pac. 1094; Wulschmer v. Sells, 87 Ind. 71; Walker v. Hall, 66 Miss. 390, 6 So. 318. But see Miller v. Kreiter, 76 Pa. St. 78.

¹⁸⁶ Hamill v. First National Bank, 14 Colo. 1, 22 Pac. 1094.

¹⁸⁷ Williamson v. Fox, 30 N. J. Eq. 488.

¹⁸⁸ Enix v. Hays, 48 Iowa 86.

¹⁸⁹ Forkner v. Dinwiddie, 3 Ind. 34.

¹⁹⁰ *Illinois*.—Burgwin v. Babcock, 11 Ill. 28.

Indiana.—First National Bank of New Castle v. Nugen, 99 Ind. 160; Menaugh v. Chandler, 89 Ind. 94; Griffin v. Cox, 30 Ind. 242.

Kentucky.—Powell v. Hogue, 8 B. Mon. (Ky.) 443.

Michigan.—Robbins v. Brooks, 42 Mich. 62, 3 N. W. 256.

JOYCE DEFENSES—50.

Mississippi.—Bullard v. Dorsey, 7 Sm. & M. (Miss.) 9.

Pennsylvania.—Henderson v. Lewis, 9 Serg. & R. (Pa.) 379.

Virginia.—Ritchie v. Moore, 5 Munf. (Va.) 388. But see Austin v. Feland, 8 Mo. 309.

¹⁹¹ Lenoir v. Moore, 61 Miss. 400; Great Western Ins. Co. v. Pierce, 1 Wyo. 45. But see Canfield v. Arnett, 17 Colo. App. 426, 68 Pac. 784, decided under Mills Ann. Code, § 57.

¹⁹² Proctor v. Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303.

¹⁹³ Burnet v. Frazier, 19 Ky. Law Rep. 299, 40 S. W. 697.

¹⁹⁴ McCarthy v. Sleight, 114 Mich. 182, 72 N. W. 165.

defendant's wife and executed the note as his surety.¹⁹⁵ And such a liability may be available as a set-off by an agreement, express or implied, of the parties.¹⁹⁶ And where the payee of a note assigned the same it was decided, in an action by the assignee, that a judgment which had been recovered by the maker, before notice of the assignment, against the payee and a third party, was available as a set-off.¹⁹⁷ Again where an action is brought by one in his sole right he is not subject to a set-off of his liability on his joint indorsement.¹⁹⁸

§ 631. Same subject—Right as affected by statute.—Though it is provided by statute that "all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants," yet this is held to refer only to the obligation and covenants made by persons jointly in their individual capacity and not to partnership debts or obligations and therefore not to authorize a set-off of a debt due from a firm against the claim of an individual partner of the firm.¹⁹⁹ And it has been decided in Massachusetts that though an indorsee of a note before delivery is by statute entitled to notice as an indorser, yet his rights and liabilities are not otherwise changed, and he is in all other respects to be considered as a co-maker of the note and cannot, in an action on the note, set off a debt due to himself alone.²⁰⁰ Under a statute in Colorado it has been decided that where the makers of a note are jointly and severally liable there may, in an action against them, be a set-off by one of them of a several demand against the plaintiff.²⁰¹

§ 632. Same subject—Principal and surety.—Where a note is executed by one as principal and another as surety it has been decided that in an action against the principal the latter may avail himself,

¹⁹⁵ *Akshire v. Corey*, 113 Ind. 484, 15 N. E. 685.

¹⁹⁶ *Mitchell v. Sellman*, 5 Md. 376.

¹⁹⁷ *Peyton v. Compress Co.*, 63 Miss. 410.

¹⁹⁸ *Alabama*.—*Duramus v. Harri-*
son, 26 Ala. 326.

Illinois.—*Hilliard v. Walker*, 11
Ill. 644.

Indiana.—*Blankenship v. Rogers*,
10 Ind. 333.

Maryland.—*Robertson v. Parks*, 3
Md. Ch. 65.

New York.—*Plets v. Johnson*, 3
Hill (N. Y.) 112.

But see *Hoffman v. Zollinger*, 39
Ind. 461; *Baker v. Kinsey*, 41 Ohio
St. 403; *Pate v. Gray*, Hempst. (U.
S.) 155, Fed. Cas. No. 10794a.

¹⁹⁹ *Coates v. Preston*, 105 Ill. 470.

²⁰⁰ *Brooks v. Stackpole*, 168 Mass.
537, 47 N. E. 419.

²⁰¹ *Canfield v. Arnett*, 17 Colo. App.
426, 68 Pac. 784.

by way of set-off, of a debt due to him individually.²⁰² And where a note is so executed it is also held that it is available as a set-off in an action brought by the principal.²⁰³ But where a person executed a note to another for the purchase of an interest in a firm and a creditor of the firm signed the same as surety it was held, in an action by a third party to whom the note was transferred, that the surety was not entitled to set-off against the plaintiff, after the payee's death, claims which he held against the firm.²⁰⁴

§ 633. **Same subject—Joint and several note.**—Where a note is a joint and several one it is available as a set-off against a claim in favor of one of the makers.²⁰⁵ But on the other hand it is decided that where an action is brought against one of the makers on a joint and several note, a debt due to the other maker from the plaintiff is not available as a set-off.²⁰⁶

§ 634. **Partners.**—In an action by a partner on a note given to him individually there can not be a set-off of a partnership debt.²⁰⁷ And where a partner gives a note to another partner for the use of the firm it is determined that, in an action by the payee, a partnership account against him is not available as a set-off.²⁰⁸ And in an action by a purchaser after maturity of a firm note indorsed to one partner, the purchaser having no knowledge or notice of the relationship of the indorsee to the firm, it is decided that an account between the firm and the partner to whom the note was indorsed is not available as a set-off, it being declared that though it is a rule that a purchaser after maturity takes a note subject to the defenses and equities existing between the parties to the note, the rule has reference to defences and equities connected with the instrument.²⁰⁹

§ 635.—**Purchasers after maturity.**—It is a general rule that where commercial paper is indorsed to a person after its maturity, the in-

²⁰² Dodge v. Dunham, 41 Ind. 191.

²⁰⁷ Mitchell v. Sellman, 5 Md. 376.

²⁰³ Harrison v. Henderson, 4 Ga. 198; Andrews v. Varrell, 46 N. H. 17.

See, also, Mynderse v. Snook, 1 Lans. (N. Y.) 488.

²⁰⁸ Anderson v. Robertson, 32 Miss.

²⁰⁴ Walker v. Eyth, 25 Pa. St. 216.

241; Willis v. Barron, 143 Mo. 450,

45 S. W. 289.

²⁰⁵ Ferguson v. Milliken, 42 Mich. 441, 4 N. W. 185; Hurdle v. Hanner, 50 N. C. 360; Moore v. Andrews, 13 U. C. C. P. 405.

²⁰⁹ Young v. Shriner, 80 Pa. St. 463. Compare Davis v. Briggs, 39 Me. 304.

²⁰⁶ Jennings v. Shriver, 5 Blackf. (Ind.) 37.

dorsee takes it subject to such defenses as existed against it in the hands of his indorser.²¹⁰ The fact that a bill or note is overdue is a circumstance of suspicion suggesting inquiry and if a purchaser of such paper makes no inquiry he buys it at his peril.²¹¹ Therefore, a purchaser after maturity is held to take the paper subject to such set-offs as existed in favor of the maker against the payee who indorsed it to him, or where he takes from the holder subsequent to the payee such set-offs as existed against the payee and were available against his indorser,²¹² but he is not subject to a set-off which existed against a payee or an intermediate holder and which was not available against the one from whom he purchased the paper.²¹³ Again there are

²¹⁰ See "Purchasers after Maturity, Chap. XIX herein.

²¹¹ See § 420 herein.

²¹² *Alabama*.—*Mobile Bank v. Poelnitz*, 61 Ala. 147.

California.—*Elich v. Greeley*, 112 Cal. 171, 44 Pac. 483.

Georgia.—*Crawford v. Beal*, 1 Dud. (Ga.) 204.

Illinois.—*Bissell v. Curran*, 69 Ill. 20; *Ronehill v. Lofquist*, 46 Ill. App. 442.

Indiana.—*Eigenmann v. Clark*, 21 Ind. App. 129, 51 N. E. 725; *Thompson v. Lowe*, 111 Ind. 272, 12 N. E. 476; *Indiana Novelty Mfg. Co. v. McGill*, 15 Ind. App. 1, 43 N. E. 464.

Kansas.—*Norton v. Foster*, 12 Kan. 44.

Louisiana.—*Jordan v. Downes*, 9 Rob. (La.) 265.

Maine.—*Robinson v. Perry*, 73 Me. 168; *Wood v. Warren*, 19 Me. (1 App.) 23; *Burnham v. Tucker*, 18 Me. 179; *Shirley v. Todd*, 9 Me. 83.

Massachusetts.—*Bond v. Fitzpatrick*, 4 Gray (Mass.) 89; *Sargent v. Southgate*, 5 Pick. (Mass.) 312.

Mississippi.—*Phipps v. Shegogg*, 30 Miss. 241.

Nebraska.—*Wilbur v. Jeep*, 37 Neb. 604, 56 N. W. 198; *First Nat. Bank of Rapid City v. Security Nat.*

Bank of Sioux City, 34 Neb. 71, 51 N. W. 305; *Haggerty v. Walker*, 21 Neb. 596, 33 N. W. 244; *Davis v. Neligh*, 7 Neb. 78.

New York.—*Sherwood v. Barton*, 36 Barb. (N. Y.) 284; *Driggs v. Rockwell*, 11 Wend. (N. Y.) 504; *Hendricks v. Judah*, 1 Johns. (N. Y.) 319; *Wiltzie v. Northam*, 5 Bosw. (N. Y.) 421.

North Carolina.—*Ransom v. McClees*, 64 N. C. 17; *Harrington v. Wilcox*, 8 Jones Law (N. C.) 349; *Hurdle v. Hanner*, 5 Jones Law (N. C.) 360.

Ohio.—*Wyman v. Robbins*, 51 Ohio St. 98, 37 N. E. 364.

Pennsylvania.—*Young v. Shriner*, 80 Pa. St. 463; *Thompson v. McClelland*, 29 Pa. St. 475; *Lighty v. Brenner*, 14 Serg. & R. (Pa.) 127.

South Carolina.—*Quackenbush v. Miller*, 4 Strobl. (S. C.) 235.

Vermont.—*Bowen v. Thrall*, 28 Vt. 382; *Pecker v. Sawyer*, 24 Vt. 459.

West Virginia.—*Davis v. Noll*, 38 W. Va. 66, 17 S. E. 791, 45 Am. St. Rep. 841.

²¹³ *Georgia*.—*Wilkinson v. Jeffers*, 30 Ga. 153.

Iowa.—*Stannus v. Stannus*, 30 Iowa 448; *Way v. Lamb*, 15 Iowa 79.

New Jersey.—*Cumberland Bank v. Hann*, 3 Har. (N. J. L.) 222.

numerous decisions, some of them founded on statutes, which hold that a set-off against the payee or an intermediate holder which was acquired prior to notice of the transfer to a purchaser after maturity is available against the latter,²¹⁴ while in other cases this right of set-off is confined to those claims or demands which were available against the original payee.²¹⁵ So it is declared that in the case of an overdue promissory note the assignee takes it subject to all equities existing between the maker and the payee and the maker may set off any liquidated demand which he held against the payee at the time he received notice of the assignment, but claims subsequently acquired, even though they had their origin in previous transactions, are not the subject of a set-off.²¹⁶ But though a claim or demand may exist of which the maker might avail himself in an action against him, yet it has been decided that a purchaser after maturity is not subject to such a set-off where it also appears that the payee held a demand against the maker in excess of the set-off at the time of the transfer.²¹⁷

§ 636. Same subject, continued.—In an action upon a note by a purchaser after maturity the maker is not entitled to a set-off of

Pennsylvania.—Donly v. Brown, 3 Wkly. Notes Cas. (Pa.) 275; Stewart v. Tizzard, 3 Phil. (Pa.) 362.

Vermont.—Haley v. Congdon, 56 Vt. 65; Walbridge v. Kibbee, 20 Vt. 543.

²¹⁴ *Indiana.*—Meeker v. Dhanks, 112 Ind. 207, 13 N. E. 712; Huston v. Bank, 85 Ind. 21; Judah v. Potter, 18 Ind. 224; Cox v. Bank, 18 Ind. App. 248, 47 N. E. 841.

Iowa.—Downing v. Gibson, 53 Iowa 517, 5 N. W. 699.

Massachusetts.—Bond v. Fitzpatrick, 4 Gray (Mass.) 89; Baxter v. Little, 6 Metc. (Mass.) 7; Sargent v. Southgate, 5 Pick. (Mass.) 312.

Minnesota.—Tuttle v. Wilson, 33 Minn. 422, 23 N. W. 864; Linn v. Rugg, 19 Minn. 181.

Missouri.—Munday v. Clements, 58 Mo. 577.

New York.—Binghamton Trust Co. v. Clark, 52 N. Y. Supp. 941.

²¹⁵ *Alabama.*—McKenzie v. Hunt, 32 Ala. 494; Kennedy v. Manship, 1 Ala. 43.

Illinois.—Favorite v. Lord, 35 Ill. 142; Root v. Irwin, 18 Ill. 147.

Iowa.—Ryan v. Chew, 13 Iowa 589.

Mississippi.—Savage v. Bank, 62 Miss. 586.

Ohio.—Lillie v. Bates, 3 Ohio Cir. Ct. R. 94.

South Carolina.—Perry v. Mays, 2 Bailey (S. C.) 354; Nixon v. English, 3 McCord (S. C.) 549.

Tennessee.—Hooper v. Spicer, 2 Swan (Tenn.) 494.

²¹⁶ Davis v. Neligh, 7 Neb. 84.

²¹⁷ Barney v. Norton, 2 Fairf. (Me.) 350; Collins v. Allen, 12 Wend. 356, 27 Am. Dec. 130; Wharton v. Hopkins, 11 Ired. (N. C.) 505.

an indebtedness arising out of a suit which is pending on appeal.²¹⁸ Nor can the maker in an action by such a purchaser of a note which is payable without defalcation or discount set-off a demand which he may have against the payee,²¹⁹ and this has been held to be the rule though it may appear that such purchaser had notice thereof.²²⁰ And it has been decided that where a cross bill is not sufficient as a counterclaim against a payee it will not be available against a purchaser after maturity.²²¹ But one to whom a bank draft payable on demand and which is in effect a check is transferred some time after the date thereof, is held to take it subject to a set-off.²²² And it is also decided that where a note is, after its maturity, repurchased by the payee, he takes it subject to a set-off which was available against his indorser, though he had no notice thereof.²²³ But though the maker may be entitled to a set-off against such a purchaser it is held that he will not be entitled to recover for any excess of such set-off over the claim of the plaintiff.²²⁴

§ 637. Same subject—Set-off arising out of other transactions.—

The rule that a purchaser of commercial paper after maturity takes it subject to equities and defenses available against his indorser has reference to those equities and defenses which are connected with the note itself.²²⁵ Therefore a purchaser after maturity of a bill does not take it subject to a set-off of any claim or demand which arises out of distinct and independent transactions.²²⁶ So

²¹⁸ Woods v. Viosca, 26 La. Ann. 716.

²¹⁹ Coryell v. Croxall, 5 N. J. L. 764.

²²⁰ Tillon v. Britton, 9 N. J. L. 120.

²²¹ Gabe v. McGinnis, 55 Ind. 373. Compare Cumberland Bank v. Hann, 18 N. J. L. 222.

²²² La Due v. Bank, 31 Minn. 33, 16 N. W. 426.

²²³ Martin v. Richardson, 68 N. C. 255.

²²⁴ Norton v. Foster, 12 Kan. 44; Reese v. Teagarden, 31 Tex. 642.

²²⁵ See § 431 herein.

²²⁶ Alabama.—Robertson v. Breedlove, 7 Port. (Ala.) 541.

Connecticut.—Robinson v. Lyman, 10 Conn. 30.

Georgia.—Elliott v. Deason, 64 Ga. 63.

Indiana.—Hankins v. Shoup, 2 Ind. 343.

Iowa.—Bates v. Kemp, 13 Iowa 223.

Maryland.—Annan v. Houck, 4 Gill. (Md.) 325.

Missouri.—Barnes v. McMullins, 78 Mo. 260; Cutler v. Cook, 77 Mo. 388; Arnot v. Woodburn, 35 Mo. 99.

Pennsylvania.—Hughes v. Large, 2 Pa. St. 103.

Rhode Island.—Trafford v. Hall, 7 R. I. 104, 82 Am. Dec. 589.

Vermont.—Haley v. Congdon, 56 Vt. 65; Armstrong v. Noble, 55 Vt. 428.

West Virginia.—Davis v. Noll, 38 W. Va. 66, 17 S. E. 791.

it is said in this connection: "Under the law merchant governing negotiable paper, a negotiable instrument passing into the hands of an innocent holder for value before maturity is exempt from all equities between the original parties. When it passes for value after maturity, the purchaser acquires it subject to such equities as are connected with or inhere in the paper, but exempt from all equities arising out of independent and collateral transactions."²²⁷ Under the law merchant this note passed to the plaintiff exempt from all rights of set-off on account of independent transactions between the original parties."²²⁸

§ 638. State—No right of set-off against.—No action can be instituted on a claim against the government at the instance of an individual, either directly or indirectly, by way of set-off, unless by the sanction of express law to that effect.²²⁹

§ 639. Sureties.—Where an action upon a note is brought against the maker and surety a counterclaim which is available to the former may, as a general rule, be set up by the latter.²³⁰ And where a set-off has been established by the maker it is held that it will inure to the benefit of the surety though such set-off would not be available to the latter in an action against him alone.²³¹ And a like rule has been held to apply in the case of a joint and several note.²³² So it is declared that the relation of the drawer and indorser to the acceptor is that of sureties for the latter and that in an action against the

England.—*Borrough v. Moss*, 10 Barn. & C. 558; *Holmes v. Kidd*, 3 Hurl. & N. 891.

But see *Robinson v. Perry*, 73 Me. 168; *Johnson v. Humphrey*, 91 Wis. 76, 64 N. W. 317.

²²⁷ Citing *Story on Bills* (4th Ed.), § 220; 1 *Edwards Bills & Notes* (3d Ed.), § 379; *Burroughs v. Moss*, 10 Barn. & Cr. 558; *Whitehead v. Walker*, 10 M. & W. 698; *Robinson v. Lyman*, 10 Conn. 30.

²²⁸ *Cutler v. Cook*, 77 Mo. 388, per *Martin, C.*

²²⁹ *Chevallier's Adm'r v. State*, 10 Tex. 315.

²³⁰ *Alabama.*—*Lynch v. Bragg*, 13 Ala. 773.

Indiana.—*Slayback v. Jones*, 9 Ind. 470.

New Hampshire.—*Mahurin v. Perason*, 8 N. H. 539.

New York.—*Loring v. Morrison*, 15 N. Y. App. Div. 498, 44 N. Y. Supp. 526.

North Carolina.—*Jarrat v. Martin*, 70 N. C. 459.

²³¹ *Queen City Bank v. Brown*, 75 Hun (N. Y.) 259, 26 N. Y. Supp. 1016. See *Wolf v. Michael*, 21 Misc. R. (N. Y.) 86, 46 N. Y. Supp. 991.

²³² *Becherwaise v. Lewis*, L. R. 7 C. P. 372. See, also, *Sefton v. Hargett*, 113 Ind. 592, 15 N. E. 513.

former, another acceptance of the plaintiff which is held by their acceptor will be available as a set-off.²³³ And in an action against the surety by an administrator upon a note given to the deceased, the surety, it appearing that the maker of the note is insolvent, is entitled to have applied by way of set-off in payment of the note a share of the estate coming to the maker.²³⁴ But it has been decided that a person is not entitled to set off against a debt due to an assignee in insolvency an amount which he was compelled to pay as surety for the assignor.²³⁵ And where a set-off is pleaded only by the principal, and the surety takes an appeal, it is decided that he will not be heard on the appeal as to the judgment which was rendered in respect to the set-off.²³⁶ And in some cases it is decided that, where the action is brought against the surety alone, he cannot avail himself of a counterclaim which may exist in favor of the principal.²³⁷ In other decisions, however, a contrary view is taken, it being declared that, where an action is so brought, a counterclaim so existing will be available to the surety.²³⁸ Again in a recent case in Alabama it is decided that a surety is not entitled to set off the amount collected on collaterals given by the principal to secure the demand of the creditor or payee of the note.²³⁹

§ 640. Same subject—Set-off of admages due to principal.—In an action upon a note against the principal and surety the latter is held to be entitled to a set-off of damages due to the principal and which arise out of the same transaction.²⁴⁰ So it has been held that where the consideration for a note was a machine, the surety may, in an action against him and the principal, set off damages which result from a breach of warranty in respect to such machine.²⁴¹

²³³ *Allen v. Kemble*, 6 Moore P. C. 314.

²³⁴ *Wright v. Austin*, 56 Barb. (N. Y.) 13.

²³⁵ *Cosgrove v. McKasy*, 65 Minn. 426, 68 N. W. 76.

²³⁶ *Home Security Bldg. & Loan Assn. v. George*, 57 Cal. 363.

²³⁷ *Phoenix Iron Works Co. v. Rhea* (Tenn. Ch. App.), 38 S. W. 1079. See *Stockton Savings & Loan Soc. v. Giddings*, 96 Cal. 84, 30 Pac. 1016.

²³⁸ *Wyman v. Robbins*, 51 Ohio St.

98, 37 N. E. 264; *Becherwaise v. Lewis*, L. R. 7 C. P. 372.

²³⁹ *Noble v. Anniston Nat. Bank* (Ala. 1906), 41 So. 136.

²⁴⁰ *Waterman v. Clark*, 76 Ill. 428; *Slayback v. Jones*, 9 Ind. 470; *City of Concord v. Pillesbury*, 33 N. H. 310; *Newell v. Salmons*, 22 Barb. (N. Y.) 647.

²⁴¹ *Loring v. Morrison*, 15 App. Div. (N. Y.) 498, 44 N. Y. Supp. 526. Compare *Stockton Sav. & Loan Soc. v. Giddings*, 96 Cal. 84, 30 Pac. 1016.

CHAPTER XXVIII.

WAIVER AND ESTOPPEL.

Sec.	Sec.
641. By acceptance—Generally.	662. By retaining consideration.
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643. Same subject—Payment by bank of check.	664. As to consideration in general.
644. By signature and execution.	665. Where consideration illegal.
645. By indorsement.	666. Signing for accommodation—Want or failure of consideration.
646. By recitals.	667. By receipt of benefits—Failure of consideration.
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649. By giving of new note.	670. As to capacity and authority generally.
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651. Same subject—Limitations of rule.	672. Same subject continued—Act of public or corporate official in violation of statute.
652. By giving paper to cover shortage in accounts or to deceive state officials.	673. As to forgery and alteration—In general.
653. By representations in connection with transfer—What operates as an estoppel.	674. Same subject—By admission of signature.
654. Same Subject—When an estoppel does not arise.	675. Same subject—Failure to give notice of forgery.
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656. By admission or declaration.	677. As to statute of limitations.
657. Same subject.	
658. Same subject.	
659. By acts, conduct or words.	
660. Same subject—Corporate transactions.	
661. By laches.	

§ 641. By acceptance—Generally.—One who accepts a bill is by his act estopped, as against a *bona fide* endorsee for value, from denying the signature of the drawer.¹ Nor will he be permitted to show

¹ *United States*.—Goetz v. Bank, - *Kansas*.—Ort v. Fowler, 31 Kan. 119 U. S. 551, 7 Sup. Ct. 318. 478, 2 Pac. 580.

that he has not sufficient funds of the drawer in his hands to meet the bill.² And it may be stated generally that the act of acceptance operates as an estoppel in respect to any antecedent matter. So where the amount is left blank an acceptor can not subsequently set up that it has been fraudulently filled with a greater amount than was agreed upon, as a person who gives an acceptance in blank holds out the person he entrusts therewith as having authority to fill in the bill as he pleases.³ And where a bill is drawn and indorsed by an agent the one who accepts such bill will not be permitted to deny that the agent had authority to so act.⁴ And it has also been decided that want of consideration for an acceptance which was unconditional cannot be set up as a defense to an action by the payee, as by such an acceptance the acceptor is held to occupy the same position as a co-maker, and having voluntarily placed himself in this position, is estopped to set up such a plea.⁵ But where one accepts a bill or draft and gives it to the drawer to enable him to raise money upon it, it is held that the acceptor is not bound by the representation that the paper is regular business paper and that he will not be estopped from setting up the defense of usury in the discount as against the holder.⁶

§ 642. **Same subject—Certification by bank of check.**—The general rule that an acceptor is by his act precluded from questioning the genuineness of the drawer's signature applies where a check is certified by a bank.⁷ And a bank will be bound by its acceptance

Louisiana.—Howard v. Mississippi Valley Bank, 28 La. Ann. 727, 26 Am. Rep. 105.

Maryland.—Commercial Bank v. First National Bank, 30 Md. 11.

New York.—Arnold v. National Albany Exchange Bank, 3 Thomp. & C. 769; Canal Bank v. Bank of Albany, 1 Hill 287.

England.—Cooper v. Meyer, 10 Barn. & C. 468; Phillips v. Im Thurm, 18 C. B. N. S. 694; Beeman v. Duck, 10 Mees. & W. 251; Hame-lin v. Bruck, L. R. 9 Q. B. 306; Price v. Neal, 3 Burrows 1334.

² Griffith v. Reed, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267. See Dur-kee v. Conklin, 13 Colo. App. 313, 57 Pac. 486.

³ Garrard v. Lewis, L. R. 102 B. Div. 30.

⁴ Jones v. Turnour, 4 Car. & P. 204.

⁵ Law v. Brinker, 6 Colo. 555; Armstrong v. American Exchange Nat. Bank, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747.

⁶ Jackson v. Fassitt, 33 Barb. (N. Y.) 645, 21 How. Prac. (N. Y.) 279.

⁷ Espy v. Bank of Cincinnati, 18 Wall. (U. S.) 605, 21 L. Ed. 947; Louisiana National Bank v. Citizens' National Bank of Louisiana, 28 La. Ann. 189, 26 Am. Rep. 92; Clews v. Association, 89 N. Y. 418; Hogen v. Bank, 6 Lans. (N. Y.) 490; Merchants' Loan & Trust Co. v. Metropolis Bank, 7 Daly (N. Y.)

as genuine of a forged certification.⁸ A certification, however, is declared to bind the bank only as to the genuineness of the signature of the drawer, that he has sufficient funds to meet it and that they will not be withdrawn and not to estop the bank from denying the genuineness of any other part of the check or of any names appearing thereon, or of the title of the holder, or the amount stated in the body of the check.⁹ A bank may, however, by reason of negligence in certifying a check be precluded from questioning the amount thereof.¹⁰

§ 643. Same subject—Payment by bank of check.—A bank is presumed to know whether the signature of a depositor is genuine, and where it pays a check to a *bona fide* holder who in no way contributes to the deception it is held to have taken the risk of paying and to be estopped to subsequently question the signature in an action to recover back the amount.¹¹ The drawee of a check by accepting it is regarded as occupying the position of a guarantor as to the genuineness of the signature affixed thereto.¹²

§ 644. By signature and execution.—One who issues negotiable paper to another for the purpose of his selling it and thus raising money upon it, is estopped to question the validity of the paper in the hands of an innocent purchaser. This principle has been applied where, for the purpose of raising money, coupon bonds are issued, it being held in such a case that the party issuing them will be estopped to question their validity in the hands of one purchasing them for value and with no notice or knowledge of the purpose for which they were issued.¹³ So the drawer of a check, draft or bill of exchange who delivers it to an impostor, supposing him to be the person whose name he has assumed, must, as against the drawee or a *bona fide* holder, bear the

137; *French v. Irwin*, 4 Baxt. (Tenn.) 401, 27 Am. Rep. 769.

⁸ *Continental Bank v. Commonwealth Bank*, 50 N. Y. 575.

⁹ *White v. Bank*, 64 N. Y. 316;

Marine National Bank v. National City Bank, 59 N. Y. 67; *National Bank of Commerce of New York v. National Mechanics' Banking Assoc. of New York*, 55 N. Y. 211. Compare *Louisiana National Bank of New Orleans v. Citizens' Bank of Louisiana*, 28 La. Ann. 189.

¹⁰ *Helwege v. Hibernia National Bank*, 28 La. Ann. 520.

¹¹ *Dedham National Bank v. Everlett National Bank*, 177 Mass. 392, 59 N. E. 62.

¹² *Farmers' & Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. 939.

¹³ *Waggoner v. German American Title Co.*, 22 Ky. Law R. 215, 56 S. W. 961.

loss where the impostor obtains payment of, or negotiates the same.¹⁴ And a maker may be estopped from setting up in defense his own fraud, as where the note was given in connection with a transaction the purpose of which was to aid in defrauding his creditors.¹⁵ But the fact that a defendant admits the genuineness of a note which is not identified as the note in controversy does not estop him from denying the execution of the note sued on.¹⁶ And the mere fact that a person had reason to believe that a note was to be used for an unlawful purpose has been held not to be sufficient to estop him from defending on the ground of illegality or fraudulent representations by which the execution was obtained.¹⁷

§ 645. **By indorsement.**—Where a person either as indorser or surety affixes his signature to commercial paper below or after the signatures of others, he thereby sanctions and affirms the genuineness of the previous signatures and will be estopped in an action by a holder in good faith and for value from showing that they are forgeries.¹⁸

¹⁴ *Land Title & Trust Co. v. Northwestern National Bank*, 211 Pa. St. 211, 60 Atl. 723.

¹⁵ *Butler v. Moore*, 73 Me. 151.

¹⁶ *Glazier v. Streamer*, 57 Ill. 91.

¹⁷ *American National Bank of Austin v. Cruger*, 91 Tex. 446, 44 S. W. 278. See, also, *Davis v. Sittig*, 65 Tex. 497, wherein it was so held, though it appeared that the maker of the note had knowledge, at the time of its execution that it was given in connection with a transaction which was in fraud of the payee's creditors.

¹⁸ *Indiana*.—*Alleman v. Wheeler*, 101 Ind. 141.

Kentucky.—*Burgess v. Northern Bank*, 4 Bush. 600.

Massachusetts.—*Cabot Bank v. Morton*, 4 Gray 156; *State Bank v. Fearing*, 16 Pick. 533.

New York.—*Mosher v. Carpenter*, 13 Hun 602; *Turnbull v. Bowyer*, 2 Rob. 406, affirmed in 40 N. Y. 456, 100 Am. Dec. 523; *Herrick v. Whitney*, 15 Johns. 240.

Ohio.—*Selser v. Brock*, 3 Ohio St. 302.

Pennsylvania.—*Rapp v. Bank*, 136 Pa. St. 426, 20 Atl. 508.

A recovery of the consideration may be had by the purchaser from the one by whom the paper was transferred to him.

Kansas.—*Smith v. McNair*, 19 Kan. 330.

Massachusetts.—*Brewster v. Burnett*, 125 Mass. 68; *Merriam v. Wolcott*, 3 Allen 258.

New York.—*Morrison v. Currie*, 11 N. Y. Super. Ct. (4 Duer) 79.

North Carolina.—*Hargrave v. Dusenberry*, 9 N. C. 326.

England.—*Gurney v. Wormersley*, 4 El. & Bl. 133; *Jones v. Ryder*, 5 Taunt. 488. So where money was paid to a broker for a note, the signature to which was forged, it was held that an action would lie to recover the money paid therefor to the broker, although he had paid the amount to his principal, the name and identity of the principal

"The language of the authorities is that by his indorsement he virtually undertakes to every subsequent holder that the names of the maker and previous indorsers are really in the handwriting of those to whom they respectively purport to belong."¹⁹ So in the case of the fraudulent transfer or disposition of a bill or note by an agent to whom the owner has indorsed it in blank and delivered it, the latter will be estopped from setting up the fraudulent conduct of his agent where an action is brought on the instrument by a *bona fide* holder.²⁰ And where a merchant entrusts his clerk with blank indorsements and one by false pretenses obtains and uses them, it is held that it is not such a fraud as will discharge the indorser in an action by an indorsee.²¹ Again, in the case of the blank indorsement, for the purpose of deposit, of a check which is subsequently repudiated and returned, if the blank indorsement is negligently left upon the check and it is transferred to a bona fide holder, the latter may recover thereon from the indorser who under such circumstances is estopped to set up the fraud.²² And where it is provided by statute that all notes are negotiable by indorsement, so as to vest the property in each indorsee successively, and the assignee is permitted to recover in his own name of the maker, in an action upon a note by an indorsee it is decided that a married woman who is bound by an estoppel *in pais* like any other person under the statute, and who has indorsed the note in blank, will be estopped, as against the indorsee who is a *bona fide* holder for value from claiming that the assignment was of a character other than it appears to be by such indorsement.²³

not being disclosed at the time of sale. *Merriam v. Wolcott*, 3 Allen (Mass.) 258. And it has been decided that if a person receive in payment a counterfeit or forged bank note, he may treat it as a nullity and recover back the amount, though the person passing the same may be guilty of no fraud. *Hargrave v. Dusenberry*, 9 N. C. 326. It is also held in such cases that it is not necessary to offer to return the worthless paper, the return being declared to be useless, since the paper being forged it is entirely worthless to all parties. *Smith v. McNair*, 19 Kan. 330. So it is decided that a purchaser of counter-

feit bonds of the United States need not return such bonds before bringing an action to recover the amount paid by him in purchasing them. *Brewster v. Burnett*, 125 Mass. 68.

¹⁹ *Veazie v. Willis*, 6 Gray (Mass.) 90, per Dewey, J.

²⁰ *Connell v. Bliss*, 52 Me. 476; *Weirick v. Bank*, 16 Ohio St. 297. See *Marston v. Allen*, 8 Mees. & W. 494.

²¹ *Putnam v. Sullivan*, 4 Mass. 45.

²² *Turnbull v. Bowyer*, 40 N. Y. 456, affirming 2 Rob. (N. Y.) 411.

²³ *Shirk v. North*, 138 Ind. 210, 37 N. E. 590; *Long v. Crosson*, 119 Ind. 3, 21 N. E. 450; *Lane v. Schlemmer*, 114 Ind. 297, 15 N. E. 454;

§ 646. **By recitals.**—When a sane man, knowingly and without restraint, delivers to another for a valuable consideration his obligation in writing for the doing or refraining from doing any certain thing, he cannot be heard to say afterwards that he was deceived and by reason thereof he did not know the purport of such instrument.²⁴ The maker of commercial paper is subject to the application of this principle and may be estopped by recitals which are contained in the instrument.²⁵ And likewise recitals contained in a collateral mortgage may operate as an estoppel,²⁶ as may also those contained in a contemporaneous agreement which is construed as a part of the instrument.²⁷ And where a note has a certificate attached thereto in which it is stated that the note is for value received and that it will be paid at maturity, the party giving it will be estopped from falsifying his own statement as contained in his certificate.²⁸ An indorsee may also be estopped from contradicting recitals which are contained in his indorsement.²⁹ The general rule that a party may be estopped by recitals in a bill or note has been applied in the case of recitals as to the consideration,³⁰ as to the place at which the note was executed,³¹ in regard to interest,³² and that those who have signed the instrument as makers are all principals.³³ Also a clause describing the payee by a firm name has been held to operate as an estoppel.³⁴ Again, it has been decided

Moore v. Moore, 112 Ind. 152, 13 N. E. 673; *Rogers v. Insurance Co.*, 111 Ind. 343, 12 N. E. 495; *Ward v. Insurance Co.*, 108 Ind. 301, 9 N. E. 361.

²⁴ *Hurt v. Wallace* (Tex. 1899), 49 S. W. 675.

²⁵ *United States*.—*Silvert v. Kent*, 105 Fed. 840.

Indiana.—*Menaugh v. Chandler*, 89 Ind. 94.

Iowa.—*James v. Dalbey*, 107 Iowa 463, 78 N. W. 51.

Nebraska.—*Bair v. People's Bank*, 27 Neb. 597.

South Carolina.—*White v. Goldsberg*, 49 S. C. 530, 27 S. E. 517; *Nott v. Thompson*, 35 S. C. 461, 14 S. E. 940.

Texas.—*Hurt v. Wallace* (Tex. 1899), 49 S. W. 675.

West Virginia.—*Quaker City Na-*

tional Bank v. Showacre, 26 W. Va. 48.

²⁶ *Brandenburgh v. Three Forks Deposit Bank*, 19 Ky. Law Rep. 1974, 45 S. W. 108.

²⁷ *Chapman v. Skellie*, 65 Ga. 124; *Reed v. Litsey*, 17 Ky. Law Rep. 1125, 33 S. W. 827; *Central Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. 141.

²⁸ *Mechanics' Bank of Brooklyn v. Townsend*, 17 How. Prac. (N. Y.) 569.

²⁹ *Kempner v. Huddleston*, 90 Tex. 182, 37 S. W. 1066.

³⁰ *Silver v. Kent*, 105 Fed. 840.

³¹ *Quaker City National Bank v. Showacre*, 26 W. Va. 48.

³² *James v. Dalbey*, 107 Iowa 463, 78 N. W. 51.

³³ *Menaugh v. Chandler*, 89 Ind. 94.

³⁴ *Bair v. People's Bank*, 27 Neb. 577, 43 N. W. 347.

that recitals in a note, executed by a married woman, to the effect that it is for the benefit of her separate estate, have been held to estop her from showing the contrary.³⁵ It has, however, been held that recitals in a mortgage that "we have purchased" and "we hereby acknowledge that we own the above described real estate in equal shares" do not estop a wife from showing that she in fact acted as surety for her husband.³⁶ And it has also been determined that a person is not estopped from availing himself of a counterclaim for damages arising from a breach of warranty in respect to the article for the purchase of which the note was given, by the fact that there is an express waiver of defenses in the note.³⁷

§ 647. **Recitals in bonds.**—Where bonds issued by a municipality contain a recital that they have been properly issued in accordance with all the conditions and requirements imposed by the law and they also bear the certificate of the proper state official to the effect that they are regularly and legally issued, one who purchases them in the open market for full value and without any knowledge of facts which would impair their validity, may recover thereon, the municipality being estopped from showing, as against such a purchaser that the recitals are untrue.³⁸

³⁵ White v. Goldsberg, 49 S. C. 530, 27 S. E. 517; Nott v. Thompson, 35 S. C. 461, 14 S. E. 940.

³⁶ Cole v. Temple, 142 Ind. 498, 41 N. E. 942.

³⁷ Osborne v. McQueen, 67 Wis. 392, 29 N. W. 636.

³⁸ Board v. Comm'rs of Kearny Co. v. Vandriss, 115 Fed. 866, 53 C. C. A. 192. The bonds referred to in this case contained a recital as follows: "It is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed in regular and due form as required by law." The bank also bore a certificate of the auditor of the state of Kansas that "this bond has been regularly and legally issued, that the signatures thereto are genuine." The court said: "The

testimony below showed, without contradiction, that the entire issue of bonds in suit * * * was sold in the open market for cash at a small premium above their par value * * * and that the purchaser had no knowledge of any facts or circumstances impairing their validity, save such as was disclosed by the bonds themselves, when read in connection with the act under which they had been issued. The original purchaser of the bonds, and all subsequent holders thereof, who succeeded to his rights, must be regarded, therefore, as *bona fide* holders, unless the bonds themselves, or the act under which they were issued, or both, when read together, disclosed that they were issued without authority or not in conformity with law, and were for that reason invalid. * * * If they

§ 648. **By bill or note.**—One who gives a note for the payment of a debt after the same has been contracted waives all defenses of which he had full knowledge at the time such settlement was made.³⁹ So where, upon the settlement of an open account between parties, a note is executed by the debtor to the creditor for a balance agreed to be due, the execution of the note is generally held to operate as a waiver of objections to the account.⁴⁰ And where a party, with knowledge of an alleged breach of a contract, accepts a substitute performance and subsequently executes his note in payment thereof, he will be considered as having waived a strict performance and cannot set up the breach in defense to an action on the note.⁴¹ So in the case of a note being given after the accrual of a cause of action which is alleged in a plea of set-off the note may operate as an estoppel in respect to the right of the party to avail himself of such set-off.⁴² And where a party procures a satisfaction of a judgment against him by executing a negotiable note for the amount thereof he will be estopped in an action against him on the note from showing that the judgment was obtained upon a note which was in part for illegal interest.⁴³

§ 649. **By giving of new note.**—One who gives a new note with full knowledge of defenses which were available in respect to the original note is held by such act to waive all such defenses and to be estopped

were *bona fide* holders, the recital in the bonds is obviously of such a nature as will cure any irregularity in the exercise of the power to issue them which was conferred on the municipality by the act of March 5, 1887. The recital also estops the municipality from pleading that its officers acted fraudulently in issuing the bonds or in disposing of the proceeds. These defenses are eliminated by the recital, upon the assumption that the securities were sold to an innocent purchaser for value." Per Thayer, J.

³⁹ *Atlanta Consol. Bottling Co. v. Hutchinson*, 109 Ga. 550, 35 S. E. 124.

⁴⁰ *Andleur v. Kuffel*, 71 Ind. 543; *Jenkins v. Levis*, 25 Kan. 479; *Knox v. Whaley*, 1 Esp. 159.

⁴¹ *Reid v. Field*, 83 Va. 26, 1 S. E. 395. The court said: "In the case here, the defendant in error, by his own showing, after the alleged breach of the original agreement by the plaintiff in error, by accepting a substituted performance, and by his subsequent promise—the note sued on—waived the protection given by the law, relinquished his right to rely upon the rule provided for his protection, and consequently stands precluded from his otherwise valid defense thereunder." Per Richardson, J.

⁴² *Borchenius v. Manutson*, 7 Ill. App. 365. See *Edison General Elec. Co. v. Blount*, 96 Ga. 272, 23 S. E. 306.

⁴³ *Gipson v. Shanklin*, 83 Ind. 147.

from availing himself of the same in an action on the renewal. So a maker may in this manner be estopped from setting up the defense of a failure of consideration,⁴⁴ or of fraud or fraudulent representations in connection with the execution of the original note.⁴⁵ So if the maker of a note gives the holder a new note, with another surety, and takes up the old one, it is decided that he is thereby precluded, when called on for payment, from entering into the original consideration, because he has, by his act, induced the holder to surrender the right which he has against the indorser, who was responsible on the original instrument.⁴⁶ Again where a note has been accepted by a person in renewal of a prior one it has been decided that he will be thereby estopped from setting up that he did not accept it for the purpose for which it was given.⁴⁷

§ 650. By new promise.—A party to commercial paper who has knowledge of matters which would be available to him as a defense to an action thereon may waive his right to set up such defense by a new promise subsequently made by him and upon the faith of which a party takes the paper.⁴⁸ So if a surety, with knowledge of the fact that an agreement for an extension of time has been made between the creditor and the principal, make a new promise to pay the debt, he cannot afterward avail himself of the agreement, as a discharge of his liability, notwithstanding there was no new consideration for his promise.⁴⁹ And it has been declared that a discharged bankrupt is

⁴⁴ *Griffith v. Trabue*, 11 Heisk. (Tenn.) 645.

⁴⁵ *Ross v. Webster*, 63 Conn. 64, 26 Atl. 476; *Isham v. Davidson*, 1 Hun (N. Y.) 114.

⁴⁶ *Coco v. Lacour*, 4 La. 507.

⁴⁷ *Dewey v. Bell*, 5 Allen (Mass.) 165.

⁴⁸ *United States v. Young v. Grundy*, 7 Cranch (U. S.) 548, 3 L. Ed. 435.

Mississippi.—*Gilpin v. Smith*, 11 Smedes & M. 109.

Missouri.—*Badger v. Stephens*, 61 Mo. App. 387, 1 Mo. App. Repr. 627.

New Hampshire.—*Fowler v. Brooks*, 13 N. H. 240; *Wiggin v. Damrell*, 4 N. H. 69.

Tennessee.—*Rosenplanter v. Toof*, 99 Tenn. 92, 41 S. W. 336.

Texas.—*Selkirk v. McCormick*, 33 Tex. 136.

Virginia.—*Davis v. Thomas*, 5 Leigh 1.

England.—*Kerrison v. Cooke*, 3 Camp. 362; *Stevens v. Lynch*, 12 East 38.

⁴⁹ *Fowler v. Brooks*, 13 N. H. 240. The court said: "If, with a knowledge of the fact, he had deemed it expedient to waive this right, a new promise to pay would have continued his liability, without any new consideration. The right of discharge, in such case, from the mere fact of the extension of time, is a

under a moral obligation to pay his debts in full, when he can, and that this obligation is, at common law, a sufficient consideration for a new promise, made after a discharge in bankruptcy to pay a note.⁵⁰ A party is not, however, estopped by a new promise from setting up defenses which were available to him and of which he had no knowledge at the time of making such new promise.⁵¹ And where the maker of a note agreed to pay the assignee thereof, provided the latter would extend the time of payment, and the assignee thereupon released his assignor and then brought an action to enforce the notes against the maker before the expiration of the time agreed upon for the extension, it was decided that the maker was not estopped from availing himself of a defense which existed at the time such agreement was made.⁵²

§ 651. **Same subject—Limitations of rule.**—In order to render a new promise, by a party to commercial paper, binding upon him it has been determined that the promise must be given to the creditor or to some one acting in his behalf.⁵³ And the promise must be unambiguous and explicit,⁵⁴ and unconditional,⁵⁵ or if depending on a condition it must be shown that the condition has been performed.⁵⁶ So where a person promised that if successful in business he would commence paying a note it was held that the promise was a conditional one and that performance of the condition must be shown to authorize a recovery.⁵⁷ It has also been decided that a consideration is not necessary to support a subsequent promise,⁵⁸ though there are

personal privilege of the surety, which he may waive; and he does so, emphatically, if, with knowledge of the fact, he notwithstanding renews his promise." Per Parker, J.

⁵⁰ Apperson & Co. v. Stewart, 27 Ark. 619.

⁵¹ *Arizona*.—Barry v. Kirkland, 52 Pac. 771.

Kentucky.—Clay v. McClanahan, 5 B. Mon. 241.

Louisiana.—Lambeth v. Kerr, 3 Rob. 144.

Massachusetts.—Mackay v. Holland, 4 Metc. 69.

Missouri.—Long v. Dismar, 71 Mo. 452.

Compare Lewis v. Hodgdon, 5 Shep. (Me.) 267.

⁵² Gilpin v. Smith, 11 Smedes & M. (Miss.) 109.

⁵³ Wakeman v. Sherman, 9 N. Y. 85. Compare Depuy v. Swart, 3 Wend. (N. Y.) 135.

⁵⁴ Huffman v. Johns (Pa. Sup.), 6 Atl. 205. See Horner v. Speed, 2 Pat. & H. (Va.) 616.

⁵⁵ Branch Bank at Mobile v. Boykin, 9 Ala. 320.

⁵⁶ Branch Bank at Mobile v. Boykin, 9 Ala. 320; Wakeman v. Sherman, 9 N. Y. 85.

⁵⁷ Wakeman v. Sherman, 9 N. Y. 85.

⁵⁸ Way v. Sperry, 6 Cush. (Mass.) 238; Hobaugh v. Murphy, 114 Pa. St. 358, 7 Atl. 139.

some cases which do not favor this doctrine.⁵⁹ But though a consideration might be necessary it would seem that an extension of time would be a sufficient one.⁶⁰

§ 652. By giving paper to cover shortage in accounts or to deceive state officials.—Parties who execute paper for the purpose of enabling an official who is short in his accounts or financially embarrassed to bridge over his financial reports, and who have knowledge of the purpose for which such paper is to be used, will not be allowed to hide themselves behind a violation of law in which they have participated and they are estopped to allege against an action on the paper such violation of law.⁶¹ And one who gives to a corporation, such as an insurance company, his note for the purpose of enabling the company to deceive the commissioners as to its financial condition, and upon the understanding that the note shall be surrendered when certain financial straits have been passed is estopped from taking advantage of his own fraud.⁶²

§ 653. By representations in connection with transfer—What operates as an estoppel.—Where a maker, by his representations to another that a note is good and is a valid and enforceable obligation, induces the latter to purchase it, the maker will be estopped in an action against him on the instrument from questioning its validity.⁶³

⁵⁹ *Henry v. Gilliland*, 103 Ind. 177; *Ray v. McMurtry*, 20 Ind. 307.

⁶⁰ *Brown v. First National Bank*, 115 Ind. 572, 18 N. E. 56; *Fraley v. Kelly*, 79 N. C. 348; *Henly v. Lanier*, 75 N. C. 172; *Jones v. Sennott*, 57 Vt. 355.

⁶¹ *Longmire v. Fain*, 89 Tenn. 393, 18 S. W. 70.

⁶² *New England Fire Insurance Co. v. Haynes*, 71 Vt. 306, 45 Atl. 221.

⁶³ *Alabama*.—*Wilkinson v. Seary*, 74 Ala. 243; *Brooks v. Martin*, 43 Ala. 360.

Arkansas.—*McLain v. Coulter*, 5 Pike 13.

Connecticut.—See *Middletown Bank v. Jerome*, 18 Conn. 443.

Georgia.—*Henry v. McAllister*, 99 Ga. 557, 26 S. E. 469.

Indiana.—*Plummer v. Bank*, 90 Ind. 386; *Rose v. Hurley*, 39 Ind. 77; *Vanderpool v. Brake*, 28 Ind. 130; *Rose v. Teeple*, 16 Ind. 37.

Iowa.—*Shipley v. Reasoner*, 87 Iowa 555, 54 N. W. 470; *Callanan v. Shaw*, 24 Iowa 441.

Kentucky.—*Tichenor v. Owensboro Sav. Bank & Trust Co.*, 24 Ky. Law Rep. 145, 68 S. W. 127; *Blades v. Newman*, 19 Ky. Law Rep. 1062, 43 S. W. 176; *Smith v. Stone*, 17 B. Mon. 170.

Massachusetts.—*Nye v. Chase*, 139 Mass. 379, 31 N. E. 736; *Tobey v. Chipman*, 13 Allen, 123.

Michigan.—*Sutton v. Beckwith*, 68 Mich. 303, 36 N. W. 79.

Mississippi.—*Torrey v. Grant*, 10 Smedes & M. 89.

So where the maker of a promissory note, payable to a certain person or bearer, answered, in response to an inquiry by one to whom the payee had offered to sell it after its dishonor, that it was all right and that he would pay it, whereupon the purchase was made, it was decided that the maker was estopped from setting up want or failure of consideration, or any other equity existing between himself and the payee, as a defense to an action on the note by the purchaser or his privies.⁶⁴ And where a bank, to which a non-negotiable note or order is presented for discount, is induced to discount the same by an answer which it receives from the maker in response to an inquiry made of him, the latter cannot subsequently deny liability on the note, and the fact that the bank gave no notice of the discount is held to be immaterial.⁶⁵ So where a purchaser relies on a representation that the note is all right and will be paid the maker will be estopped from availing himself of a set-off which he may have against the payee.⁶⁶ This general rule of estoppel has also been applied in the case of representations by the maker that the paper is business paper.⁶⁷ And it has been decided that representations as to the priority of a mortgage given as collateral to secure the payment of notes may operate as an estoppel, although it could have been learned from an examination of the record that a prior mortgage was in existence.⁶⁸ Again where a bank is induced by another bank to honor the draft of a third person so that he may pay a debt due to one of his creditors, it has been decided that the latter bank will be estopped, in an action on the draft, from asserting the claim that the maker did not owe to his creditor

New York.—*Fleischman v. Stern*, 90 N. Y. 110.

Pennsylvania.—*Edgar v. Kline*, 6 Pa. St. 327.

England.—*Davison v. Franklin*, 1 Barn. & Adol. 142.

⁶⁴ *Reedy v. Brunner & Co.*, 60 Ga. 107, where in the court said: "The note being past due, the payee offered it for sale. The person to whom it was offered, went to the maker and inquired concerning it. The maker answered that it was all right, and that he would pay it. Acting upon this clear and explicit answer, the individual to whom the answer was made purchased the note and paid value for it. Under

him the plaintiffs below afterwards acquired their title. * * * The maker of the note is estopped from using the defense which he now sets up. He cannot use it against the person who purchased on the faith of his statement, nor against the privies of that purchase." Per Bleckley, J.

See, also, *Davis v. Thomas*, 5 Leigh. (Va.) 1.

⁶⁵ *Strang v. MacArthur*, 212 Pa. St. 477, 61 Atl. 1015.

⁶⁶ *Wiggin v. Damrell*, 4 N. H. 69.

⁶⁷ *Fleischman v. Stern*, 90 N. Y. 110; *Lynch v. Kennedy*, 34 N. Y. 151; *In re, Many*, Fed. Cas. No. 9054.

⁶⁸ *Dodge v. Pope*, 93 Ind. 480.

the amount of such draft.⁶⁹ A city may also be estopped to deny the validity of its warrants on the ground that they were not issued in pursuance of an ordinance appropriating money to the payment thereof where, by the promises and misrepresentations of its officers, a holder of the same has been induced to permit them to remain uncollected until the cause of action on the debt is barred.⁷⁰ The rule that a maker may, by his representations in connection with the transfer of paper, be estopped from asserting defenses against such paper includes those cases where a note is executed and placed in the hands of an agent or broker for sale and a false representation inducing the purchase is made by the one so acting for the maker.⁷¹ And it would also seem that representations of such a character made by the maker would operate as an estoppel upon a receiver appointed for the maker.⁷²

§ 654. Same subject, continued.—When an estoppel does not arise.

—An estoppel does not arise in favor of a purchaser of commercial paper where it appears that the representation relied upon was obtained by fraud on the part of such purchaser,⁷³ or that the latter neither relied upon nor was deceived by the statement of the maker.⁷⁴ So a representation that a note is all right and a promise to pay the same has been held not to estop the maker from setting up the defense of usury where it is apparent that the purchaser knew of the usury and did not in good faith rely on such statements.⁷⁵ And the fact that representations have been made by a maker of a note which may have influenced or induced the pur-

⁶⁹ Guthrie National Bank v. Dosbaugh, 11 Okla. 664, 69 Pac. 797.

⁷⁰ Hubbell v. City of South Hutchinson, 64 Kan. 645, 68 Pac. 52.

⁷¹ Ahern v. Goodspeed, 9 Hun (N. Y.) 263, aff'd 72 N. Y. 108. As was said in this case: "The broker could not be expected to sell notes or have them discounted, by silently presenting them to a purchaser. He must be expected to know something of them, and what he assumes to know legitimately connected with them, and necessarily a part of them, if stated by him, is as binding as if uttered by the principal. The latter has placed the broker in a position to do wrong, and if the

trust be violated, the innocent dealer must be protected. The choice of the medium rests with the seller, and he must take the consequences." Per Brady, J.

⁷² Armstrong v. American Exchange National Bank, 133 U. S. 433, 10 Sup. Ct. 450.

⁷³ Hill v. Thixton, 94 Ky. 96, 23 S. W. 947; Lyndonville National Bank v. Fletcher, 68 Vt. 81, 34 Atl. 38.

⁷⁴ Spray v. Burk, 123 Ind. 565, 24 N. E. 588, so holding where a note was given for a gambling debt and the purchaser had knowledge thereof.

⁷⁵ Watson v. Hoag, 40 Iowa 142.

chase of the paper will not operate as an estoppel to assert fraud where it appears that, at the time of making such representation, the maker had no knowledge of such defense and it also appears that the intending purchaser had full knowledge thereof.⁷⁶ Nor will he be estopped by casual answers made to persons who have no interest in the subject-matter of their inquiries, though the instrument is subsequently purchased by them.⁷⁷ And it has also been decided that an acceptor of a bill will not be estopped by representations made to the purchaser by the drawer for whose accommodation it was accepted.⁷⁸ Again where a person indorses a note upon an agreement in writing with the payee that the latter shall not proceed against him until he has first exhausted all the property of the principal, the payee cannot proceed by suit against the indorser until he has first exhausted the property of the principal as agreed, and notice to sue the principal given to the indorser is not notice to sue the indorser himself, and does not estop the latter from setting up the defense that he is liable only after the property referred to has been exhausted.⁷⁹

§ 655. Effect of representations subsequent to transfer.—A maker or indorser of commercial paper is not estopped by representations, made subsequent to its transfer, in regard to its binding force or validity.⁸⁰ A representation, however, made by the holder of a note

⁷⁶ *Sackett v. Kellar*, 22 Ohio St. 554. It appeared in this case that one about to purchase notes and having knowledge of fraud in connection with the procuring of their execution went to the maker and inquired concerning them and was informed that they were all right and would be paid at maturity. Having received this answer he purchased the notes, without disclosing to the maker his knowledge in regard to the fraud, and of which the maker had no knowledge at the time. The court said of the purchaser's conduct: "It was his plain duty, under the circumstances, to inform the defendant of the facts affecting the validity of the notes which had come to his knowledge before purchasing them. Fair deal-

ing required this, and the withholding of such information, under such state of facts, was, in law and in good conscience, a fraudulent suppression of the truth, and the plaintiff took the notes subject to all their infirmities, which had come to his knowledge." Per McIlvaine, J.

See, also, *Clements v. Loggins*, 2 Ala. 514.

⁷⁷ *Allum v. Perry*, 68 Me. 232.

⁷⁸ *Jackson v. Fassitt*, 33 Barb. (N. Y.) 645.

⁷⁹ *Planters' Bank v. Houser*, 57 Ga. 140.

⁸⁰ *Crossan v. May*, 68 Ind. 242; *Stutsman v. Thomas*, 39 Ind. 384; *Windle v. Canaday*, 21 Ind. 248; *Traders' National Bank v. Rogers*, 167 Mass. 316, 45 N. E. 923.

after its maturity, which is of such a nature as to induce an indorser to believe that no liability is claimed to exist against him, and by reason of which he is in fact induced to abstain from securing himself when he might easily have done so, and such security is subsequently lost to him, will operate as an estoppel in an action by such holder against the indorser.⁸¹ And where a note had been discounted by a bank, under an agreement that it was to be paid by a third party, and at its maturity it was protested and notice sent to the maker and indorser, who immediately called at the bank and were informed that the one who was to have paid the note had requested that it be charged to his account, that this had been done, that it was all right, and that they need not trouble themselves any further, whereupon the maker returned to such third party funds of the latter which were sufficient to pay the note, it was held that the bank was by such representations and statements estopped to enforce the note against such maker and indorser.⁸²

§ 656. **By admission or declaration.**—If the maker of a note, when applied to by one intending to purchase it to know if there is any defense against it, admits that he has none, he thereby estops himself from afterward setting up any defense, when sued on the note, which existed at that time within his knowledge, as it would be a fraud on the intended purchaser; but this would not preclude a defense which might subsequently arise out of the original contract, such as total failure of consideration.⁸³ And where the maker of a note admitted in supplemental proceedings against the payee that he owed the latter the amount of a note, and at the time the proceedings were commenced the note had been transferred to a bona fide holder, who was not a party to the proceedings, it was decided that such holder could recover in an action against the maker, as it was the maker's folly to admit that he owed the note to the payee before ascertaining whether the note had been negotiated.⁸⁴ And where admissions were made after maturity by the indorser of a note upon which the holder relied and postponed bringing suit until after the maker had become insolvent it was decided that the indorser was by such admissions estopped from

⁸¹ *Roberts v. Miles*, 12 Mich. 297; *State Bank v. Wilson*, 12 N. C. 484. 60 Am. Dec. 478; *Clements v. Loggins*, 2 Ala. 514.

⁸³ *Mawry v. Coleman*, 24 Ala. 381.

⁸² *Manufacturers' Bank of Troy v. E.* 571.

Seofield, 39 Vt. 590.

denying his signature.⁸⁵ But where an action was brought on a note pledged to the plaintiff as collateral security it was decided that the defendant was not estopped by an admission that the plaintiff obtained the note before maturity from setting up the defense that he was not a *bona fide* holder and that there was a failure of consideration.⁸⁶

§ 657. **By admission or declaration, continued.**—Though a party to commercial paper may be bound by declarations or admissions made by him while he is the owner and in possession thereof, yet such declarations or admissions will not as a general rule operate as an estoppel upon others who may be parties to the paper.⁸⁷ So a maker will not be bound by admission made by an indorser.⁸⁸ And admissions of one of two makers, where they are not partners, as to the validity of the paper have been held not to estop the other from setting up want of consideration, though the plaintiff in interest, or the person from whom he received it, purchased the note on the faith of the admission.⁸⁹ And in an action against partners on a promissory note executed by one of them in the name of the firm, it has been decided that admissions of that partner are not admissible to prove the note a partnership one.⁹⁰

§ 658. **By admissions or declarations, continued.**—Admissions by an assignor have in many cases been held binding upon an assignee,⁹¹ or one who is a holder by delivery merely.⁹² Admissions of one party may also be binding upon another where there is an identity of interest,⁹³ as where an indorsee is the agent of the indorser with power

⁸⁵ *Bates v. Leclair*, 49 Vt. 229.

⁸⁶ *McDonald v. Mayer*, 97 Ga. 281, 23 S. E. 72.

⁸⁷ *United States*.—*Dodge v. Freedman's Savings & Trust Co.*, 93 U. S. 379.

New York.—*Paige v. Cagwin*, 7 Hill 361; *Whitaker v. Brown*, 8 Wend. 490.

Pennsylvania.—*Camp v. Walker*, 5 Watts 482.

South Carolina.—*De Bruhl v. Paterson*, 12 Rich. L. 363.

England.—*Hemings v. Robinson*, Barnes 436; *Beauchamp v. Parry*, 1 Barn. & Adol. 89; *Kent v. Lowen*, 1 Camp. 177.

⁸⁸ *Andrews v. Campbell*, 36 Ohio St. 361.

⁸⁹ *Lewis v. Woodworth*, 2 N. Y. 512.

⁹⁰ *Tuttle v. Cooper*, 5 Pick. (Mass.) 414.

⁹¹ *Thorp v. Goewey*, 85 Ill. 611; *Shade v. Creviston*, 93 Ind. 591; *Stoner v. Ellis*, 6 Ind. 152; *Abbott v. Muir*, 5 Ind. 444; *Blount v. Riley*, 3 Ind. 471; *Bond v. Fitzpatrick*, 8 Gray (Mass.) 536; *Sharp v. Smith*, 7 Rich. L. (S. C.) 3.

⁹² *Thorp v. Goewey*, 85 Ill. 611.

⁹³ *Welstead v. Levy*, 1 Moody & R. 138; *Rocock v. Billing*, 2 Bing. 269.

to sue for him.⁹⁴ And where paper is delivered into the possession of another who is authorized to treat and deal with it as his own, it is decided that admissions made by the latter may operate as an estoppel upon the one by whom the power was given.⁹⁵ It has also been held that a purchaser after maturity may be estopped by admissions made by a prior holder while the instrument was in his possession.⁹⁶

§ 659. **By acts, conduct or words.**—One who, by his words or conduct, induces another to pursue a certain course of action in regard to commercial paper, and the words or conduct are of such a character as would justify a man of ordinary prudence in pursuing that course, may be estopped from showing that the facts, which the other party has been thereby led to believe exist, do not in fact exist, and consequently be precluded from availing himself of a defense which would be inconsistent with the existence of such facts.⁹⁷ So where paper is given or transferred in settlement of an account and the party giving or transferring it treats it as valid until the account has been barred, he will be estopped from denying his liability thereon in an action against him.⁹⁸ And where the maker of a note presents it for discount he should be estopped from setting up any defense affecting its validity against the party discounting it with no notice or knowledge thereof.⁹⁹ So in the case where an acceptor's liability is made

⁹⁴ *Welstead v. Levy*, 1 *Moody & R.* 138.

⁹⁵ *Bank of Newbury v. Sinclair*, 60 N. H. 100; *Reed v. Vancleve*, 27 N. J. L. 352.

⁹⁶ *Curtiss v. Martin*, 20 *Ill.* 557; *Eaton v. Corson*, 59 *Me.* 510. But see *Shober v. Jack*, 3 *Mont.* 351; *Paige v. Cagwin*, 7 *Hill* (N. Y.) 361.

⁹⁷ *United States*.—*Andrus v. Bradley*, 102 *Fed.* 54; *Many*, *In re*, *Fed. Cas.* No. 9054.

Connecticut.—*Middleton Bank v. Jerome*, 18 *Conn.* 443.

Indiana.—*Musselman v. McElhenry*, 23 *Ind.* 4, 85 *Am. Dec.* 445; *Kuiss v. Holbrook*, 16 *Ind. App.* 229, 44 N. E. 563.

Iowa.—*Bartle v. Breniger*, 37 *Iowa* 139.

Maine.—*Stratford v. Crosby*, 8 *Me.* 154.

Minnesota.—*Yellow Medicine Co. Bank v. Wiger*, 59 *Minn.* 384, 61 N. W. 452.

New York.—*Weed v. Carpenter*, 4 *Wend.* 219.

Pennsylvania.—*Decker v. Eisenhauer*, 1 *Ren. & W.* 476.

Texas.—*Kolp v. Specht*, 11 *Tex. Civ. App.* 685, 33 S. W. 714.

⁹⁸ *Carter v. Bolin*, 11 *Tex. Civ. App.* 283, 32 S. W. 123.

⁹⁹ *Kitchell v. Schenck*, 29 N. Y. 515, so holding where in an action by one discounting a note against the maker the latter sought to show usury between him and an accommodation indorser. The court said: "If in such a case as this, where the maker of a note having it in his possession applies to an innocent party to discount it, and receives from him the face of the paper, the

dependent upon the performance of some contract obligation by a party to the paper and performance is prevented by the former, he will be estopped in an action against him on the paper from setting up non-performance as a defense.¹⁰⁰ And it has been decided that an equitable estoppel may arise against a plaintiff from his permitting mortgaged property to be sacrificed at a mortgagee's sale for a sum less than its value, thereby creating a deficiency which would be sufficient to pay the amount of the note.¹⁰¹ Again the granting of an extension of time, with full knowledge of facts which would constitute a good defense to an action on a note, may operate to estop a party from availing himself of such defense, though at the time of granting the extension he was ignorant of the legal effect of such facts.¹⁰² It has, however, been decided that a maker does not, by permitting the holder of the note to retain the same, estop himself from setting up payment as a defense.¹⁰³ Where a partnership note is given to a bank and one of the partners subsequently sells his interest to a third person who agrees to assume the liabilities of such partner, the fact that the bank subsequently accepts a part payment on the note from the incoming partner does not operate as an estoppel so as to prevent the bank from recovering the balance due from the retiring partner.¹⁰⁴

§ 660. **Same subject—Corporate transactions.**—Where stockholders of a corporation have been guilty of laches in permitting corporation bonds to be issued and have availed themselves of the benefits, they will be precluded from the defense that the act of issuing them was *ultra vires*.¹⁰⁵ And where a corporation receives the benefit of money which was borrowed by its president and notes of the corporation, secured by mortgage on its property, are executed therefor, and successive renewals of the notes are procured by the corporation with full knowledge of the facts, it will be estopped from denying its liability

maker may afterwards set up a defense of usury founded on a transaction between him and an accommodation indorser, there can be no safety in discounting negotiable paper. On the contrary, where the maker of a note thus presents his own paper for discount, he should be estopped from setting up any defense of such a character." Per *Ingraham, J.*

¹⁰⁰ *Home Bank v. Drumgoole*, 109 N. Y. 63, 15 N. E. 747.

¹⁰¹ *Island Savings Bank v. Galvin*, 20 R. I. 158, 37 Atl. 809.

¹⁰² *Rindskopf v. Doman*, 28 Ohio St. 516.

¹⁰³ *Hardy v. Waddell*, 58 N. H. 460.

¹⁰⁴ *Smart v. Breckenridge Bank* (Ky. C. A. 1906), 90 S. W. 5, 91 S. W. 697.

¹⁰⁵ *Tyrell v. Railroad Co.*, 7 Mo. App. 294.

in a subsequent action on the paper so given.¹⁰⁶ Again, where property is sold to a corporation or syndicate and the land is conveyed to an individual member whose notes are accepted on the understanding that it is for the purpose of relieving a certain one of the purchasers from liability for the balance of the purchase money, the vendor is estopped to subsequently assert a liability against the latter on the notes or otherwise.¹⁰⁷

§ 661. **By laches.**—Where, owing to the carelessness or negligence of a maker in the execution of commercial paper, an alteration may be easily made, either by the filling in of blanks in an incomplete instrument or by erasure without either defacing it or in such a manner as to excite the suspicions of a careful man, the maker may be estopped thereby from setting up the alteration as a defense to an action brought by a bona fide holder.¹⁰⁸ So it has been held proper in such a case to instruct the jury in substance, that if the maker executed the note in controversy with a material portion written only in pencil, subject to be easily erased so as to leave no appearance of alteration on the face of the note, when, by ordinary care and prudence, he could have guarded against such erasures, he was guilty of negligence, and could not defeat its collection in the hands of an innocent holder who took it before maturity without notice of any alteration.¹⁰⁹ And where a maker or acceptor attempts to destroy an instrument but it is done in such a negligent manner that there are no indications upon its face of an intention to destroy it, and a third party subsequently negotiates it, it has been decided that the maker or acceptor will be estopped from setting up either his attempt or the fraud of the third party in negotiating it, where the action is brought by a bona fide holder. So where the drawer of a bill picked it up in the presence of the acceptor, who had negligently torn it in half and thrown it down, and subsequently

¹⁰⁶ *Mining Co. v. First National Bank*, 95 Fed. 23.

¹⁰⁷ *Underwood v. Patrick*, 94 Fed. 468.

¹⁰⁸ *Illinois*.—*Seibel v. Vaughan*, 69 Ill. 257; *Harvey v. Smith*, 55 Ill. 224; *Elliott v. Levings*, 54 Ill. 213.

Indiana.—*Noll v. Smith*, 64 Ind. 511; *Cornell v. Nebeker*, 58 Ind. 425.

Kentucky.—*Blakey v. Johnson*, 13 Bush 197, 26 Am. Rep. 254; *Woolfolk v. Bank*, 10 Bush 504.

Louisiana.—*Isnard v. Torres*, 10 La. Ann. 103.

Pennsylvania.—*Zimmerman v. Rote*, 75 Pa. St. 188; *Phelan v. Moss*, 67 Pa. St. 59.

Compare Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115.

¹⁰⁹ *Seibel v. Vaughan*, 69 Ill. 257. See, also, *Harvey v. Smith*, 55 Ill. 224.

pasted the two pieces together and negotiated it to a bona fide holder, and the appearance of the bill was as consistent with its having been divided for the purpose of transmission by post as with its having been torn for the purpose of destroying it, the acceptor was held to be estopped from setting up the fraud of the drawer as a defense to an action by the bona fide holder.¹¹⁰ But where a note given for property purchased was prepared by the payee, and the purchaser before signing the same and without the knowledge of the former erased a clause of the note making it negotiable and it was accepted by the payee, who did not know of or assent to the change, without an examination, it was decided that he was not guilty of such negligence as would amount to an estoppel.¹¹¹

§ 662. By retaining consideration.—It is a general rule that a party who receives the consideration for which commercial paper was given or transferred and continues to retain the same is thereby estopped from setting up a defense of which he might otherwise avail himself.¹¹² So where the cashier of a bank sold a note, and the proceeds were received and retained by the bank, it was decided that the bank and its receiver were estopped from denying the authority of the cashier to make such sale.¹¹³ And though a note may have been pro-

¹¹⁰ *Ingham v. Primrose*, 7 C. B. N. S. 82.

¹¹¹ *Frum v. Keeney*, 109 Iowa 393, 80 N. W. 507.

¹¹² *United States*.—*People's National Bank v. National Bank*, 101 U. S. 181; *Weber v. Spokane National Bank*, 64 Fed. 208, 12 C. C. A. 93; *Union Loan & Trust Co. v. Southern California Motor Road Co.*, 51 Fed. 840; *Waynesville National Bank v. Irons*, 8 Fed. 1.

Indiana.—*Hawkins v. Fourth National Bank*, 150 Ind. 117, 49 N. E. 957.

Kentucky.—*German National Bank v. Louisville Butcher's Hide & Tallow Co.*, 97 Ky. 34, 29 S. W. 882.

New Jersey.—*Hackettstown National Bank v. Ming*, 52 N. J. Eq. 157, 27 Atl. 920.

Wisconsin.—*Rogers v. Priest*, 74 Wis. 538, 43 N. W. 510.

¹¹³ *Hawkins v. Fourth National Bank*, 150 Ind. 117, 49 N. E. 957.

It was said by the court in this case: "It is insisted that under the statute of the United States, § 5209, R. S. U. S., the cashier for the Indianapolis Bank had no power to sell said note to the Knightstown Bank unless such authority was conferred upon such cashier by the board of directors of said bank, that the burden of proving such authority was upon the Knightstown Bank, and as the special finding does not state that such authority was conferred by the board of directors upon the cashier, it is equivalent to a finding that such was not conferred by the board of directors of said bank. * * * But even if the special finding stated that said cashier was not authorized by the board of directors to sell said note

cured by fraud or fraudulent representations a maker may, nevertheless, be precluded from availing himself of such a defense by neither restoring nor making any offer to restore the consideration which he received.¹¹⁴ So in a case in which this question is considered it is said: "Conceding that the contract was procured by false and fraudulent representations, the party defrauded cannot rely upon such fraud as a defense unless he has rescinded the contract and offered to restore whatever of value he has received. A party cannot repudiate a contract on the ground of fraud and at the same time retain the benefits derived from it, but must, when he discovers the fraud, restore or offer to restore to the other party what he has received, and failing to do this he affirms the contract. When the consideration received is of any value to either party, its return must be tendered before the party can sustain an action for rescission of the contract or successfully defend an action based upon such contract. A party to a contract cannot treat it as good in part and void in part, but he must affirm it or avoid it as a whole; nor can a contract, either for mistake or fraud, be rescinded in part and affirmed in part, but must be rescinded in toto or not at all."¹¹⁵

§ 663. By another action or proceeding.—A party is not estopped from bringing a proceeding in a United States court upon commercial paper by the mere fact that there is a suit pending in a state court, provided the action is one which may be properly brought before the former court, it being declared that the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends and that they cannot abdicate their authority and duty in any case in favor of another jurisdiction.¹¹⁶ And where an action is brought against an individual as maker of a note it has been decided that the plaintiff will not be estopped from maintaining such action by the fact that he has brought another action against a corporation as maker, where the lat-

on behalf of said bank, as it is found that the said Indianapolis Bank received \$4,930 for said note and retained the same and has returned no part thereof, said bank and its receiver are estopped from denying that said cashier was authorized by the board of directors to sell said note, or that the sale was ratified by said board." Per Monks, J.

¹¹⁴ *Heaton v. Knowlton*, 53 Ind. 357; *Drake v. Lowry*, 14 Iowa 125; *Kenworthy v. Merritt*, 2 Wash. Terr. 155, 7 Pac. 62; *City National Bank v. Kusworm*, 91 Wis. 166, 64 N. W. 843.

¹¹⁵ *Heaton v. Knowlton*, 53 Ind. 357. Per Buskirk, J.

¹¹⁶ *Hyde v. Stone*, 20 How. (U. S.)

170.

ter action has not gone to judgment and it does not appear that the acts of the plaintiff, which are relied on to create an estoppel, have caused the defendant to change his position or to take any action in regard to the note which would be injurious to him.¹¹⁷ And where officers of a corporation executed a note in such a manner as to bind them individually it has been decided that the bringing of an action by the holder against the corporation upon a note similarly executed is no bar to an action against the makers of the note in suit as individuals.¹¹⁸ So it is decided that a temporary injunction restraining the payment of a note by the makers and guarantors is no bar to an action on the note, it being declared that if such an injunction could be pleaded in bar it would amount to a complete satisfaction of the debt as much so as an actual payment.¹¹⁹ Nor in an action upon a note against an indorsee is it any defense that a bill in equity has been filed against the principal in said writing to enforce a vendor's lien on the property for which the obligation sued on was given.¹²⁰ And it has also been decided that an action brought upon a note secured by a mortgage cannot be defeated by showing that the mortgagee has entered for the purpose of foreclosure and that the value of premises is in excess of the debt for which they are security.¹²¹ Nor is a bona fide indorsee of paper, who takes it from the payee for a valuable consideration, precluded from maintaining an action thereon by the fact that the payee had commenced an action against the maker, founded on the paper indorsed, and that he had attached real and personal property much beyond the amount thereof and afterwards, while the action was pending, had negotiated the note to the indorsee for the purpose of relinquishing the attachment, and that the latter, with knowledge of the purpose of the payee and that the maker was also insolvent and unable to pay his debt, had purchased the paper, it not, however, appearing that the transfer was fraudulent.¹²² And it is decided that the rights of the holder of an order, which is payable out of the amount due on a builder's contract, to enforce the same cannot be affected by proceedings by him to enforce a mechanic's lien.¹²³ Again,

¹¹⁷ McClure v. Livermore, 78 Me. (Ky.) 672. Compare Porter v. Knapp, 6 Lans. (N. Y.) 125.

¹¹⁸ First National Bank of Brooklyn v. Wallis, 150 N. Y. 455, 44 N. E. 1038, affirming 84 Hun 376, 32 N. Y. Supp. 382.

¹¹⁹ Campbell v. Gilman, 26 Ill. 120; Bryan v. Saltenstall, 3 J. J. Marsh. (Mass.) 153.

¹²⁰ Speight v. Porter, 4 Cushm. (Miss.) 286.

¹²¹ Portland Bank v. Fox, 19 Me. 99.

¹²² Bellows v. Lovell, 4 Pick. (Mass.) 153.

where an action upon a note is brought against the maker it is held that he will not be estopped from setting up a breach of warranty in regard to the property for the purchase of which the note was given by the fact that an action has been brought by him for damages on the contract.¹²⁴ Nor will the pendency of a suit brought by the vendor on a purchase price note preclude the vendor from setting up a want of consideration for a note given by him to balance the excess of the purchase price note over the purchase price.¹²⁵

§ 664. **As to consideration in general.**—In an action against a purchaser of land upon the purchase price note given by him it has been decided that his acceptance of a deed with a warranty will estop him from setting up as a defense thereto a failure of consideration, it being declared that relief should be sought in a court of equity.¹²⁶ And where a corporation is authorized by statute to accept premium notes in advance to represent capital stock for the security of dealers, the signers of notes which are given under a statute and for the purpose stated will be estopped in an action against them from showing that the notes were without consideration because no insurance has been effected under the policies for which the notes were given.¹²⁷ So where the board of directors of a bank, whose capital was impaired by bad loans, deemed it advisable to charge off these bad loans and substitute in lieu of the amount so charged off notes executed and indorsed by the individual members of the board, it was decided in an action upon a note so executed and indorsed brought by the receiver of the bank that the directors were estopped to set up a want of consideration.¹²⁸ Again one who promises pay "without plea or offset" is held to be thereby estopped from setting up failure of consideration, it being declared that by these terms of the contract the party has absolutely waived the right to resist payment at maturity.¹²⁹ It is, however, decided that, as against one who is not a holder for value, a party does not, either by his silence in claiming failure of consideration or by the execution of a new note to such

¹²³ *Dunn v. Stokern*, 43 N. J. Eq. 401, 3 Atl. 349.

¹²⁴ *Applegarth v. Robertson*, 65 Md. 493, 4 Atl. 896.

¹²⁵ *Litchfield v. Allen*, 7 Ala. 779.

¹²⁶ *Starke v. Hill*, 6 Ala. 785; *Cul-lum v. Bank*, 4 Ala. 21, 37 Am. Dec. 725. See, also, *Horton v. Arnold*, 18 Wis. 212.

¹²⁷ *Maine Mut. Marine Ins. Co. v. Blunt*, 64 Me. 95; *Howard v. Palmer*, 64 Me. 86.

¹²⁸ *State Bank v. Kirk* (Pa. 1907), 65 Atl. 932.

¹²⁹ *Grand Gulf Railroad & Banking Co. v. Stanbrough*, 1 La. Ann. 261.

holder, estop himself from setting up failure of consideration as a defense, it not appearing that such holder has been induced to change his situation in any way, or that he has been misled into the assumption of fresh liabilities, or has relinquished some advantage he might otherwise have availed himself of.¹³⁰ And where an action upon a non-negotiable note is brought in the name of the original promisee for the benefit of the assignee, want of consideration rendering the assignment void is held to be available to the maker as a defense.¹³¹ And it is also declared that a man who, either by himself or his agent, sells his note for cash, especially if it is one not covered by the law merchant, for a price less than that expressed upon its face does not by such sale preclude himself from setting up want of consideration to the extent of a discount, unless, perhaps, a possible case of estoppel might arise, where the sale was by an agent.¹³²

§ 665. Where consideration illegal.—Where the consideration of a note is an agreement, or the doing of an act, which is illegal or in violation of public policy, a party will not be precluded by estoppel from showing such fact. And an obligor is not bound by the fact that a consideration is stated upon the face of a note which appears to be valid, from averring and proving that there was a further consideration which was illegal and against public policy, it being declared that the right of avoiding a contract having for its object or consideration the defeat of the law itself, is allowed not for the advantage of the party, but for the benefit of the public, and it cannot be precluded by estoppel or by express agreement.¹³³ So where an indorsee of an usurious note had knowledge at the time he took it of the usury, the fact that the maker assured him when he took it that he would make no defense to it, does not, in an action against the maker, preclude him from setting up such defense, as, the consideration being an illegal one, the waiver of the defense was not binding as to a party having notice.¹³⁴ So in another case it is said that there can be no ratification

¹³⁰ *Kirkpatrick v. Muirhead*, 16 Pa. St. 117.

¹³¹ *Dunning v. Sayward*, 1 Me. 366.

¹³² *Musselman v. McEhenny*, 23 Ind. 4, 85 Am. Dec. 445.

¹³³ *Gardner v. Maxey*, 9 B. Mon. (Ky.) 90, holding that the compounding of a prosecution for felony, or an agreement to suppress

evidence in a judicial proceeding, is unlawful as against public policy, though it be the evidence of the injured party, and is not a valid consideration for a promise, either verbal or written.

¹³⁴ *Torrey v. Grant*, 10 Sm. & M. (Miss.) 89.

of contracts which are forbidden by statute or which are inconsistent with public policy, or where there is fraud of such a character as to involve a public wrong or a crime, in which case the ratification is also opposed to public policy and cannot be permitted.¹³⁵ And a party is not precluded from availing himself of a defense of this character by the fact that the paper in controversy is under seal.¹³⁶

§ 666. Signing for accommodation—Want or failure of consideration.—One who lends his credit to another, in the form of a note executed by him, to be sold so as to raise funds, cannot, against an assignee or indorsee who is a *bona fide* holder of the paper, set up want or failure of consideration.¹³⁷ And one who, to enable the payee to negotiate a note, signs it after the other makers have signed and delivered it to the payee, is held to be precluded from setting up the defense that there was no consideration for his signature.¹³⁸

§ 667. By receipt of benefits—Failure of consideration.—One who, in the absence of fraud or mistake, gives his notes in settlement of a balance due for goods purchased by him is held to thereby waive a failure which is merely technical on the part of the payee to perform his contract and to be estopped from availing himself of the defense that there was a partial failure of consideration because the quality or quantity of the goods delivered and for which the notes were given was not in accordance with the terms of the contract.¹³⁹

§ 668. By conduct, representation or promise—Want or failure of consideration.—Failure of consideration is not available as a defense to a person where such failure is due to his own neglect or refusal to comply with his part of the agreement, as in such a case he has by his own conduct estopped himself to assert this defense.¹⁴⁰ And where a third person is induced by the maker of a note to purchase it the latter is thereby estopped to assert a want or failure of consideration, as to permit him in such a case to set up this defense would operate

¹³⁵ *Lyon v. Phillips*, 106 Pa. St. 57.
Compare *Kelly v. Allen*, 34 Ala. 663.

¹³⁶ *Calfee v. Burgess*, 3 W. Va. 274.

¹³⁷ *Ritchie v. Cralle*, 108 Ky. 483,
56 S. W. 963. See further as to
right of accommodation maker or
indorser to set up this defense,
§§ 269-283, 342 herein.

¹³⁸ *Rudolph v. Brewer*, 96 Ala. 189,
11 So. 314.

¹³⁹ *Colby v. Lyman*, 4 Neb. 429.

¹⁴⁰ *Cook v. Whitfield*, 41 Miss. 541;
Kolp v. Specht, 11 Tex. Civ. App.
685, 33 S. W. 714.

as a deception upon the purchaser. This rule, however, is held to apply only in those cases where the one taking the paper is an innocent purchaser and also takes it on the strength of the assurance of the maker, without notice of any defense in respect to the consideration.¹⁴¹ So a maker of a note who induces another to purchase it on the strength of his promise to pay the same at maturity is estopped in an action against him on the note to set up the defense of or want or failure of consideration.¹⁴²

§ 669. By knowledge or notice—Want or failure of consideration.—One who indorses notes to another with knowledge of a want or failure of consideration, and they are indorsed in payment of an indebtedness which will be barred by the statute of limitations at the time suit may be brought upon such note, is estopped in an action by such indorsee to assert that there was a want of consideration.¹⁴³ And where a person could, at the time of executing a note in renewal of a former one, easily have obtained information affecting the consideration and which would be a defense to the original note, it has been decided that law will charge him with actual notice and knowledge of the facts which he could then have learned and that he will be estopped from setting up a defense in respect to the consideration based on such facts.¹⁴⁴

§ 670. As to capacity and authority generally.—A party, by executing a note as maker, warrants the capacity of the payee to accept and transfer it in the usual course of business and is estopped, in an action by a bona fide holder, to assert that the payee did not have such capacity.¹⁴⁵ Likewise one who has procured a loan from another and executed his note therefor is precluded in an action on the note from showing that there was a want of capacity in the payee to make

¹⁴¹ *Torrey v. Grant*, 10 Smedes & M. (Miss.) 89.

¹⁴² *McCreary v. Parsons*, 31 Kan. 447, 2 Pac. 570; *Brown v. Daggett*, 22 Me. 30.

¹⁴³ *Carter v. Bolin*, 11 Tex. Civ. App. 283, 32 S. W. 123.

¹⁴⁴ *Montfort v. Americus Guano Co.*, 108 Ga. 12, 33 S. E. 636. See, also, *McNeel v. Smith*, 106 Ga. 215, 32 S. E. 119.

¹⁴⁵ *Arkansas*.—*Winship v. Bank*, 42 Ark. 22.

Indiana.—*Wolke v. Kuhne*, 109 Ind. 313, 10 N. E. 116; *Wells v. Sutton*, 85 Ind. 70.

New York.—*Nelson v. Eaton*, 26 N. Y. 410.

Ohio.—*Ehrman v. Union Central Life Ins. Co.*, 35 Ohio St. 324.

Pennsylvania.—*Housum v. Rogers*, 40 Pa. St. 190.

See § 95 herein.

the loan.¹⁴⁶ And where a note is made payable by a person to his own order and to that of another he will be estopped in an action upon the instrument from asserting that the indorsement was made without his authority where it is shown that it was used to take up a note of his own, liability upon which was not disputed by him.¹⁴⁷ And where a note, which a firm was under an obligation to guaranty, was guaranteed by one of the partners after the firm had dissolved, it was decided, in an action against the firm, that the defense that the partner was not authorized to so act could not be set up.¹⁴⁸ Again where, after the dissolution of a firm, one of the members, without the authority of his partners, executed a note in the firm name, as a renewal of some firm notes and the individual debt of one of the members was included by mistake, it was held in an action on the note that the defendant, a member of the firm who had promised to pay the obligation, supposing it simply a renewal, was estopped to deny his liability on the joint indebtedness, it appearing that he had shared in the benefit to the firm which had resulted from the surrender of the original notes.¹⁴⁹ But where a partner indorsed paper in the firm name, but not in the course of the firm business, it was decided that his partner was not estopped from setting up want of authority to make such indorsement, although it appeared that he had knowledge of similar acts having been previously done by such partner, where it also appeared that he had on numerous occasions protested against this practice.¹⁵⁰ And where a disability on the part of a maker or indorser exists owing to want of mental capacity he will not be estopped from denying that he has acted, even as against a *bona fide* holder.¹⁵¹

¹⁴⁶ *Florida*.—Allen v. Freedman's Savings & Trust Co., 14 Fla. 418.

Georgia.—Bond v. Central Bank of Georgia, 2 Kelly 92.

Indiana.—Pooch v. Association, 71 Ind. 357.

Iowa.—Pleasant Valley District Township v. Calvin, 59 Iowa 189, 13 N. W. 80.

Massachusetts.—Little v. O'Brien, 9 Mass. 423.

Missouri.—McClintock v. Central Bank, 120 Mo. 127, 24 S. W. 1052.

New York.—Rome Savings Bank v. Kramer, 32 Hun 270, affirmed in 102 N. Y. 331, 6 N. E. 682; Colum-

bus City Bank v. Bruce, 17 N. Y. 507.

United States.—Wyman v. Bank, 29 Fed. 734.

¹⁴⁷ Main v. Hilton, 54 Cal. 110.

¹⁴⁸ Star Wagon Co. v. Swezy, 59 Iowa 609, 13 N. W. 749.

¹⁴⁹ Wilson v. Forder, 20 Ohio St. 89, 5 Am. Rep. 627.

¹⁵⁰ Smith v. Weston, 88 Hun (N. Y.) 25, 34 N. Y. Supp. 557.

¹⁵¹ Anglo-Californian Bank v. Ames, 27 Fed. 727, wherein it was so decided in an insane indorser of a certificate of deposit. The court said: "Does this plaintiff, as a *bona*

§ 671. **Same subject—Corporate transactions.**—One who executes a note to a corporation as payee thereby admits the existence of the corporation and its capacity to contract and cannot, in an action against him on the instrument, introduce evidence of facts which tend to impeach or contradict the force and effect of such admissions.¹⁵² So where a note was made payable in bank to an illegal corporation whose existence was subsequently annulled by the courts it was decided that the maker was estopped to deny its existence or capacity to accept or transfer the note where the action was brought by a *bona fide* holder.¹⁵³ And one who has obtained the funds of a corporation and impaired the security of depositors by getting money advanced on commercial paper will not be permitted to consummate a fraud on the depositors and the public by setting up as a defense to an action on a note given for such loan that the act of the corporation was unauthorized.¹⁵⁴ Again, where a party makes a note payable to a *de*

fide holder, occupy any better position than the wrongdoer from whom he purchased? Doubtless, it is entitled to all the protection given to such a purchaser of negotiable paper; but such protection does not extend to an indorsement like this. There was no valid contract of indorsement created by defendant's signature on the back of the paper. It was no better than a signature written in a state of somnambulism, or even than a forgery. No negligence is imputable, for one who is incapable of prudence cannot be guilty of negligence; nor can there be an estoppel. He who is legally disabled to act, cannot be estopped from denying that he has acted. An estoppel creates no power; and while, in favor of a *bona fide* purchaser, inquiry is denied as to equities between prior parties, yet such protection does not cut off inquiry into the contractual capacity of those parties." Per Brewer, J. See, also, McClain v. Davis, 77 Ind. 419; Burke v. Allen, 29 N. H. 106; Wirebach v. First Nat. Bank, 97 Pa. St. 543.

¹⁵² *United States*.—Lauter v. Jarvis-Conklin Mortgage Trust Co., 88 Fed. 894, 29 C. C. A. 473; Gorrell v. Home Life Ins. Co., 63 Fed. 371, 11 C. C. A. 240; City Bank of Hartford v. Press Co., 56 Fed. 260, Affirmed in 58 Fed. 321, 7 C. C. A. 248.

Arkansas.—Reynolds v. Roth, 61 Ark. 317, 33 S. W. 105.

Indiana.—Brickley v. Edwards, 131 Ind. 3, 30 N. E. 708.

Missouri.—Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101; First National Bank v. Gillilan, 72 Mo. 77; Camp v. Bryne, 41 Mo. 525.

Nebraska.—Bair v. People's Bank, 27 Neb. 577, 43 N. W. 347.

New Hampshire.—Nashua Fire Ins. Co. v. Moore, 55 N. H. 48; Pine River Bank v. Hodsdon, 46 N. H. 114.

See § 95 herein.

¹⁵³ Brickley v. Edwards, 131 Ind. 3, 30 N. E. 708.

¹⁵⁴ Allen v. Freedman's Savings & Trust Co., 14 Fla. 418; Brown v. United States Home & D. Ass'n (Ky.), 13 S. W. 1085.

facto corporation he will be estopped from setting up in defense to an action thereon a defect in its organization which it is claimed affects its capacity to sue.¹⁵⁵ Nor can the maker of a note to a national bank or other corporation which was executed for a loan defeat recovery thereon by showing that no security was taken as required by law.¹⁵⁶ Likewise the maker of a note cannot set up that the act of the corporation in purchasing the note was *ultra vires*,¹⁵⁷ or that a corporation in discounting a note acted in excess of the powers conferred upon it by its charter and the laws of the state or of the United States.¹⁵⁸ Again, a corporation which purchases notes cannot subsequently, after the contract has been performed and executed, rescind the contract on the ground that it had no authority to make the purchase, as, having placed itself in the position of a wrongdoer, it is subject to the liabilities which result from its act.¹⁵⁹ Nor can a corporation, which has executed a note in the corporate name in the usual course of business, defeat a recovery thereon by showing that it was not properly incorporated.¹⁶⁰

§ 672. Same subject, continued—Act of public or corporate official in violation of statute.—A maker or acceptor of commercial paper which is received by a public officer in his official capacity is estopped to set up in defense to an action thereon that such officer acted in violation of his rights and duties in that he was required by statute to receive payment in money.¹⁶¹ And where the charter of a bank requires a certain amount of stock to be paid in before the bank can go into operation, and the public statute requires the capital of banks to be

¹⁵⁵ *Bank of Port Jefferson v. Darlin*, 91 Hun (N. Y.) 236, 36 N. Y. Supp. 153.

¹⁵⁶ *Union Gold Min. Co. v. Rocky Mountain National Bank*, 2 Colo. 248, affirming 1 Colo. 532.

¹⁵⁷ *Merchants' National Bank v. Hanson*, 33 Minn. 40, 21 N. W. 849, overruling *First National Bank of Rochester v. Pierson*, 24 Minn. 140; *Ehrman v. Union Central Life Ins. Co.*, 35 Ohio St. 324.

¹⁵⁸ *Alabama*.—*Bates v. State Bank*, 2 Ala. 451.

Dakota.—*Neillsville Bank v. Tut-hill*, 4 Dak. 295, 30 N. W. 154.

Maine.—*Richmond Bank v. Robinson*, 42 Me. 589.

Missouri.—*St. Joseph Fire & Marine Ins. Co. v. Hauck*, 71 Mo. 465.

New York.—*Pratt v. Short*, 53 How. Prac. 506, affirmed in 79 N. Y. 437, 35 Am. Rep. 531.

Compare *Western Bank v. Mills*, 7 Cush. (Mass.) 539; *Mills v. Rice*, 6 Gray (Mass.) 458; *Vanatta v. Bank*, 9 Ohio St. 27.

¹⁵⁹ *Attleborough National Bank v. Rogers*, 125 Mass. 339.

¹⁶⁰ *Empire Mfg. Co. v. Stuart*, 46 Mich. 482, 9 N. W. 527.

¹⁶¹ *Miltenberger v. Cooke*, 18 Wall. (U. S.) 421.

pand in cash, if a subscriber for stock is allowed by the directors to give a note for his stock instead of paying cash, and the bank goes into operation in violation of the charter on a capital in which the note is reckoned as a cash payment for stock, it is held that the illegality of the transaction cannot be set up in defense to an action by the bank on the note.¹⁶²

§ 673. **As to forgery and alteration.—In general.**—Where a bill or note has been put into circulation by a maker or drawee who has received the proceeds thereof he will be estopped to set up in defense to an action on the instrument that the signature of an indorser thereon is forged.¹⁶³ So where one of two partners drew a bill in the firm name upon another payable to the order of one whose name was forged as indorser upon the bill and such partner had it discounted in the regular course of business and applied the proceeds to his private use it was held that, having received the avails of the bill, such party would be estopped from controverting the genuineness of the indorsement.¹⁶⁴ And where one to whom a bill is indorsed and delivered is acting under an assumed name of which fact the indorser is ignorant and the indorsee afterward indorses and transfers it by indorsement under such assumed name to a *bona fide* holder, the original indorser will be estopped in an action against him by such holder from setting up that the indorsement is a forgery.¹⁶⁵ Nor can indorsers of a note who have executed a release to the maker which amounts to a recognition of the instrument as a valid obligation, set up, as a defense to an action by a *bona fide* holder, that there is a material alteration in

¹⁶² *Pine River Bank v. Hodsdon*, 46 N. H. 114. The court said: "The plaintiffs in claiming on these notes act for the general benefit of all parties interested in the assets of the bank; for the innocent stockholders, whether they hold under the original subscriptions or by subsequent purchase, for the bill-holders, depositors and other creditors of the corporation. The bank in this suit represents their interests. If a recovery should be had, the amount recovered will be added to the assets of the bank for their benefit and security. We think that the

directors, if they were concerned in such cheat and crime, did not make the bank, representing such interests and charged with such duties, party to the cheat and crime in such way as to prevent a recovery on these notes for the benefit of the parties whom the violated law was intended to protect." Per Perley, J.

¹⁶³ *Coggill v. Bank*, 1 N. Y. 113; *Meacher v. Fort*, 3 Hill (S. C.) 227; *Beekman v. Duck*, 11 Mees. & W. 251.

¹⁶⁴ *Coggill v. American Exchange Bank*, 1 N. Y. 113.

¹⁶⁵ *Forbes v. Espy*, 21 Ohio St. 474.

the note.¹⁶⁶ So where, at a time a person signs an instrument as surety, there are no other signatures thereon, he is held to thereby admit the genuineness of such signatures if it is accepted by the payee or obligee without notice.¹⁶⁷ Where a person voluntarily erases his signature as a maker or indorser he will not be permitted to prove that it was not genuine, as one, who voluntarily, without mistake or accident, destroys primary evidence, thereby deprives himself of the production and use of secondary evidence.¹⁶⁸ Mere silence, however, has been held insufficient to create an estoppel.¹⁶⁹ And it has also been held that a party is not estopped from setting up the defense that his signature is forged by the mere fact that he has paid previous notes forged by the same person.¹⁷⁰ In other cases, however, it has been held that a party may be estopped by such payment.¹⁷¹ Again it has been decided that written assent given by a party to an extension of time upon the giving by the maker of additional security to the holder does not operate as a waiver of the defense of forgery where it is provided by the writing that the party giving such assent holds himself liable "in the same manner and to the same extent" as it was at that time.¹⁷² And it has been decided that acceptance by the drawee of a bill and his payment of the same does not estop to deny that the signature of an indorser is genuine, it being declared that though an acceptor is presumed to know

¹⁶⁶ Conable v. Smith, 61 Hun (N. Y.) 185, 15 N. Y. Supp. 924.

¹⁶⁷ Wayne Agricultural Co. v. Cardwell, 73 Ind. 555; Helms v. Agricultural Co., 73 Ind. 325; Wheeler v. Trades Deposit Bank, 107 Ky. 653, 55 S. W. 552; Chase v. Hathorn, 61 Me. 505; Selser v. Brock, 3 Ohio St. 302.

¹⁶⁸ Broadwell v. Stiles, 8 N. J. L. 58. The court said: "The best evidence is required, and if a party having such in his power voluntarily destroys it, the law knows no relaxation for him, whatever may be given to accident or misfortune. The fact of destruction excites suspicion and unfavorable presumption." Per Ewing, J.

¹⁶⁹ Furnish v. Burge (Tenn.), 54 S. W. 90.

¹⁷⁰ Whiteford v. Munroe, 17 Md.

135; People v. Bank of North America, 75 N. Y. 547; Palm v. Watt, 7 Hun (N. Y.) 317; Cohen v. Teller, 93 Pa. St. 123; Morris v. Bethel, L. R. 5 C. P. 47.

¹⁷¹ Neal v. First National Bank, 26 Ind. App. 503, 60 N. E. 164, holding that a payment by a husband to a bank of checks forged by the wife without any complaint on his part, would preclude a recovery by him from the bank of the amount of future checks forged by her. Buck v. Wood, 85 Me. 204, 27 Atl. 103, holding that payments on a note to an innocent holder, without disclosing the forgery, for the purpose of shielding the forger, when otherwise he would have been prosecuted criminally, estopped defendant from setting up the forgery.

¹⁷² Bell v. Shields, 19 N. J. L. 93.

the signature of the drawer he is not supposed to know an indorser's signature and does not by his acceptance admit the genuineness of, or guaranty the same.¹⁷³

§ 674. **Same subject—By admission of signature.**—An admission by a party that a signature purporting to be his is genuine may operate to estop him from subsequently setting up the defense that it is a forgery.¹⁷⁴ So a maker was held to be estopped from denying his signature on a note where the evidence went to show that he not only had adopted and ratified such signature but that by his admissions and declarations that the note was "all right" and that if plaintiff would "hold still" he would pay him, he had knowingly and designedly induced the plaintiff to omit taking any measures to collect the note of the co-maker at the time when the latter had ample property in his hands, and a resort to whom for the collection of the note would, in all probability, have been successful; and that afterwards, while the plaintiff continued to be misled by the assurances of the defendant, the co-maker failed in business and absconded, rendering the collection of the note from him impossible.¹⁷⁵ It has, however, been determined that in order to create an estoppel by an admission of this character it is necessary that the instrument should have been produced or identified at the time the admission was made¹⁷⁶ and that the party to whom the admission was made acted thereon in such a manner as to create an equitable estoppel.¹⁷⁷

¹⁷³ *Holt v. Ross*, 54 N. Y. 472, 13 Am. Rep. 615. Compare *Phillips v. Im Thurm*, L. R. 1 C. P. 463, holding that where one has been induced to part with his money by a party's acceptance of a bill the latter is estopped to deny the genuineness of indorsements thereon.

¹⁷⁴ *Illinois*.—*Hefner v. Dawson*, 63 Ill. 403; *Hefner v. Vandolah*, 62 Ill. 483.

Indiana.—*Kuriger v. Joest*, 22 Ind. App. 633, 52 N. E. 764, 54 N. E. 414.

Kentucky.—*Rudd v. Matthews*, 79 Ky. 479.

Maine.—*Casco Bank v. Keene*, 53 Me. 103.

England.—*Leach v. Buchanan*, 4 Esp. 226.

Compare *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *Brook v. Hook*, L. R. 6 Exch. 89.

¹⁷⁵ *Hefner v. Dawson*, 63 Ill. 403.

¹⁷⁶ *Sheller v. McKenney*, 17 Ill. App. 185.

¹⁷⁷ *Sheller v. McKenney*, 17 Ill. App. 185, wherein the court said: "The foundation of the doctrine of equitable estoppel is the necessity of preventing the consummation of the fraud which would result if a person who, by his words or conduct, has induced another to act so as to change his previous position, should afterward be permitted to

§ 675. **Same subject—Failure to give notice of forgery.**—The drawer, maker, or indorser of a bill or note will not be estopped by a delay of a few days in giving notice of a forgery to a holder of the paper provided the position of the latter has in no way been altered for the worse. If, however, it appears that the one whose name is forged leads the holder to believe in the genuineness of the signature until he has lost some opportunity of recovering on the instrument which would have been available if he had known of the forgery it will be a sufficient alteration of the holder's position to estop him from setting up this defense.¹⁷⁸ So where the drawer of a check discovers that it has been paid upon a forged indorsement notice of such fact should be given, without unnecessary delay to the bank which has paid it and if the drawer waits an unreasonable length of time before giving such notice he will not be permitted to recover the amount of such check from the bank.¹⁷⁹

§ 676. **Same subject—As to checks.**—A depositor, by his failure to examine his pass book and the returned checks, is not necessarily guilty of such negligence as will estop him from showing that a check which has been returned from the bank is a forgery, unless the bank has thereby sustained a loss.¹⁸⁰ But where a check is ratified by the drawer whose name is signed thereto he will be estopped to deny its validity or to show that his signature is forged where an action is brought against him by a holder in good faith.¹⁸¹ And where a check which is presented to a teller of a bank and purports to be certified by

deny the existence of the state of things upon the faith of which the other party has so acted. But it would certainly be a novel doctrine to hold that a party may invoke the rule of equitable estoppel, where he has not been induced to change his previous position, but only to change his previous condition of mind. By merely changing his condition of mind or adopting a particular belief, no rights are lost or put in jeopardy, since by correcting his state of mind when the truth is ascertained he is placed completely *in statu quo*." Per Bailey, J.

See, also, *Starr v. Yourtree*, 17 Md. 341.

¹⁷⁸ *McKenzie v. British Linen Co.*, 44 Law T. N. S. 431.

¹⁷⁹ *United States v. National Exchange Bank*, 45 Fed. 163, holding a delay of over thirty days unreasonable.

¹⁸⁰ *Janin v. London & San Francisco Bank*, 92 Cal. 14, 27 Pac. 1100; *Bank of British North America v. Mechanics' National Bank of New York City*, 91 N. Y. 106; *Ogilvie v. Mortgage Co.*, L. R. App. Cas. 257.

¹⁸¹ *Charles River National Bank v. Davis*, 100 Mass. 413.

him is pronounced to be good, the bank will be estopped to subsequently show that the certification was forged.¹⁸²

§ 677. **As to statute of limitations.**—The statute of limitations in the case of a certified check begins to run from the time the bank refuses to pay the same and in an action on such an instrument it has been decided that the bank is not estopped to plead such statute by the fact that it has included the check as a part of its indebtedness in its annual statement made in compliance with a statute requiring a bank to make a statement annually of its accounts with its customers.¹⁸³

¹⁸² Continental National Bank v. National Bank of Commerce, 50 N. Y. 575. ¹⁸³ Blades v. Grant County Deposit Bank, 21 Ky. Law R. 1761, 56 S. W. 415.

CHAPTER XXIX.

DISCHARGE.

Sec.	Sec.
678. What constitutes a discharge— Under statute.	691. By assignment, transfer or sur- render of property.
679. Same subject—Maker.	692. Surrender of valid notes for forged notes.
680. Discharge of surety.	693. By work, labor or services per- formed or rendered.
681. Discharge of guarantor.	694. Tender of payment.
682. Mortgage security.	695. Indorsements of payments— Receipts—Cancellation.
683. Sale or surrender of collateral, or satisfaction of debt.	696. Whether a purchase or pay- ment.
684. Agreement and condition—De- cisions generally.	697. Payment—By whom.
685. Same subject.	698. Same subject—To whom.
686. Payment by note or check of or by order on third person— Accord and satisfaction.	699. Same subject.
687. By payment of other indebted- ness.	700. Renunciation by holder.
688. By bill, note or check—Substi- tuted note—Renewal note.	701. Right of party who discharges instrument.
689. By stock or bonds.	702. Discharge—Miscellaneous deci- sions.
690. By conveyance of land or agreement to take deed.	

§ 678. What constitutes a discharge—Under statute.—The negotiable instruments law provides that: A negotiable instrument is discharged (1) By payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder. (4) By any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right. It is further provided by that enactment that: A person secondarily liable on the instrument is discharged: (1) By any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal

debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved.¹

§ 679. **Same subject—Maker.**—A maker may be discharged by a release based upon a sufficient and valid consideration.^{1*} Again, the satisfaction between the maker and the payee of a note not payable in bank may constitute a good defense in an action by the assignee against the maker, such satisfaction being agreed upon before notice to the maker that the note has been assigned.² And the maker may set up and rely upon any defense that he may have to a note in the hands of a purchaser by mere delivery, or who takes it after maturity, and this includes a defense that the note has been satisfied by an agreement of the grantor with his grantee rescinding a sale in connection with which the note was given.³ If the maker and the payee enter into the state of matrimony the marriage is held to extinguish the former's liability.⁴ So non-presentment or laches in presentment of a claim against the maker's estate may constitute a good defense.⁵ And if a note is transferred after its maturity to a co-partnership of which one of the makers of the paper is a partner such transfer operates to extinguish the note as to all the makers.⁶ But where one of the joint makers of a note receives it under an order of distribution of the estate of the payee the other debtor's proportion

¹ *Negot. Inst. Law*, §§ 200, 201, Appendix herein.

^{1*} *Ludington v. Bell*, 77 N. Y. 138, rev'g 43 N. Y. Super. Ct. 557.

When release not available by maker see: *McCann v. Lewis*, 9 Cal. 246; *Smith v. Smith*, 80 Ind. 267; *Washington College v. Duke*, 14 Iowa 14; *Lewis v. Westover*, 29 Mich. 14.

Release of insolvent maker, see: *Keeler v. Bartine*, 12 Wend. (N. Y.) 110.

Maker released by election of corporation to perfect stock instead of enforcing note therefor, see: *Ashton v. Burbank*, 2 Dill. (U. S.) 435, Fed. Cas. No. 582.

² *Shade v. Creviston*, 93 Ind. 591. Compare *First National Bank v. Bynum*, 84 N. C. 24; *Wetmore v. Blush, Brayt.* (Vt.) 55; *Cowdrey v. Vandenburg*, 101 U. S. 572.

³ *Shinn v. Fredericks*, 56 Ill. 439.

⁴ *Chapman v. Kellogg*, 102 Mass. 246; *Curtis v. Brooks*, 37 Barb. (N. Y.) 476.

⁵ *Marshall v. Perkins*, 72 Me. 343; *Pratt v. Lamson*, 128 Mass. 529. Examine *Tinker v. Babcock*, 107 Ill. App. 78, aff'd 204 Ill. 571, 68 N. E. 445.

⁶ *Logan County National Bank v. Barclay*, 20 Ky. L. Rep. 773, 46 S. W. 675.

of the obligation is not extinguished nor is the note thereby paid.⁷ Co-debtors may, however, be discharged by a release which is unqualified clearly expressed and absolute in its terms.⁸ But parties who indorse a note at the time of execution may be liable for contribution in the absence of a statute to the contrary.⁹ A judgment against one of several joint debtors on a joint contract is at common law a bar to an action against them and this applies to a note, as there is a merger of the entire cause of action consequent upon such judgment and the joint liability is thereby extinguished.¹⁰ The acceptor will be ex-

⁷ *Enscoe v. Fletcher*, 1 Cal. App. 659, 82 Pac. 1075, under Cal. Civ. Code, § 1543. *Examine Louis v. Triscony*, 58 Cal. 304; *Hawk v. Johnson (Pa.)*, 6 Atl. 725.

⁸ *Illinois*.—*Clark v. Mallory*, 185 Ill. 227, 56 N. E. 1099.

Michigan.—*Stevens v. Hannan*, 88 Mich. 13, 49 N. W. 874, aff'g 86 Mich. 305, 48 N. W. 951.

New Hampshire.—*Young v. Currier*, 63 N. H. 419.

Texas.—*Kneeland v. Miles (Tex. Civ. App.)*, 24 S. W. 1113.

West Virginia.—*Maslin's Ex'rs v. Hiett*, 37 W. Va. 15, 16 S. E. 437.

England.—*Cocks v. Nash*, 9 Bing. 341.

See the following cases:

Colorado.—*Hochmark v. Richler*, 16 Colo. 263, 26 Pac. 818.

Maine.—*Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461.

Massachusetts.—*Shaw v. Pratt*, 22 Pick. (Mass.) 305.

Oregon.—*Crawford v. Roberts*, 8 Oreg. 324.

Tennessee.—*Richardson v. McLe-more*, 5 Baxt. (Tenn.) 586.

England.—*Nicholson v. Revill*, 4 Adol. & E. 675, 6 Nev. & M. 192.

But compare *First National Bank v. Watkins*, 154 Mass. 385, 28 N. E. 275; *Potter v. Green*, 6 Allen (Mass.) 442; *Carrier v. Sears*, 4 Allen (Mass.) 336; *Smith v. Bartholomew*, 1 Metc. (Mass.) 276;

Ruggles v. Pattem, 8 Mass. 480; *Young v. Currier*, 63 N. H. 419; *Line v. Nelson*, 38 N. J. L. 358; *Bowman v. Rector (Tenn.)*, 59 S. W. 389.

⁹ *Caldwell v. Hurley*, 41 Wash. 296, 83 Pac. 318.,

¹⁰ *United States*.—*Mason v. Eldred*, 6 Wall. (U. S.) 231 (except in Michigan when the debtors are partners). See *Eldred v. Bank*, 17 Wall. 545.

Indiana.—*Cox v. Maddux*, 72 Ind. 206; *Archer v. Heiman*, 21 Ind. 29.

Massachusetts.—*Ward v. Johnson*, 13 Mass. 148.

New Hampshire.—*Farwell v. Hilliard*, 3 N. H. 318.

New York.—*Candee v. Smith*, 93 N. Y. 349.

England.—*King v. Hoare*, 13 Mees. & W. 494.

But see generally, *Joyce v. Spafford*, 101 Ill. App. 422; *Giles v. Canary*, 99 Ind. 116; *Bute v. Brainerd*, 93 Tex. 137, 53 S. W. 1017, under Rev. Stat. 1895, art. 1203; *Ayrey v. Davenport*, 2 Bos. & P. 474.

That judgment on note merges cause of action, see the following cases:

United States.—*Harrison v. Remington Paper Co.*, 140 Fed. 385.

Alabama.—*Brown v. Foster*, 4 Ala. 282.

Illinois.—*Brown v. Schurtz*, 203 Ill. 136, 67 N. E. 767.

operated if there are funds in the hands of the assignee of the drawer for whose accommodation the bill was accepted and such funds are available for satisfaction of the bill.¹¹ Again, satisfaction of a bill as between a drawer or indorser and an indorsee, whether made prior or subsequent to the bill becoming due, does not necessarily enure as a satisfaction on behalf of the acceptor, or operate to discharge him from liability to the indorsee.¹² A release by an indorser is not binding upon his immediate indorsee;¹³ although a release by the holder may be availed of as a bar.¹⁴

§ 680. **Discharge of surety.**—A surety may be relieved of all liability on a note by assigning a judgment owned by him to the payee

Indiana.—Dunn v. Dills, 31 Ind. App. 673, 68 N. E. 1035.

Kansas.—Redden v. First National Bank, 66 Kan. 747, 71 Pac. 578.

New Mexico.—See First National Bank v. Lewinson (N. M.), 76 Pac. 288.

New York.—Lytle v. Crawford, 74 N. Y. Supp. 660, 69 App. Div. 273.

Ohio.—Erwin v. Lynn, 16 Ohio St. 539.

Pennsylvania.—Work v. Prall, 26 Pa. Super. Ct. 104.

When judgment is not a merger or bar, see the following cases:

United States.—Clark v. Young, 1 Cranch (U. S.) 181.

Georgia.—Taylor v. Jarrell, 104 Ga. 169, 30 S. E. 675.

Illinois.—Mount v. Sholes, 120 Ill. 394, 11 N. E. 401.

Indiana.—Yance v. English, 78 Ind. 80; Morrison v. Fishel, 64 Ind. 177; Smith v. Hunter, 33 Ind. 106.

Massachusetts.—Burnham v. Windram, 164 Mass. 313, 41 N. E. 305; Stone v. Wainwright, 147 Mass. 201, 17 N. E. 301; Hunt v. Brown, 146 Mass. 253, 15 N. E. 587; Fisher v. Fisher, 98 Mass. 303; Andover Sav. Bank v. Adams, 1 Allen (Mass.) 28.

Michigan.—Smith v. Curtiss, 38 Mich. 393.

Missouri.—Orrick v. Dunham, 79 Mo. 174.

Nebraska.—Sackett v. Montgomery, 57 Neb. 424, 77 N. W. 1083.

New York.—Russel & Irwin Mfg. Co. v. Carpenter, 5 Hun (N. Y.) 162.

Pennsylvania.—Rice v. Groff, 58 Pa. St. 116; Kirkpatrick v. Muirhead, 16 Pa. St. (4 Harris) 117.

Tennessee.—Bowman v. Rector (Tenn.), 59 S. W. 389.

Vermont.—Tremont Bank v. Paine, 2 Williams (Vt.) 24.

Canada.—McLennan v. McMonies, 25 U. C. Q. B. 114; Bank of Montreal v. Douglas, 17 U. C. Q. B. 208.

England.—Tarleton v. Allhusen, 2 Adol. & E. 32; Claxton v. Swift, 2 Show 441.

¹¹ Bradford v. Hubbard, 8 Pick (25 Mass.) 155. Examine Rolfe v. Wyatt, 5 Car. & P. 181.

¹² Jones v. Broadhurst, 9 C. B. (O. S.) 173. Examine Williams v. Jones, 77 Ala. 294.

¹³ Russell v. Cornwell, 2 Root (Conn.) 122.

¹⁴ Bauerman v. Radenius, 7 Term R. 663.

of the note, it being agreed that such assignment shall so operate.¹⁵ A surety will also be released by a valid binding contract extending time without the surety's notice or knowledge.¹⁶ But there must be a clear and binding agreement for such extension of time in order that it shall operate as a release.¹⁷ Such extension must also be based upon a sufficient consideration.¹⁸ And the shortness of time is immaterial provided the agreement is certain, clear and unconditional.¹⁹ So the surety's liability may be affected by a contemporaneous parol agreement for the extension of time, when based upon a sufficient consideration.²⁰ If a debt, for which a partner is surety, is increased or the character thereof changed by a note without such surety's consent the surety is discharged.²¹ A surety is also discharged where, through the creditor's neglect to proceed against the principal, he has been precluded from recovering the debt or has sustained damage.²² So the

¹⁵ *First National Bank of Indianapolis v. New*, 146 Ind. 411, 45 N. E. 597.

¹⁶ *California*.—*Daneri v. Gazzola*, 139 Cal. 416, 73 Pac. 179.

Illinois.—*Wyatt v. Dufrene*, 106 Ill. App. 214.

Kansas.—*Bank of Horton v. Brooks*, 64 Kan. 285, 67 Pac. 860.

Kentucky.—*Barber v. Ruggles*, 27 Ky. L. Rep. 1077, 87 S. W. 785.

Missouri.—*Johnson v. Franklin Bank*, 173 Mo. 171, 73 S. W. 391; *Steele v. Johnson* (Mo. App.), 69 S. W. 1065.

Nebraska.—*Shuler v. Hummel* (Neb.), 95 N. W. 350.

Wisconsin.—*Fanning v. Murphy*, 126 Wis. 538, 105 N. W. 1056.

Texas.—*Marshall Nat. Bank v. Smith*, 33 Tex. Civ. App. 555, 77 S. W. 237.

See *People v. Grant* (Mich.), 11 Det. L. News 474, 100 N. W. 1006; *Lazelle v. Miller*, 40 Oreg. 549, 67 Pac. 307; *Westbrook v. Belden Nat. Bank*, 97 Tex. 246, 77 S. W. 942; *Guerguin v. Boone*, 33 Tex. Civ. App. 622, 77 S. W. 630.

Examine *Parlin & Orendorff Co. v. Hudson*, 198 Ill. 389, 65 N. E. 93; *Brink v. Stratton*, 72 N. Y. Supp.

87, 64 App. Div. 331; *Hummels-town Brownstone Co. v. Knerr*, 25 Pa. Sup. Ct. 465.

¹⁷ *Barber v. Ruggles*, 27 Ky. L. Rep. 1077, 87 S. W. 785; *Westbay v. Stone*, 112 Mo. App. 411, 87 S. W. 34.

Examine Bank of Morehead v. Elam, 24 Ky. L. Rep. 2425, 74 S. W. 209; *Johnson v. Franklin Bank*, 173 Mo. 171, 73 S. W. 391. Compare *Revell v. Thrash*, 113 N. C. 803, 44 S. E. 596.

When surety not released by extending credit in excess of stipulated amount in a contract made contemporaneously with a note given as collateral security for a debt, see *Rouss v. King*, 69 S. C. 168, 48 S. E. 220.

¹⁸ *Higgins v. McPherson*, 118 Ill. App. 464; *Durbin v. Northwestern Scraper Co.* (Ind. App.), 73 N. E. 297; *Regan v. Williams*, 185 Mo. 620, 84 S. W. 959.

¹⁹ *Revell v. Thrash*, 132 N. C. 803, 44 S. E. 596.

²⁰ *Moroney v. Coombes* (Tex. Civ. App.), 88 S. W. 430.

²¹ *Casey-Swazy Co. v. Anderson* (Tex. Civ. App.), 83 S. W. 840.

²² *Dampskibsaktieselskabet Håbil v. United States Fidelity & Guar-*

surrender or release of securities operates to discharge him.²³ And the question whether payments have been properly applied may affect the surety's right to a discharge.²⁴ Again, where the maker is surety for the indorser, the transactions between the indorser and the holder may be of such a character as to discharge him.²⁵ But, if a note is in no way varied, he is not discharged by the mere payment by the principal of interest due;²⁶ nor is he released by the mere surrender of the note for a worthless check.²⁷

§ 681. **Discharge of guarantor.**—A release of a guarantor's obligations on a note must be based on a valid consideration.²⁸ But a guarantor is exonerated where, without his consent the original obligation of the principal is altered by an act of the creditor, or where such creditor's rights or remedies against the principal are impaired.²⁹ And so a guarantor who has given his mortgage to secure a part of the amount of a note, is discharged therefrom by the payment of the debt secured.³⁰ A guarantor may also be released by an extension of time without his consent,³¹ or by neglect to take action against or to

anty Co. (Ala.), 39 So. 54. Examine *Bolling v. Chambers*, 20 Colo. App. 113, 77 Pac. 16; *Burge v. Duden* (Mo. App.), 78 S. W. 653; *Robertson v. Angle* (Tex. Civ. App.), 76 S. W. 317.

²³ *Molaka v. American Fire Ins. Co.*, 29 Pa. Super. Ct. 149. See *Brown v. First National Bank*, 132 Fed. 450, 66 C. C. A. 293; *Trammell v. Swift Fertilizer Works*, 121 Ga. 778, 49 S. E. 739; *Gotzian & Co. v. Heine*, 87 Minn. 429, 92 N. W. 398; *Rouss v. King*, 69 S. C. 168, 48 S. E. 220.

²⁴ *Eccleston v. Sands*, 95 N. Y. Supp. 1107, 108 App. Div. 147. See *Mitchell v. Wheeler*, 122 Iowa 368, 98 N. W. 152.

²⁵ *Jennings v. Moore*, 189 Mass. 197, 75 N. E. 214.

²⁶ *Bitler's Estate*, In re, 30 Pa. Super. Ct. 84.

²⁷ *Hogan v. Kaiser*, 113 Mo. App. 711, 88 S. W. 1128.

When surety not discharged, see

generally: *Ingells v. Sutcliff*, 36 Kan. 444, 13 Pac. 828; *Prather v. Gammon*, 25 Kan. 379; *Deposit Bank of Sulphur v. Peak*, 23 Ky. L. Rep. 19, 62 S. W. 268; *First National Bank v. Marshall*, 73 Me. 79; *North Ave. Savings Bank v. Hays*, 188 Mass. 135, 74 N. E. 311.

Surety—as to right of contribution, see *Skiles' Estate*, In re, 211 Pa. 631, 61 Atl. 245; *Adams v. DeFrehn*, 27 Pa. Sup. Ct. 184.

²⁸ *Hale v. Dressen*, 76 Minn. 183, 78 N. W. 1045. Examine *Davis Sewing Machine Co. v. Buckles*, 89 Ill. 237.

²⁹ *Stanford v. Coram*, 26 Mont. 285, 67 Pac. 1005.

³⁰ *Carson v. Reed*, 137 Cal. 253, 70 Pac. 89.

³¹ *Loeff v. Taussig*, 102 Ill. App. 398; *American Iron & Steel Mfg. Co. v. Beal*, 101 Md. 423, 61 Atl. 629; *Bank v. Hunt* (R. I.), 13 Atl. 115, 5 N. Eng. 777.

When not so released, see *Leon-*

prosecute the principal with due diligence.³² But it is decided that the neglect to enforce a security, or the want of diligence in collecting the note, will not affect the liability of a guarantor where the guaranty is an absolute one.³³ And it is held that it is obligatory upon a guarantor to ascertain whether payment of the instrument has been made and that his liability thereon arises immediately upon the default of the debtor;³⁴ nevertheless, it is also determined that he is entitled to notice of the maker's default within a reasonable time, otherwise he will be entitled to a discharge to the extent of his consequent or resulting damage.³⁵ If the payment of the note is dependent

hardt v. Citizens' Bank, 56 Neb. 38, 76 N. W. 452; *Bank of Buffalo v. Danziger*, 65 N. Y. Supp. 981, 53 App. Div. 517; *Providence Mach. Co. v. Browning*, 70 S. C. 148, 49 S. E. 325.

³² *Getty v. Schantz*, 101 Wis. 229, 77 N. W. 191.

Examine the following cases:

United States.—*Getty v. Schantz*, 100 Fed. 577, 40 C. C. A. 560.

Georgia.—*Nance v. Winship Machine Co.*, 94 Ga. 649, 21 S. E. 901.

Iowa.—*Durand v. Bowen*, 73 Iowa 573, 35 N. W. 644.

Minnesota.—*D. M. Osborne & Co. v. Gullickson*, 64 Minn. 218, 66 N. W. 965.

Nebraska.—*Rice v. McCague*, 61 Neb. 861, 86 N. W. 486.

New York.—*Chatham National Bank v. Pratt*, 135 N. Y. 423, 48 N. Y. St. R. 478, 32 N. E. 236, rev'g 16 N. Y. Supp. 216, 40 N. Y. St. R. 789; *Jackson v. Decker*, 43 N. Y. Supp. 957, 14 App. Div. 415.

North Dakota.—*Roberts, Thorp & Co. v. Laughlin*, 4 N. D. 167, 59 N. W. 967.

South Carolina.—*Carroll County Savings' Bank v. Strother*, 28 S. C. 504, 6 S. E. 313.

South Dakota.—*Hanna v. Stroud*, 13 S. Dak. 352, 83 N. W. 365.

Texas.—*Burrow v. Zapp*, 69 Tex. 474, 6 S. W. 783.

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³³ *Warder-Bushnell & Co. v. Johnson*, 114 Mo. App. 571, 90 S. W. 392. Compare *Fegley v. Jennings*, 44 Fla. 203, 32 So. 873.

³⁴ *M. V. Monarch Co. v. First National Bank*, 20 Ky. L. Rep. 1223, 49 S. W. 32, 16 Bkg. L. J. 151. See also *Hoyt v. Quint*, 105 Iowa 443, 75 N. W. 342. Compare *German Savings Bank v. Drake* (Iowa), 79 N. W. 121.

³⁵ *Lemmert v. Guthrie Bros.*, 69 Neb. 499, 95 N. W. 1046. See Chap. XXIII herein.

But examine the following cases:

District of Columbia.—*Hughes v. Heyman*, 4 App. D. C. 444, 22 Wash. L. Rep. 737.

Florida.—*Ferst v. Blackwell*, 39 Fla. 621, 22 So. 892.

Georgia.—*Rogers v. Burr*, 97 Ga. 10, 25 S. E. 329.

Illinois.—*Taussig v. Reid*, 145 Ill. 488, 32 N. E. 918.

Iowa.—*Hoyt v. Quint*, 105 Iowa 443, 75 N. W. 342; *Davey v. Waughtal*, 99 Iowa 654, 68 N. W. 904.

Kansas.—*Bonebrake v. King*, 49 Kan. 296, 31 Pac. 1006.

Kentucky.—*Yager v. Kentucky Title Co.*, 23 Ky. L. Rep. 2240, 66 S. W. 1027.

Maryland.—*Heyman v. Dooley*, 77 Md. 162, 20 L. R. A. 257, 26 Atl. 117.

Massachusetts.—*Bishop v. Eaton*, 161 Mass. 496, 37 N. E. 665.

upon certain conditions, the guarantor of payment is discharged by acts of the maker which preclude the performance of such conditions.³⁶ So the surrender of one of several guaranteed notes and the taking of other notes therefor will release the guarantor to the amount of the surrendered note.³⁷ The taking by the guarantee of additional security does not, it is decided, discharge a guarantor.³⁸

§ 682. Mortgage security.—Where a mortgage is merely a collateral security for the debt and a separate obligation, the satisfaction thereof does not operate to discharge the bond where the debt itself is not satisfied, and a mortgage sale does not satisfy the bond although under the mortgage recitals the grant is for better security and in discharge of such obligation.³⁹ If a mortgagee of a negotiable mortgage note assigns it to an innocent party before due, as security for goods sold, he has no right to enter of record a satisfaction of the mortgage, although the note was given without any consideration and such a satisfaction will be vacated in equity and will constitute no defense to an action on the instrument.⁴⁰ And where the drawer of a bill, before it became due, agreed with the acceptor, that on his giving a certain mortgage securing for the amount, he, the drawer, should deliver up to him the bill as discharged and fully satisfied; and the acceptor, executed the mortgage and received back the bill uncanceled, the drawer was held liable on the bill to the party to whom the acceptor afterward indorsed it for value before it became due, and a plea, in such an action, that the bill was paid by the acceptor before it became due, and afterward reissued by him, can be supported by proof only of actual payment in cash, and not by proof of an agreement between

Michigan.—*Roberts v. Hawkins*, 70 Mich. 566, 38 N. W. 575, 14 West. Rep. 867.

Minnesota.—*Fall v. Youmans*, 67 Minn. 83, 69 N. W. 697.

Nebraska.—*Harvey v. First National Bank*, 56 Neb. 320, 76 N. W. 870.

New York.—*Central Bank v. Kimball*, 76 N. Y. Supp. 227, 73 App. Div. 100; *Glens Falls Insurance Co. v. Temple*, 51 N. Y. Supp. 948, 29 App. Div. 577.

North Carolina.—*Andrews v. Pope*, 126 N. C. 472, 35 S. E. 817;

Sullivan v. Field, 118 N. C. 358, 24 S. E. 735; *Myer v. Reedy*, 115 N. C. 538, 20 S. E. 521.

Oregon.—*Weiler v. Henarie*, 15 Oreg. 28, 13 Pac. 614.

³⁶ *Bagley v. Cohen* (Cal.), 50 Pac. 4.

³⁷ *First National Bank v. Bradley*, 61 Kan. 615, 60 Pac. 322.

³⁸ *Presbyterian Board of Publication & S. S. Work v. Gilliford Ind.*, 38 N. E. 404.

³⁹ *Stricker v. McDonnell*, 213 Pa. 108, 62 Atl. 520.

⁴⁰ *Gordon v. Mulhare*, 13 Wis. 22.

the drawer and acceptor whereby the bill was to be deemed satisfied.⁴¹ Again, where a mortgage is given as collateral security to be void upon the payment of certain bills of exchange there is no merger of the claim upon such bills,⁴² especially so where the right to sue upon the note is expressly reserved.⁴³ And the giving of a mortgage by one of two sureties on a note does not of itself discharge another surety.⁴⁴ So where the indorsee sues the maker of a promissory note, a plea is bad which sets up a mortgage as payment of the note where the very terms of the mortgage show that it was taken as collateral security and not in satisfaction or as a merger of the notes.⁴⁵ And where notes were surrendered to their maker upon his executing a mortgage to secure the same indebtedness but there was no agreement that the mortgage was to be a satisfaction of the debt, or that the surrender of the original notes was to discharge the original obligation to pay them, the original obligation was held not to be discharged nor the debt paid by the renewal of the obligation, and the surrender of the original notes, but in such case there was only an evidence of the extension of the time of payment, and not an absolute payment, in the absence of an agreement to the contrary.⁴⁶ Again, where a note of a third party is taken from the debtor, and indorsed by the latter as security for a part of the debt, but the creditor afterward takes a mortgage from the debtor for the entire sum due, fixing a longer time for payment than that evidenced by the note, such act extinguishes the remedy against the debtor as indorser of the note, where the mortgage does not refer to the note as being a security for the same debt.⁴⁷ And where notes are overdue, if a mortgage is given and received as security for the total amount thereof, it is held that the remedy on the notes is extinguished by the merger of the lesser security in the higher.⁴⁸ So indorsers may be discharged from liability on notes, even though not so intended by the plaintiff, by the latter's act in taking from the makers of the paper a mortgage on personal property containing a power of sale in case of default in pay-

⁴¹ *Morley v. Culverwell*, 7 Mees. & W. 174.

⁴² *Gore Bank v. Eaton*, 27 Upp. Can. Q. B. 332; *Gore Bank v. M'Whirter*, 18 Upp. Can. C. P. 293.

⁴³ *Commercial Bank v. Cuvillier*, 18 Upp. Can. Q. B. 378.

⁴⁴ *Kerr v. Hereford*, 17 Upp. Can. Q. B. 158.

⁴⁵ *Murray v. Miller*, 1 Upp. Can. Q. B. 353.

⁴⁶ *Hance v. Holiman*, 69 Ark. 57, 60 S. W. 730.

⁴⁷ *Mathewson v. Brouse*, 1 U. C. Q. B. 272.

⁴⁸ *Fraser v. Armstrong*, 10 U. C. C. P. 506.

ment of the notes.⁴⁹ But where a mortgage includes property of the maker's wife and a foreclosure and sale is had thereof against the wife's protest, and the property did not belong to the mortgagor, such apparent payment is of no importance and does not constitute a real payment so as to preclude recovery of the note against her husband's estate, and it is immaterial that she had not recovered judgment for the conversion at the time the action was brought on the note.⁵⁰ Again, where a bill of exchange was given for a loan and it was agreed that the bill should be surrendered upon the borrowers' executing a mortgage as security for payment, it was held that upon retention of the mortgage given and suing thereon, all recourse to the bill was lost.⁵¹ And where there is found to be fraudulent misrepresentation as to the mortgage and it is not accepted in lieu of bills and notes, still there can be no suit upon the original cause of action except, at least, a reconveyance is tendered.⁵² A mortgage executed and delivered by a married woman in payment of her husband's note will discharge the note.⁵³ And where a note is secured by a vendor's lien on real estate if the vendor takes a new and distinct security for the payment of the purchase money, as in case of taking a mortgage not only on the particular lots but also on others, he waives his lien and discharges the notes.⁵⁴ Where a series of notes are secured by mortgage and the latter is foreclosed it does not operate as payment except to the value of the property acquired.⁵⁵ A remedy upon a joint and several promissory note is not taken away by reason of a higher security for the same debt, namely a mortgage with covenant to pay the debt, having been given by one of the makers, as the remedy given in such case by the special security, being confined to one of the debtors only is not coextensive with that which the creditor had upon the original paper, it not being proven that such higher security was accepted in place of such note.⁵⁶ It is decided in a recent case that whether or not the note is secured by mortgage the maker must, in order to satisfy it,

⁴⁹ *Bank of British N. A. v. Jones*, 8 U. C. Q. B. 86. See *Smith v. Clop-ton*, 48 Miss. 66; *Parker v. McCrea*, 7 U. C. C. P. 124; *Smith v. Judson*, 4 U. C. Q. B. (O. S.) 134.

⁵⁰ *Handy v. Tracy*, 150 Mass. 524, 23 N. E. 226.

⁵¹ *Johnson v. Watt*, 15 La. Ann. 428.

⁵² *Adams v. Nelson*, 22 U. C. Q. B. 199.

⁵³ *Caryl v. Williams*, 7 Lans. (N. Y.) 416.

⁵⁴ *White v. Dougherty*, Mart. & Y. (Tenn.) 308.

⁵⁵ *McKean v. Cook*, 73 N. H. 410, 62 Atl. 729.

⁵⁶ *Ansell v. Baker*, 15 Q. B. (Adol. & El. N. S.) 20.

make payment thereof either to the then owner or to his authorized agent.⁵⁷

§ 683. Sale or surrender of collateral, or satisfaction of debt.—

Where a bank which holds stock as collateral security for notes sells the same without the consent of the pledgor, it thereby converts them to its own use and must credit the note secured before the sale with the value of the stock at the time of the conversion.⁵⁸ And in a suit against the accommodation payee and indorser of a note, it is *prima facie* a defense, that the plaintiff, at the request of the makers, sold another note made by them, for the purpose of paying, and realized enough from such sale to pay the amount owing upon the note in suit.⁵⁹ Again, an agreement between the creditor and his debtor that the former will surrender one or more of the collateral notes pledged to secure the debt in consideration of a present payment thereon constitutes a valid contract. Such an agreement is not without consideration, even though the principal debt is due, and it is the duty of the debtor to pay it.⁶⁰ Payment of the collateral may operate as a payment of or defense to the original note.⁶¹ And the satisfaction of the indebtedness or loan made on a collateral note by the transfer of property accepted in full satisfaction of money loaned extinguishes the obligation of the note and constitutes a defense to an action on the note by the apparent maker.⁶²

§ 684. Agreements and conditions—Decisions generally.—An executory agreement as to the payment of a note, constitutes no bar to a suit upon such paper, and it is necessary to sustain a plea of accord to prove an accord which is not executory only but one which ought to be and has been executed before the commencement of the action.⁶³ If the payee's consent to an agreement to release is conditional upon the giving of new notes and such condition is never performed the release will not be operative.⁶⁴ In case an agreement as to the mode of payment of a note is in the nature of a composition, a

⁵⁷ *Marling v. Milwaukee Realty Co.* (Wis. 1906), 106 N. W. 844.

⁵⁸ *Pauly v. Wilson*, 57 Fed. 548.

⁵⁹ *Burrall v. Jones*, 20 N. Y. Super. Ct. (7 Bosw.) 404.

⁶⁰ *Lincoln Savings Bank & Safe Deposit Co. v. Allen*, 82 Fed. 148, 152, 27 C. C. A. 87.

⁶¹ *Post v. Bank*, 159 Ill. 421, 42 N. E. 976; *Babbitt v. Moore*, 51 N. J. L. 229, 17 Atl. 99.

⁶² *Merrill v. Bank*, 94 Cal. 59, 29 Pac. 242.

⁶³ *Cushing v. Wyman*, 44 Me. 121.

⁶⁴ *Jackson v. Lalicker* (Neb.), 99 N. W. 32.

strict compliance with the conditions thereof is necessary.⁶⁵ If a person, at the request of an insolvent debtor, is induced to give to a purchaser of the latter's notes a note in place thereof, he is not discharged by an agreement not to prove the claim against the insolvent's estate.⁶⁶ Again, where a purchase price note is given for property, the transferee of such note is not precluded from recovering from both makers thereof by reason of the sale by one of the makers of his entire interest in the property, and an agreement by such vendee to assume the obligation evidenced by the note where neither the transferee nor the payee had notice of such agreement.⁶⁷ A secret agreement between a national bank official and a director of such bank will not operate to defeat the latter's liability to the bank receiver upon his purchase price note for shares of the stock of the bank.⁶⁸ And an agreement between a bank on discounting a note and the payee whereby the fact of its being discounted is concealed from the payee is not of itself such a fraud as to justify its payment to the payee without production and surrender of the paper.⁶⁹ If, under an extrinsic agreement, certain conditions are to be performed before payment of a note to a transferee he cannot recover thereon where such conditions remain unperformed.⁷⁰ And where a note for insurance premiums is given under an agreement that if the policy should not be satisfactory the note would be returned such condition must be fulfilled or recovery on the note is precluded upon the offer to return the policy and a demand made for the note.⁷¹

§ 685. Same subject.—Where it is stipulated in writing made by the payee contemporaneously with the execution of a note that the payment thereof should rest in the maker's discretion and that he would not be sued thereon, such an agreement is obligatory not only upon the payee but also upon his legal representatives, and operates as a release of the maker from all liability.⁷² And a stranger is bound

⁶⁵ *Makepeace v. College*, 10 Pick. (27 Mass.) 298.

⁶⁶ *Jennings v. Moore*, 189 Mass. 197, 75 N. E. 214.

⁶⁷ *McCullough v. Pritchett*, 120 Ga. 585, 48 S. E. 148.

⁶⁸ *Atwater v. Smith*, 73 Minn. 507, 76 N. W. 253.

⁶⁹ *Tuck v. National Bank of Athens*, 108 Ga. 446, 33 S. E. 983.

⁷⁰ *Wilson v. Wright*, 116 Mich. 476, 5 Det. L. N. 10, 74 N. W. 721.

⁷¹ *Parker v. Bond*, 121 Ala. 529, 25 So. 898. See also *Bresee v. Comp-ton*, 121 N. C. 122, 28 S. E. 351. Compare *Maher v. Moore* (Del.), 42 Atl. 721.

⁷² *Martin v. Monroe*, 107 Ga. 330, 33 S. E. 62.

by an agreement made between the parties to an instrument that it shall be paid and obligation extinguished, and this rule applies notwithstanding the money with which to satisfy the amount of the note is loaned to the maker by such third person.⁷³ Again where, under an agreement, the acceptor is to be discharged from liability upon delivery before maturity of a warehouse receipt, such delivery constitutes a sufficient consideration for the release.⁷⁴ In a Washington case it is decided that payment of a promissory note by a joint maker who claimed to have signed as surety only, is not shown where it appears that the surety, after giving notice to the bank of the suretyship, and requesting suit to be instituted against the original maker, entered into a written agreement with the bank, and with its president acting as a trustee and not in his official capacity, under the terms of which the surety deposited with the trustee a sum sufficient to pay the note and costs of suit, to be held until final judgment against the principal maker, and the bank agreed to at once institute a suit thereon without making the surety a party defendant, the deposit to be returned in case of payment by the principal maker, and the judgment to be assigned to the surety if not paid; it being a prerequisite to the banks receiving the deposit that it should reduce the claim to judgment; and it being specifically stipulated that the transaction should not be considered a payment of the note, but that the deposit shall be held only as security for any judgment that might be obtained.⁷⁵ Although the liability of an indorser becomes fixed by proper notice of dishonor, still it may be modified by an agreement giving the indorsee the right to require its redemption with other like notes of the indorser's own notes; that is, he may elect to have the paper redeemed in that manner instead of insisting upon payment.⁷⁶ A mere promise to accept currency which is rapidly de-

⁷³ *Stevenson v. Short*, 25 La. 967, 27 So. 350.

⁷⁴ *Burch v. Hubbard*, 48 Ill. 164; *Lord v. Favorite*, 29 Ill. 149. "If the proposition of the makers to discharge the note after its maturity with the certificate of deposit which they held on the payees, and before they parted with the note, constituted a satisfaction, the liability of the makers has not been revived." A case of a note transferred after maturity.

⁷⁵ *Capital National Bank v. Robinson*, 41 Wash. 454, 83 Pac. 1021, Root, J., dissenting.

⁷⁶ *Strickland v. Lee*, 65 Md. 384, 387, 4 Atl. 884.

See further as to agreements and conditions affecting discharge satisfaction and release of notes, etc., in general the following cases:

United States.—*Harmon v. Adams*, 120 U. S. 363, 7 Sup. Ct. 553.

Alabama.—*Carpenter v. Murphy*, 49 Ala. 84.

preciating is without any consideration and is a mere privilege accorded to the debtor.⁷⁷

§ 686. Payment by note or check of or by order on third person—Accord and satisfaction.—While an agreement between a creditor and his debtor to accept the payment of less than the full amount due him in satisfaction of an ascertained debt is without consideration and not binding upon the creditor, yet a contract to accept a note of a third person for a greater or less amount than the face of the debt, or to accept any consideration other than current funds in satisfaction of the debt constitutes a valid and enforceable contract.⁷⁸ It is also competent proof of accord and satisfaction and a good defense that a debt has been discharged in consideration of the payment of part of the amount by a third person's check.⁷⁹ But it is held that a plea that the plaintiff accepted an order of the defendant on a third person for a certain sum in satisfaction constitutes no bar to an action for the original cause of indebtedness; nor is a plea good as an accord and satisfaction that the plaintiff agreed to accept the note of a third person which on being tendered to him he refused to accept.⁸⁰

§ 687. By payment of other indebtedness.—It is a good defense *pro tanto*, in an action upon a note by an assignee of a bankrupt promisee, that the promisor is obligated to pay a bond executed by him to a third person at the promisee's request upon condition that a balance should remain unpaid upon the note which the promisee would not claim if the promisor should be obliged to pay the bond.⁸¹ So a verbal agreement, contemporaneous with the execution of a note,

Connecticut.—*Barber v. Gordon*, Bos. & P. 630; *Edwards v. Jones*, 2 Root (Conn.) 95. 2 Mees. & W. 414, 7 Car. & P. 633, 5

Illinois.—*Hart v. Strong*, 183 Ill. Dowl. 585.

349, 55 N. E. 629.

⁷⁷ *Lewis v. Davisson*, 29 Gratt. (Va.) 216, 227.

Maine.—*First National Bank v. Marshall*, 73 Me. 79; *Merrill v. Mowry*, 33 Me. 455.

⁷⁸ *Lincoln Savings Bank & Safe-Deposit Co. v. Allen*, 82 Fed. 148, 151, 27 C. C. A. 87, per Sanborn, C. J.

Massachusetts.—*Hanchett v. Birge*, 12 Metc. (Mass.) 545; *Nichols v. Holt*, 9 Gray (Mass.) 202.

⁷⁹ *Guild v. Butler*, 127 Mass. 386; *Brooks v. White*, 2 Metc. (43 Mass.) 283; *Lapham v. Barnes*, 2 Vt. 213.

15 Neb. 118, 17 N. W. 359.

Wisconsin.—*Jackson County Bank v. Parsons*, 112 Wis. 265, 87 N. W. 1083.

⁸⁰ *Hawley v. Foote*, 19 Wend. (N. Y.) 516.

⁸¹ *Ward v. Winship*, 12 Mass. 480.

England.—*Cheetham v. Ward*, 1

that the note should be satisfied by the payment of certain insurance premiums and orders to be drawn upon the payee, is a good plea in defense.⁸² But a verbal promise made to the maker of a note by the holder of it to surrender it in payment of an account the maker had against a third person and which the holder of the note was not liable for, will not, unless it is executed, affect the note as a payment.⁸³

§ 688. By bill, note or check—Substituted note—Renewal note.—

It may be a good defense to an action upon commercial paper that the original note or draft has been paid and discharged by a subsequent note, as where it has been executed and accepted by the parties for the purpose of satisfaction. The question of the parties' intention in such case is an important factor.⁸⁴ If a note is given for a less sum in compromise of the original notes and upon express agreement that if not paid at maturity it might be surrendered to the maker, and thereupon the cause of action on the other notes should revive, the holder, though suing upon all the notes, is limited to a recovery upon the last note.⁸⁵ Again, where a note is executed to cover an indebtedness from the maker to the payee and when the amount of indebtedness is ascertained and a new note is substituted for the original in accordance with the terms of an agreement between the parties, a tender of the new note constitutes a *pro tanto* defense to an action on the original note by a purchaser after maturity with notice of the agreement.⁸⁶ And in an action by an indorsee against the acceptor of a bill of exchange if a promissory note is given by the drawer of the bill in full satisfaction and discharge thereof the fact that the note was not paid when due will not enable a suit to be sustained upon the bill.⁸⁷ And where a note or bill on time is accepted in payment of the original debt, such acceptance suspends the right of action on the

⁸² *Jones v. Snow*, 64 Cal. 456.

⁸³ *Noble v. Edes*, 51 Me. 34.

⁸⁴ *Belleville Savings Bank v. Bornman*, 124 Ill. 200, 16 N. E. 925. *Examine Robertson v. Bank*, 41 Mich. 356, 1 N. W. 1033; *Brown v. Kewley*, 2 Bos. & P. 518; *Crisp v. Griffiths*, 2 Crompt., M. & R. 159, 3 Dowl. 752.

⁸⁵ *Northern Liberty Market Co. v. Kelly*, 113 U. S. 199, 5 Sup. Ct. 422; *Brooks v. White*, 2 Metc. (43 Mass.) 283; *Sibree v. Tripp*, 15 Mees. & W.

23, holding that the acceptance of a negotiable security may be in law the satisfaction of a debt of a greater amount. See 8 Cent. Law Jour. 350.

⁸⁶ *Murray v. Reed*, 17 Wash. 1, 48 Pac. 343.

⁸⁷ *Sard v. Rhodes*, 1 Mees. & W. 153, 1 Tyrwh. & Gr. 298; *Kearslake v. Morgan*, 5 Term Rep. 513. See, also, *Da Costa v. O'Rourke*, 12 Phila. (Pa.) 223; *Crisp v. Griffiths*, 2 Crompt. M. & R. 159.

original debt until the note or bill becomes due or is dishonored, and this is so even in the absence of an express agreement to that effect; but sureties on the original debt are released unless they assented to the arrangement.⁸⁸ But in an action by a town, the payee, against the indorsers of a note, who had received the money thereon, it is determined that it constitutes no equitable defense thereto that the defendants have given the maker their own individual note as an offset or protection for the one so discounted, and one of the defendants had paid part of such individual note.⁸⁹ But it is held in a New York case that a sufficient consideration exists in case of an agreement of the payee to accept in payment a note signed by only one of the parties to the original note.⁹⁰ A widow's note for a debt evidenced by a note, however, is based upon no such sufficient consideration as to extinguish the creditor's claim against an estate, even though he had destroyed the original note in reliance upon the substituted note.⁹¹ And the giving of a new note by one of two joint and several makers, intended as a provision for a former note, not agreed to be taken in payment and not in fact paid, constitutes no defense to an action upon the original note.⁹² So it is held to be a question of intention whether or not a renewal note operates as a payment, as the mere giving

⁸⁸ *Alabama*.—*Mobile Life Ins. Co. v. Randall*, 71 Ala. 220. Bos. & P. 62; *Gould v. Robinson*, 8 East. 576.

Michigan.—*Smith v. Sheldon*, 35 Mich. 42. Payments by other notes, see *Sarraille v. Calmon*, 142 Cal. 651,

Minnesota.—*Wheaton v. Wheeler*, 27 Minn. 464. 76 Pac. 497.

New Jersey.—*Morris Canal & Banking Co. v. Van Vorst*, 21 N. J. L. 100. ⁸⁹ *Town of Northborough v. Wood*, 142 Mass. 551, 8 N. E. 591.

New York.—*Millerd v. Thorn*, 56 N. Y. 402, 15 Abb. N. S. 371; *Henderson v. Marvin*, 31 Barb. (N. Y.) 297; *Myers v. Welles*, 5 Hill (N. Y.) 463. ⁹⁰ *Brink v. Stratton*, 98 N. Y., Supp. 421, 112 App. Div. 299.

Grimes v. Grimes, 28 Ky. L. Rep. 549, 89 S. W. 548.

Bates v. Rosekrans, 37 N. Y. 409. This rule is declared to be "well settled."

Vermont.—*Michigan State Bank v. Leavenworth*, 28 Vt. 209. *Examine Leach v. Funk*, 97 Iowa 576, 66 N. W. 768; *Agawam National Bank v. Downing*, 169 Mass. 297, 47 N. E. 1016; *Haas v. Bank of Commerce*, 41 Neb. 754, 60 N. W. 85; *National Bank of Commerce v. Guthrie*, 11 S. Dak. 517, 78 N. W. 995.

Virginia.—*Callaway v. Price*, 32 Grat. (Va.) 1.

Washington.—*First National Bank of Seattle v. Harris*, 7 Wash. 139, 34 Pac. 466.

England.—*English v. Darley*, 2

of such a note does not have that effect.⁹³ Again, where a corporation composed of a former co-partnership gives to the payee its notes in exchange for the partnership notes such substitution of the new notes operates as a payment of the co-partnership notes and precludes a recovery thereon after the corporation's insolvency.⁹⁴ And where partners were liable on original bills retained by a creditor who agreed to take upon dissolution the separate notes of one of the partners for the entire amount of the bills, reserving his rights against the other partners, the taking and even the renewal of such notes does not constitute a satisfaction of the joint debt.⁹⁵ In the absence of fraud or collusion payment may also be sufficiently made by the drawee's check on the collecting bank where there are funds to meet it.⁹⁶ But giving a worthless check does not constitute payment although the note is surrendered.⁹⁷ A check given in payment of a note is, however, held to be only a medium for securing payment and not a payment of itself.⁹⁸ Where a check sent for the amount of the discount on a note then due is forwarded by the maker with a request for renewal and such extension is not given, but the check is used, it constitutes a part payment to the amount of the check as of the time of its being received by the holder.⁹⁹ If an attorney gives his personal check in payment of a note, and presentment thereof is delayed by request of the attorney, the time when such check is given and the note surrendered fixes that of payment.¹⁰⁰

§ 689. **By stock or bonds.**—Where the payee sues the maker, upon the issue of payment, it may constitute a defense to the suit that by agreement¹⁰¹ certain shares of stock were taken in full satisfaction.¹⁰² And where stock is held as collateral security for the payment of a note, its transfer to the pledgee may constitute payment of the note even though it has been transferred to another, where the latter is

⁹³ *First National Bank v. Gridley*, 93 N. Y. Supp. 445, 112 App. Div. 398. See, also, *Fuller Buggy Co. v. Waldron*, 99 N. Y. Supp. 561, 112 App. Div. 814.

⁹⁴ *Ellis v. Ballou*, 129 Mich. 303, 8 Det. L. N. 966, 88 N. W. 898.

⁹⁵ *Bedford v. Deking*, 2 Barn. & Ald. 210.

⁹⁶ *North Carolina Corp. Commission v. Merchants' & Farmers' Bank*, 137 N. C. 697, 50 S. E. 308.

⁹⁷ *Hogan v. Kaiser*, 113 Mo. App. 711, 88 S. W. 1128.

⁹⁸ *Cooney v. United States Wringer Co.*, 101 Ill. App. 468.

⁹⁹ *Kelly v. Lawrence Bros.*, 79 N. Y. Supp. 914, 78 App. Div. 484.

¹⁰⁰ *Upton v. Mt. Morris Bank*, 92 N. Y. Supp. 1101, 103 App. Div. 367.

¹⁰¹ See §§ 684, 685 herein.

¹⁰² *Brown v. Smith*, 122 Mass. 589; *Baker v. Hawkins*, 14 R. I. 359; *Hawkins v. Baker*, 14 R. I. 139.

not a *bona fide* holder and had not acquired the note until a long period after its execution.¹⁰³ Again, although a right to pay in bonds may exist under the terms of a note, yet it may be lost by want of tender at or before maturity so that a money payment is necessary.¹⁰⁴ And an independent oral agreement between the parties to a note that the defendant would sell and the plaintiff would buy a certain number of shares of specified stock at a named price and that the note should be taken as payment *pro tanto* of such shares is not a satisfaction of the note nor a new contract substituted for the note and entitling defendant to it, and is no defense to an action on the note nor is it within the principle which allows parties in order to avoid circuity of action to avail themselves by way of defense in certain matters which might be the subject of a suit.¹⁰⁵

§ 690. By conveyance of land or agreement to take deed.—It may constitute a good defense that land has been conveyed to the payee in satisfaction of the instrument;¹⁰⁶ or that a deed of certain lands has been executed to the payee's guardian by the maker after the former's incompetency.¹⁰⁷ But a deed made in view of bankruptcy in favor of the principal will not release the surety.¹⁰⁸ If the vendor in an executory contract for the purchase of lands receives from the vendee a quit-claim deed of the lands, such act operates as a rescission of the contract, and he cannot afterwards maintain an action on notes which were given for the purchase price. Thus where the vendor in a land contract had taken notes payable to his own order for the purchase price, which notes he indorsed to a bank and at the same time gave the bank a deed of the lands as security for the payment of the notes, and the bank afterward took from the vendee a quit-claim deed of the lands, without the vendor's knowledge, it was held that such act operated as a rescission of the contract, and that the vendor was thereby discharged from his liability as indorser of the notes, at least to the extent of the value of the land. And an agreement between the vendee and the bank, at the time of the delivery

¹⁰³ *Carrington v. Turner*, 101 Md. 437, 61 Atl. 324. *Examine Henry Wood's Sons Co. v. Schaefer*, 173 Mass. 443, 53 N. E. 881.

¹⁰⁴ *Reed v. Fleming*, 102 Ill. App. 668.

¹⁰⁵ *Hayes v. Allen*, 160 Mass. 286, 35 N. E. 852.

¹⁰⁶ *Stephens v. Stephens*, 66 Ark. 356, 50 S. W. 874; *Poor's Exr. v. Scott*, 24 Ky. L. Rep. 239, 68 S. W. 397; *Jarratt v. Wilson*, 70 N. C. 401.

¹⁰⁷ *Aikens v. Wilson*, 7 Idaho 12, 59 Pac. 932.

¹⁰⁸ *Harner v. Batdorf*, 35 Ohio St. 113.

of the quit-claim deed, made without the knowledge of the vendor, that such deed should not affect the liability of the vendee on his notes, will not prevent its having such an effect upon the rights of the vendor as indorser. To make such an agreement binding upon him he should have been made a party to it.¹⁰⁹

§ 691. **By assignment, transfer or surrender of property.**—If a discharge of a note is not intended by an assignment, it is held that it will not so operate.¹¹⁰ And if property is assigned in trust to pay a note after certain other debts have been paid, such transfer constitutes no bar to an action by one who has not assented thereto nor claimed the benefit of such assignment and who had not executed the same or received any part of the proceeds;¹¹¹ nor does such a conveyance operate as payment, or discharge a surety on the note.¹¹² An order, however, for the delivery of personal property accepted in full satisfaction of the note sued on constitutes a good defense.¹¹³ But although a delivery of goods may constitute payment, yet such transfer must be a valid one in order to have that effect; so in case of bankruptcy before surrender of the notes where the sale is declared void the consideration for such surrender has failed.¹¹⁴ The performance of a contract constitutes a defense to an action on an agreement that the maker should sell goods delivered to him by the payee, and that the proceeds from the sale of such goods should be received by the latter in full payment of the note. So where one had in his possession another's goods as a mere cover to defraud creditors and for further protection conveyed them to another, taking his note therefor under an agreement between the parties that such property should be sold and the avails paid over to the real owner, and that this should operate as a payment of the note, it was held that a performance of the contract would constitute a defense to an action on the note by the party who originally held possession of the goods to aid the owner.¹¹⁵ Again, an agreement to accept an interest in a claim of the maker against the United States government, entered into prior to the revised statutes, in a certain stipulated proportion in satisfaction and discharge of notes, may operate as an extinguish-

¹⁰⁹ *Ives v. Bank of Lansingburgh*, 12 Mich. 361.

¹¹⁰ *Welch v. Kinney*, 46 Oreg. 406, 80 Pac. 648.

¹¹¹ *Rice v. Catlin*, 14 Pick. (31 Mass.) 221.

¹¹² *Harner v. Batdorf*, 35 Ohio St. 113.

¹¹³ *Pettigrew v. Dix*, 33 Tex. 277.

¹¹⁴ *Maxfield v. Jones*, 76 Me. 135.

¹¹⁵ *Carpenter v. McClure*, 37 Vt. 127.

ment of the debt evidenced by such notes without an actual transfer or assignment of such interest and acceptance thereof.¹¹⁶ So a transfer of other notes, together with the execution of a deed as security, made upon the purchase of defendant's note and in consideration thereof, operates *pro tanto* as payment even though it is not found that the property was accepted as a satisfaction.¹¹⁷

§ 692. **Surrender of valid notes for forged notes.**—Valid notes of a town are not extinguished by surrendering them and taking other notes which subsequently prove to have been forged by the treasurer.¹¹⁸

§ 693. **By work, labor or services performed or rendered.**—If all the parties agree that a bill for work performed shall be indorsed on a note as part payment, it so operates and should be so applied, as such contract constitutes a good defense.¹¹⁹ So a note may be paid by rendering certain services of benefit to the payee, as where the

¹¹⁶ *Whitney v. Cook*, 53 Miss. 551, Campbell, J., said: "The settled doctrine is that, if the promise or agreement itself, and not its performance, is accepted in satisfaction and extinction of the demand, it is good as an accord and satisfaction without performance. If Whitney had a claim against the United States, and Cook agreed to accept an interest in this claim in certain stipulated proportion, in satisfaction and discharge of the notes sued on, and Whitney agreed that Cook should have in satisfaction of the notes the stipulated interest in the claim against the United States, there is no rule of law which prevents the notes from being thereby discharged and extinguished as a cause of action against Whitney. Cook had a right to accept an interest in the claim of Whitney against the United States in payment of the notes, and, if he did this, cannot now maintain an action on them. If, however, the contemplation of the parties was that performance of the contract for an in-

terest in the claim should be a discharge of the notes, the mere agreement did not constitute an accord and satisfaction, but performance is necessary to complete it. *Hevin v. Carron*, 11 S. & M. 361; *Pulliam v. Taylor*, 50 Miss. 251; 2 *Parsons on Contracts* 681; *Comyns's Dig.*, tit. Accord (B) 4; 1 *Smith's Lead. Cas.* (7th Am. Ed.) 595 *et seq.*; 2 *Chitty on Contracts* (11th Am. Ed.) 1122; 2 *Story on Contracts*, § 1354; 1 *Addison on Contracts*, § 378; *Babcock v. Hawkins*, 23 Vt. 561; *Goodrich v. Stanley*, 24 Conn. 613; *Hall v. Smith*, 15 Iowa 584. It was not necessary that there should have been any formal or written assignment by Whitney to Cook of an interest in the claim. A distinct contract between the parties that the notes were paid by the right to share in the claim is all that was required." *Id.* 559, 560.

¹¹⁷ *Kerr v. Topping*, 109 Iowa 150, 80 N. W. 321.

¹¹⁸ *Bass v. Inhabitants of Wellesley* (Mass. 1906), 78 N. E. 543.

¹¹⁹ *Jennings v. Davis*, 31 Conn. 134.

payor is to obtain an assignment to himself of certain liens upon lands and hold them for the payor's benefit, as in such case there is an accord and satisfaction.¹²⁰ A non-negotiable note may also be paid by services rendered.¹²¹ If an agreement that a note may be paid by board furnished is fully executed, it constitutes payment.¹²² But an agreement to give credit on a note for the value of work performed, although enforceable as a contract, does not operate as payment so far as to bind an estate, when such agreement is made by the administratrix, as it is either purely personal or without consideration.¹²³ Again, if a claim for services, board and lodging, at request, is relied upon as a counter-claim, such a request must, it is held, be proven.¹²⁴

§ 694. Tender of payment.—A valid tender of payment made by a prior party discharges one secondarily liable.¹²⁵ And, as we have stated elsewhere, where a note is payable at a particular place, an ability and readiness with funds to make payment there at maturity of the note is equivalent to a tender of payment.¹²⁶ If a tender of the amount of a note then due is made by a guarantor to the holder, but it is not accepted, and the guarantor relies upon the promise of the holder, made at the time of the refusal, to resort to the maker and not to the guarantor, and in consequence thereof does not pursue his remedies, the extent of his damage thereby sustained admeasures the extent to which he is discharged.¹²⁷ But an unaccepted legal tender of an installment on a non-negotiable note will not defeat the maker's obligation on a note conditioned for return of the note if such installment should be paid.¹²⁸ Again, where there exists an agreement to accept a deed for land in full settlement of all claims upon a note a performance of the agreement should be averred or there should be a tender of a deed in compliance therewith, and an allegation of readiness and willingness to perform without tender is in-

¹²⁰ Treadwell v. Himmelmann, 50 Cal. 9.

¹²¹ Lowrey v. Danforth, 95 Mo. App. 441, 69 S. W. 39.

¹²² Whittaker v. Ordway, 69 N. H. 182, 38 Atl. 789.

¹²³ Cook v. Cook, 24 S. C. 204.

¹²⁴ Olpherts v. Kelly, 61 N. Y. Supp. 1107, 30 Misc. 824.

¹²⁵ State Bank v. Kahn, 98 N. Y.

Supp. 858, 49 Misc. 500; Negot. Inst. Law N. Y., § 201 (4), Appendix herein.

¹²⁶ See § 502 herein. See also under Negot. Inst. Law N. Y., § 130.

¹²⁷ McAllister v. Pitts, 58 Neb. 424, 78 N. W. 711.

¹²⁸ Wallace v. Randol (Cal.), 54 Pac. 842.

sufficient in a law action where performance is the essence of the contract, and such allegation is not a defense. So in an action on a promissory note, the execution of which is admitted, where as a defense an accord and satisfaction is attempted to be pleaded, the plea is bad when the performance necessary to constitute the satisfaction is not alleged, and it appears upon the face of the plea that performance, and not the agreement to perform, was to be received in satisfaction.¹²⁹

§ 695. Indorsements of payments—Receipts—Cancellation.—Indorsements of payments may be shown to be erroneous.¹³⁰ And indorsements of payments on a mortgage note do not necessarily establish payment of such note;¹³¹ although if the payee of a past-due mortgage note indorses thereon the receipt of a note for the amount of the balance then due such indorsement is evidence of the discharge of the original note.¹³² So payment of interest may be evidenced by an indorsement of the receipt thereof on a note.¹³³ Again, if there is no surrender or delivery of a note to the maker no discharge or release results from merely writing the word paid across the face of the instrument.¹³⁴ And receipts from the payee do not establish payment of a note indorsed to another where it does not appear that the money receipted for was sent as payments.¹³⁵ If the maker makes a partial payment and obtains the note in order to compute the balance due and cancels the note upon a claim of services rendered equivalent to such balance, the note still exists as a binding obligation of the unpaid portion of the debt and evidences the same.¹³⁶ Again, where an action is brought to obtain the possession of certain premises and notes for the rent thereof are surrendered to the lessee, and all matters in controversy are settled in the action, the lessor cannot confer any right of action upon an indorsee by a subsequent indorsement of the note.¹³⁷ If the cancellation is made and renewal

¹²⁹ *Perdew v. Tillma*, 62 Neb. 865, 88 N. W. 123.

¹³⁰ *Grooms v. Lieurance*, 98 Ill. App. 394.

¹³¹ *McCaffrey v. Burkhardt*, 97 Minn. 1, 105 N. W. 971.

¹³² *Cunningham v. Davis*, 175 Mass. 213, 56 N. E. 2.

¹³³ *Iberia Cypress Co. v. Cristen*, 112 La. 451, 36 So. 491.

¹³⁴ *Wittman v. Pickens*, 33 Colo. 484, 81 Pac. 299. See *McLemore v. Hawkins*, 46 Miss. 715.

¹³⁵ *Silverstri v. Savieriano*, 95 N. Y. Supp. 580.

¹³⁶ *Liesmer v. Berg* (Mich.), 2 Det. L. N. 266, 63 N. W. 999.

¹³⁷ *Campbell v. Nixon*, 25 Ind. App.

notes are given, but the signatures are forged, such forgery is a ground for setting aside the cancellation where the party making it has exercised proper diligence.¹³⁸

§ 696. Whether a purchase or payment.—If the cashier of the collecting bank, who is not liable on the paper, pays it after it matures, it operates as a purchase, if so intended by him and is not a payment.¹³⁹ But where a stranger to a note with the intention of purchasing it goes to a bank holding it, and a person there, who is not an officer of the bank stamps it as paid, and it is so taken away by the purchaser and there is nothing to show that the bank intended a sale, it will be held to be a payment and not a sale so that a surety thereon will be released.¹⁴⁰ And if a check of a director and stockholder in a corporation is given for the amount of a corporation note to a holder of such note, by the corporation's secretary and treasurer, and such creditor surrenders the note and also certain corporate funds of greater value than the face of the note, such check constitutes a payment even though the secretary was acting without the creditor's knowledge, as an agent for the purchase of the note, and there can be no recovery back of the sum so paid by the drawer of the check.¹⁴¹

§ 697. Payment—By whom.—As stated in a prior section the negotiable instruments law provides for the discharge of negotiable instruments by payment by or on behalf of the principal debtor or the party accommodated.¹⁴² It is held that if a note is paid by the

¹³⁸ *Humboldt State Bank v. Rossing*, 95 Iowa 1, 63 N. W. 351.

As to cancellation and surrender of notes generally, see also the following cases:

California.—*Steinhart v. Bank*, 94 Cal. 362, 29 Pac. 717.

Maine.—*Maine Mutual Marine Ins. Co. v. Pickering*, 66 Me. 130.

Minnesota.—*Stewart v. Hidden*, 13 Minn. (Gil. 29) 43.

New Jersey.—*Silvers v. Reynolds*, 17 N. J. L. 275.

New York.—*Larking v. Hardenbrook*, 90 N. Y. 333; *Garlock v. Geortner*, 7 Wend. (N. Y.) 198.

Pennsylvania.—*In re Campbell's Estate*, 7 Pa. St. 100.

England.—*Cooke v. Darwin*, 18 Beav. 60.

¹³⁹ *Sturgis v. Baker*, 43 Oreg. 236, 72 Pac. 744.

When a purchase and not a payment, see further: *Marshall v. Meyers*, 96 Mo. App. 643, 70 S. W. 927.

¹⁴⁰ *Riddle v. Russell*, 117 Iowa 533, 91 N. W. 810.

¹⁴¹ *Henderson v. Shafer*, 110 La. Ann. 481, 34 So. 644.

When a payment and not a purchase, see further: *Robertson v. Case*, 8 Ohio S. & C. P. Dec. 386, 7 Ohio N. P. 127.

¹⁴² See § 678 herein.

indorser and payee and it is subsequently paid by a party liable thereon and transferred to a person who loaned money for such last payment and it is assigned, the payee is not liable thereon to such assignee.¹⁴³ If a drawee, acting under a mistake as to funds in his hands pays a draft he is concluded thereby.¹⁴⁴ Again, it is decided that a bill may be satisfied, at least by way of conditional payment, by a stranger, and if the condition to defeat it has not happened then there is an absolute payment.¹⁴⁵ So under an Ohio decision the note may be extinguished by payment by a third person;¹⁴⁶ and a case in New Mexico determines that, in the absence of an agreement to purchase, a stranger may extinguish the note by paying the holder the money due thereon.¹⁴⁷ But it is held that although a person pays a note for the maker's benefit he cannot sue thereon.¹⁴⁸

§ 698. **Same subject—To whom.**—The maker assumes the risk of payment of a note before its maturity to an agent of the payee where such agent has neither authority to collect nor possession of the paper.¹⁴⁹ But if an agent is fully authorized to receive payment it may be made to him even though the note is not in his possession.¹⁵⁰ And a mortgage debt is satisfied by payment to an authorized agent.¹⁵¹ But a mere authority to collect interest, vested in one without possession of mortgage notes, does not empower him to receive payments on the principal.¹⁵² And although a person has possession of interest coupons, with authority to collect the interest, he is not authorized to collect the principal.¹⁵³ Under a Missouri decision a note and

¹⁴³ Rich v. Goldman, 90 N. Y. Supp. 364.

Payment by indorser after suit brought: *Mechanics' Bank v. Hasard*, 13 Johns. (N. Y.) 353; *Concord Granite Co. v. French*, 65 How. Prac. (N. Y.) 317.

¹⁴⁴ *Bank of Indian Territory v. First National Bank*, 109 Mo. App. 665, 83 S. W. 537.

¹⁴⁵ *Belshaw v. Bush*, 11 C. B. (O. S.) 191, 207, 22 L. J. C. P. 24. See *Kemp v. Balls*, 10 Exch. 607; *Grymes v. Blofield*, Cro. Eliz. 541.

¹⁴⁶ *Robertson v. Case*, 8 Ohio S. & C. P. Dec. 386, 7 Ohio N. P. 127.

¹⁴⁷ *Lee v. Field*, 9 N. M. 435, 54 Pac. 873.

¹⁴⁸ *Riddle v. Russell*, 108 Iowa 591, 79 N. W. 363.

¹⁴⁹ *Walsh v. Peterson*, 59 Neb. 645, 81 N. W. 853.

See *Englert v. White*, 92 Iowa 97, 60 N. W. 224.

¹⁵⁰ *Union Stock Yards National Bank v. Haskell* (Neb.), 90 N. W. 233.

¹⁵¹ *Boyd v. Page* (Neb.), 90 N. W. 646.

¹⁵² *Thompson v. Buehler* (Neb.), 95 N. W. 854.

¹⁵³ *Connecticut Trust Co. v. Trumbo* (Neb.), 90 N. W. 216.

Burden of proof of authority to collect; payment to one not in possession of instrument, see: *Thomp-*

interest coupons attached, the coupons providing for payment of an attorney's fee in case of collection by suits, and the principal note authorizing judgment, not only for the amount thereof and the coupons, but for any taxes which the maker may not pay when due, are non-negotiable, so that under Revised Statutes 1889, § 8161, the maker is protected in making payments to the payee after assignment of which he had no notice. Again, the payee of a note with interest coupons attached, which assigned them with a guaranty of payment, is not made the agent of the assignee to collect the same by the slip attached thereto providing that "payment hereof, when made by this company (the payee), being made as guarantor only, it is desired that any bank or individual through whose hands these papers may pass * * * will refrain from placing on * * * (them) the word 'paid' * * * which might interfere with the collection by the company."¹⁵⁴ But an assignee in possession of a note is not bound by a payment to the payee even though he is given authority to collect the interest coupons.¹⁵⁵ If a maker has notice that a note is lost, and without requiring evidence of title pays the same to one in possession, who makes presentment without authority to collect, he still remains liable thereon.¹⁵⁶ And it may be generally stated that a person should by universal custom have possession of the note or be vested with authority to collect it.¹⁵⁷ If co-trustees are payees and one of them permits the other to have possession of a note and he collects the note the maker is released although the proceeds are misappropriated.¹⁵⁸ Again, a payment to a bank in possession of a note is a payment to the payee where the latter has deposited it with a bank for collection and it had been sent to the bank where it was paid.¹⁵⁹ But, the maker is not discharged by paying a note at a particular bank at which it is payable where the latter has neither pos-

son v. Buehler (Neb.), 95 N. W. 854.

When the evidence shows no authority to collect by one not in possession, see: Lay v. Honey (Neb.), 89 N. W. 998.

¹⁵⁴ Syllabus in Pace v. Gilbert School (Mo. App. 1906), 93 S. W. 1124.

¹⁵⁵ Loizeaux v. Frender, 123 Wis. 129, 101 N. W. 423. See Cunning-

ham v. McDonald, 98 Tex. 316, 83 S. W. 372, rev'g 80 S. W. 871.

¹⁵⁶ Page Woven Wire Fence Co. v. Pool, 133 Mich. 323, 10 Det. L. N. 208, 94 N. W. 1053.

¹⁵⁷ Stockton v. Fortune, 82 Ill. App. 272, aff'd Fortune v. Stockton, 182 Ill. 454, 55 N. E. 367.

¹⁵⁸ Barroll v. Foreman, 88 Md. 188, 40 Atl. 883.

¹⁵⁹ Porter v. Roseman, 165 Ind. 255, 74 N. E. 1005.

session thereof nor authority to collect it.¹⁶⁰ So payments of a series of notes as they mature to a private banker not in possession thereof, though such notes are payable there, does not release the maker.¹⁶¹ And where notes of a bank's customers are used by it as security to obtain loans from another bank, payment to the former does not bind the latter, there being no agency, even though when such notes were so paid the bank by its customers it was accustomed to send such moneys to the lender, which surrendered the notes paid to the borrower.¹⁶² But either the payee or his authorized agent is entitled to receive payment even though it is indorsed to a bank for collection.¹⁶³

§ 699. **Same subject.**—Although a note was, prior to the negotiable instruments law, extinguished by payment by one who became a co-maker and joint promisor by indorsing a note prior to its delivery, still he was entitled to recover against a joint promisor who was liable upon the paper, as between the two.¹⁶⁴ And payments made to the first assignees after the second transfer of a note does not release the maker where such assignee is not clothed with authority to receive such payments and has not possession of the note, and this applies even though the person who receives such payments is a trustee under a trust deed to secure the paper.¹⁶⁵ If the holder of a note requests that payment be made to a third person by the maker and it is so made it operates as a payment for which credit should be given by the administratrix of the holders' estate.¹⁶⁶ And in case a note is given to a married woman in consideration of the conveyance of land and it is indorsed and deposited as collateral to secure a renewal of another note made by her, the proceeds being deposited with the pledgee bank to her credit, the maker may in good faith pay the collateral note to the pledgee and not lose his right to have the land conveyed as per his contract with the wife even though the proceeds of the first note obtained by discounting the same were used to

¹⁶⁰ *State National Bank v. J. J. Pool*, 133 Mich. 323, 10 Det. L. N. Hyatt & Co., 75 Ark. 170, 86 S. W. 208, 94 N. W. 1053.

1002. ¹⁶⁴ *Quimby v. Varnum*, 190 Mass.

¹⁶¹ *Chapman v. Wagner* (Neb.), 96 211, 76 N. E. 671.

N. W. 412. ¹⁶⁵ *Maguire v. Donovan*, 108 Mo.

¹⁶² *State National Bank v. J. J. App.* 511, 84 S. W. 156.

Hyatt & Co., 75 Ark. 170, 86 S. W. ¹⁶⁶ *Baker, In re*, 76 N. Y. Supp. 61, 1002. 72 App. Div. 211, aff'd, 172 N. Y.

¹⁶³ *Page Woven Wire Fence Co. v.* 617, 64 N. E. 1118.

discharge the husband's indebtedness.¹⁶⁷ Payment is held to be sufficient when made to the payee in possession although he had indorsed it to another who had not indorsed it.¹⁶⁸ So negotiable paper indorsed in blank by the payee is satisfied by payment to one in possession when made in good faith without notice of facts impeaching his title.¹⁶⁹ So where the original payee of a note and the holder's assignor is authorized to collect it, money received by such agent constitutes payment even though not accounted for by him to his principal.¹⁷⁰ A debt may be discharged by payments to the original payee by the maker even though the former is not in possession thereof and the instrument is not surrendered or delivered to the maker. Thus, where the actual holder who became the transferee of a mortgage note before maturity, consents to an extension of the debt at maturity and retains the benefits arising therefrom and holds the agreements between the payor and the payee under which it is made, but the maker has never been notified of such transfer the doctrine of estoppel applies and precludes such transferee from disputing the validity or legality of the payments.¹⁷¹ And if the circumstances show that the holder authorized the payee to act as his agent in collecting a note and it is collected, recovery against the maker by the holder is precluded.¹⁷² So a payment at the place of payment may be made without production of the note to the payee when justified by the entire course of dealings for years as to the collection of interest, permitting such payee to assert ownership, and failure to give notice of the facts as to the payee's actual authority or want of authority to act as agent for the holder.¹⁷³ Payments by the maker to the payee of non-negotiable paper also operate as a discharge when such note has been transferred without notice to the former.¹⁷⁴ But payment to payee when he is not the holder or in possession of the paper will not operate as a release even though such payee promises to obtain surrender of the note.¹⁷⁵ And if the maker has knowledge as

¹⁶⁷ *Johnston v. Gullledge*, 115 Ga. 981, 42 S. E. 354.

¹⁶⁸ *Higley v. Dennis* (Tex. Civ. App.), 88 S. W. 400.

¹⁶⁹ *Drinkall v. Morris State Bank* (N. Dak.), 88 N. W. 724.

¹⁷⁰ *Stuart v. Stonebraker*, 63 Neb. 554, 88 N. W. 653.

¹⁷¹ *Swan v. Craig* (Neb.), 102 N. W. 471.

¹⁷² *Doe v. Callow*, 10 Kan. 581, 63 Pac. 603, aff'd 64 Kan. 886, 67 Pac. 824.

¹⁷³ *Fowle v. Outcalt*, 64 Kan. 352, 67 Pac. 880.

¹⁷⁴ *Swan v. Craig* (Neb.), 102 N. W. 471.

¹⁷⁵ *Hunt v. Bessey*, 96 Me. 429, 52 Atl. 905.

to the actual ownership of a renewal note a payment by him to the original payee without title, possession or authority to receive such payment does not effect a release.¹⁷⁶ Again, payment to the original payee or intermediate party is no defense against a *bona fide* holder.¹⁷⁷

§ 700. **Renunciation by holder.**—The holder may expressly renounce his rights against any party to the instrument, before, or after its maturity. An absolute and unconditional renunciation of

¹⁷⁶ *Grimm v. Grimm*, 65 N. Y. Supp. 1134, aff'd, 169 N. Y. 421, 62 N. E. 569.

Payment by maker of note and mortgage to payee where former has not notice of transfer, see: *Garnett v. Myers*, 91 N. Y. Supp. 400, rev'd 94 N. Y. Supp. 803.

¹⁷⁷ *Prim v. Hammel*, 134 Ala. 652, 32 So. 1006; *Jurden v. Ming*, 98 Mo. App. 205, 71 S. W. 1075.

See also the following cases:

Alabama.—*Capital City Ins. Co. v. Quinn*, 73 Ala. 558; *Barbour v. Washington Fire & Marine Ins. Co.*, 60 Ala. 433.

Delaware.—*Sudler v. Collins*, 2 Houst. (Del.) 538.

Florida.—*Trustees of Internal Improvement Fund v. Lewis*, 34 Fla. 424, 16 So. 325.

Georgia.—*Bank of University v. Tuck*, 96 Ga. 456, 23 S. E. 467; *Wilcox v. Aultman*, 64 Ga. 544, 34 Am. Rep. 92.

Illinois.—*Hunter v. Clarke* (Ill.), 56 N. E. 297; *Mobley v. Ryan*, 4 Peck (Ill.) 51, 16 Am. Dec. 488; *Avery v. Swords*, 28 Ill. App. 202; *McClelland v. Bartlett*, 13 Bradw. (Ill. App.) 236.

Iowa.—*City Bank v. Taylor*, 60 Iowa 66, 14 N. W. 128; *Lathrop v. Donaldson*, 22 Iowa 234; *Wilkinson v. Sargent*, 9 Iowa 521; *Commissioners Jefferson County v. Fox*, 1 Morris (Iowa) 48.

Louisiana.—*Flower v. Noble*, 38

La. Ann. 938; *Doll v. Rizotti*, 20 La. Ann. 263, 96 Am. Dec. 399.

Massachusetts.—*Biggerstaff v. Marston*, 161 Mass. 101, 36 N. E. 785.

Michigan.—*Williams v. Keyes*, 90 Mich. 290, 51 N. W. 520.

Mississippi.—*Coffman v. Bank of Kentucky*, 41 Miss. 212, 90 Am. Dec. 371.

Missouri.—*Goodfellow v. Stiwel*, 73 Mo. 17; *Grant v. Kidwell*, 30 Mo. 455; *Holland v. Smit*, 11 Mo. App. 6.

Nebraska.—*Yenney v. Central City Bank*, 44 Neb. 402, 62 N. W. 872.

New Hampshire.—*Dow v. Rowell*, 12 N. H. 49.

New York.—*Harpending v. Gray*, 76 Hun (N. Y.) 351, 27 N. Y. Supp. 762; *Smith v. Van Loan*, 16 Wend. (N. Y.) 659; *Mitchell v. Bristol*, 10 Wend. (N. Y.) 492; *Prior v. Jacks*, 1 Johns. Cas. (N. Y.) 169.

North Carolina.—*First Nat. Bank of Salisbury v. Michael*, 96 N. C. 53, 1 S. E. 855.

Ohio.—*Chappell v. Phillips*, *Wright* (Ohio) 372.

Pennsylvania.—*Hocksher v. Shoemaker*, 47 Pa. St. 249.

Tennessee.—*Gosling v. Griffin*, 85 Tenn. 737, 3 S. W. 642.

England.—*Glasscock v. Balls*, 24 Q. B. Div. 13.

Compare *Murray v. Gibson*, 2 La. Ann. 311; *Sharps v. Eccles*, 5 T. B. Mon. (Ky.) 69.

his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.¹⁷⁸ Under this statute it is held in New York that no valid renunciation is effected by a writing found among the deceased payee's papers signed by him and reading as follows: "The enclosed note I wish to be cancelled in case of my death, and if the law does not allow it, I wish you to notify my heirs that it is my wish and orders."¹⁷⁹ In a recent case in Washington the word "renunciation" under the negotiable instruments act of that state is equivalent to the term "release" and parol evidence is inadmissible to show a release of a surety where the statute permits the holder to renounce his rights "against any party" to the instrument only "in writing."¹⁸⁰

§ 701. Right of party who discharges instrument.—Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except: (1) Where it is payable to the order of a third person, and has been paid by the drawer; and (2) Where it was made or accepted for accommodation, and has been paid by the party accommodated.¹⁸¹

§ 702. Discharge—Miscellaneous decisions.—Payment may be valid though not made in money.¹⁸² A plea is held good in an action on

¹⁷⁸ Negot. Inst. Law., § 203, Appendix herein.

¹⁷⁹ Leash v. Dew, 184 N. Y. 599, 77 N. E. 190.

¹⁸⁰ Baldwin v. Daly, 41 Wash. 416, 83 Pac. 724; Laws 1899, p. 361, § 122.

¹⁸¹ Negot. Inst. Law., § 202, Appendix herein.

As to rights of parties, see the following cases:

California.—Bradley v. Bush, 1 Cal. App. 516, 82 Pac. 560; Crystal v. Hutton, 1 Cal. App. 251, 81 Pac. 1115.

Georgia.—Woods v. Colony Bank, 114 Ga. 683, 40 S. E. 720.

Massachusetts.—Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671.

New Jersey.—Lawson v. Dunn (N. J. Eq.), 49 Atl. 1087.

New York.—Twelfth Ward Bank v. Brooks, 71 N. Y. Supp. 388, 63 App. Div. 220.

Rhode Island.—Chapman v. Niantic National Bank (R. I.), 57 Atl. 934.

Washington.—Carr v. Jones (Wash.), 69 Pac. 646.

¹⁸² Root v. Kelley, 80 N. Y. Supp. 482, 39 Misc. 530. See, also, preceding sections in this chapter.

When bank draft not paid by pass-

a joint note that after it fell due the maker covenanted with the plaintiff to pay him a certain sum of money, even though not alleged to have been accepted in satisfaction and the sum secured was less than the note.¹⁸³ But the indorser of a note may be liable for the debt although there is evidence that dividends out of assets of one of the insolvent makers have been paid to the plaintiff.¹⁸⁴ A holder may by his own acts in precluding the indorser's remedy against the maker also deprive himself of the right to enforce the note against such indorser even though he has reserved such right at the time of transfer.¹⁸⁵

ing credits, see: *Bernard v. Mercer*, 54 Kan. 630, 39 Pac. 182.

When payment or release not established, see sections throughout this chapter and also the following cases:

Arkansas.—*Carpenter v. Rosenbaum*, 73 Ark. 259, 82 S. W. 1047.

Kentucky.—*Ewing v. Ewing*, 26 Ky. L. Rep. 580, 82 S. W. 292; *Fordville Banking Co. v. Thompson*, 26 Ky. L. Rep. 534, 82 S. W. 251.

Maine.—*Furber v. Fogler*, 97 Me. 585, 55 Atl. 514.

Missouri.—*Siewing v. Tacke*, 112 Mo. App. 414, 86 S. W. 1103.

Virginia.—*Burnham v. James*, 100 Va. 493, 42 S. E. 292.

Wisconsin.—*Milwaukee Trust Co. v. Warren*, 112 Wis. 505, 87 N. W. 801.

See, also, as to payment or release not being established, *Garthwaite v. Bank of Tulare*, 134 Cal. 237, 66

Pac. 326; *Power v. Hambrick*, 25 Ky. L. Rep. 30, 74 S. W. 660; *Barber v. Boyd*, 24 Ky. L. Rep. 1389, 71 S. W. 528; *Lewis v. North*, 62 Neb. 552, 87 N. W. 312; *Ashburn v. Evans* (Tex. Civ. App.), 72 S. W. 242.

Examine, also, as to payment or release not being established, *Oxford State Bank v. Holscher*, 115 Iowa 196, 88 N. W. 360; *Golden v. Vyse*, 115 Iowa 726, 87 N. W. 691; *Shove v. Martine*, 85 Minn. 29, 88 N. W. 254; *Van Buren County Savings Bank v. Mills*, 99 Mo. App. 65, 72 S. W. 497.

¹⁸³ *McLeod v. McKay*, 20 U. C. Q. B. 258.

¹⁸⁴ *Lyndon Savings Bank v. International Co.*, 78 Vt. 169, 75 N. E. 214.

¹⁸⁵ *Spies v. National City Bank*, 174 N. Y. 222, 66 N. E. 736, 61 L. R. A. 193, aff'g 74 N. Y. Supp. 64, 68 App. Div. 70.

APPENDIX.

NEGOTIABLE INSTRUMENTS LAW.

THIS LAW EXISTS IN THE FOLLOWING STATES AND TERRITORIES.

ARIZONA.—Rev. Stat. 1901, pp. 852-879 (title 49 of Civil Code, §§ 3304-3491), took effect September 1, 1901, amended and corrected, Chap. 23, Laws 1905, pp. 24-27.

COLORADO.—Laws 1897, pp. 210-248, Chap. 64; 3 Mills Annot. Stat. (Rev. Supp. 1891-1905), pp. 103-134. As to holidays see Laws 1903, p. 245; 3 Mills Annot. Stat. (Rev. Supp. 1891-1905), p. 601.

CONNECTICUT.—Genl. Stat. Rev. 1902, pp. 1028-1052 (Act 1897).

DISTRICT OF COLUMBIA.—Code (Garges, as amended to March 3, 1905, pp. 275-297), §§ 1304-1493.

FLORIDA.—Genl. Stat. 1906, pp. 1147-1181 (Act 1897, Holidays, p. 1182).

IDAHO.—Session Laws 1903, pp. 380-410.

IOWA.—Code Supp. Annot. 1902, pp. 352-394. Chap. 3-A, §§ 3060ai-3060a198. Laws 1902, Chap. 130, pp. 81-99; Laws 1906, Chap. 149, p. 108.

KANSAS.—Dassless Gen. Stat. 1905, pp. 967-990, Chap. 70, §§ 4533-4732. In effect June 8, 1905.

KENTUCKY.—Acts 1904, pp. 213-252, Chap. 102.

LOUISIANA.—Acts 1904, pp. 147-174, Act No. 64.

MARYLAND.—Code Pub. Gen. Laws, pp. 125-157, Art. XIII (Laws 1898, Chap. 119).

MASSACHUSETTS.—Rev. Laws 1902, pp. 628-653, Chap. 73 (Laws 1898, Chap. 533).

MICHIGAN.—Pub. Acts 1905, pp. 389-413, No. 265.

MISSOURI.—Laws 1905, pp. 243-265, Laws 1907, p. 366.

MONTANA.—Laws 1903, pp. 237-273, Chap. 121.

NEBRASKA.—Laws 1905, pp. 389-435, Chap. 83.

NEW JERSEY.—Laws 1902, pp. 583-616, Chap. 184.

NEW MEXICO.—Laws 1907, pp. 161-191, Chap. 83.

NEW YORK.—Cumming & Gilbert's Gen. Laws & Stat., pp. 2534-2586 (Laws 1897, Chap. 712).

NORTH CAROLINA.—Revisal of 1905, pp. 655-688, Chap. 54, §§ 2151-2346 (Laws 1899, Chap. 733, §§ 1-197); Pub. Laws 1907, p. 1288, Chap. 897, amending § 2234 of Revisal.

NORTH DAKOTA.—Laws 1899, pp. 154-180, Chap. 113; Rev. Codes 1899, pp. 1039-1060, Chap. 100 (Chap. 88, Rev. Codes 1899, repealed. Laws 1905,

p. 246, Chap. 138, "Provided, that all actions that are now pending under the provisions of said chapter shall in no manner be affected by this repeal").

OHIO.—Bates' Annot. Stat. (5th Ed., 1787–1906), pp. 1800a–1807, §§ 3171–3178g.

OREGON.—Belinger & Cotton's Annot. Codes & Stat., pp. 1440–1469, §§ 4403–4594 (Laws 1899, p. 18).

PENNSYLVANIA.—Laws 1901, No. 162, pp. 194–220.

RHODE ISLAND.—Acts & Resolutions 1899, pp. 83–117, Chap. 674.

TENNESSEE.—Acts 1899, pp. 139–172, Chap. 94. Shannon's Supp. Code (1897–1903), pp. 571–606.

UTAH.—Laws 1899, pp. 122–148, Chap. 83.

VIRGINIA.—Pollards' Annot. Code, 1904, pp. 1455–1490, Chap. 133A, § 2841a (Acts 1898, Chap. 866, pp. 896–918).

WASHINGTON.—Ballingers Code Supp. (1899–1903), § 3650, pp. 413–438 (Laws 1899, pp. 340–373).

WEST VIRGINIA.—Acts 1907, pp. 378–410, Chap. 81 (in effect January 1, 1908).

WISCONSIN.—Laws 1899, pp. 681–748, Chap. 356, §§ 1675–1684–6 (§§ 1681–9, p. 44, Chap. 41; §§ 1684–6–2, p. 524, Chap. 361; Amended Laws 1901, § 1675–24, p. 381, Chap. 262, added Laws 1905).

WYOMING.—Laws 1905, pp. 39–64, Chap. 43.

NEGOTIABLE INSTRUMENTS LAW OF NEW YORK.

(Laws of New York, 1897, Chapter 612.)

ARTICLE

- I. General provisions. (§§ 1–7.)
- II. Form and interpretation of negotiable instruments. (§§ 20–42.)
- III. Consideration. (§§ 50–55.)
- IV. Negotiation. (§§ 60–80.)
- V. Rights of holder. (§§ 90–98.)
- VI. Liabilities of parties. (§§ 110–119.)
- VII. Presentment for payment. (§§ 130–148.)
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- IX. Discharge of negotiable instruments. (§§ 200–206.)
- X. Bills of exchange; form and interpretation. (§§ 210–215.)
- XI. Acceptance. (§§ 220–230.)
- XII. Presentment for acceptance. (§§ 240–248.)
- XIII. Protest. (§§ 260–268.)
- XIV. Acceptance for honor. (§§ 280–290.)
- XV. Payment for honor. (§§ 300–306.)
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- XVII. Promissory notes and checks. (§§ 320–325.)
- tion. (§§ 330–332.)
- XIX. Laws repealed, when to take effect. (§§ 340–341.)

ARTICLE I.

GENERAL PROVISIONS.

SEC.

1. Short title.
2. Definitions and meaning of terms.
3. Persons primarily liable on instrument.
4. Reasonable time, what constitutes.

SEC.

5. Time, how computed; when last day falls on holiday.
6. Application of chapter.
7. Rule of law merchant; when governs.

§ 1. **Short title.**—This act shall be known as the negotiable instruments law.

§ 2. **Definitions and meaning of terms.**—In this act, unless the context otherwise requires:

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counter-claim and set-off.

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means negotiable promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement completed by delivery.

“Instrument” means negotiable instrument.

“Issue” means the first delivery of the instrument, complete in form to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print.

§ 3. **Person primarily liable on instrument.**—The person “primarily” liable on an instrument is the person who by the terms of the instrument, is absolutely required to pay the same. All other parties are “secondarily” liable.

§ 4. Reasonable time, what constitutes.—In determining what is a “reasonable time” or an “unreasonable time” regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

§ 5. Time, how computed; when last day falls on holiday.—Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

§ 6. Application of chapter.—The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

§ 7. Law merchant; when governs.—In any case not provided for in this act the rules of the law merchant shall govern.

ARTICLE II.

FORM AND INTERPRETATION.

SEC.

20. Form of negotiable instrument.
21. Certainty as to sum; what constitutes.
22. When promise is unconditional.
23. Determinable future time; what constitutes.
24. Additional provisions not affecting negotiability.
25. Omissions; Seal; Particular money.
26. When payable on demand.
27. When payable to order.
28. When payable to bearer.
29. Terms when sufficient.
30. Date, presumption as to.
31. Ante-dated and post-dated.
32. When date may be inserted.
33. Blanks, when may be filled.

SEC.

34. Incomplete instrument not delivered.
35. Delivery; when effectual; when presumed.
36. Construction where instrument is ambiguous.
37. Liability of persons signing in trade or assumed name.
38. Signature by agent; authority; how shown.
39. Liability of person signing as agent, et cetera.
40. Signature by procuration; effect of.
41. Effect of indorsement by infant or corporation.
42. Forged signature; effect of.

§ 20. Form of negotiable instrument.—An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.

2. Must contain an unconditional promise or order to pay a sum certain in money;
3. Must be payable on demand, or at a fixed or determinable future time;
4. Must be payable to order or to bearer; and
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

§ 21. Certainty as to sum; what constitutes.—The sum payable is a sum certain within the meaning of this act, although it is to be paid:

1. With interest; or
2. By stated instalments; or
3. By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or
4. With exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

§ 22. When promise is unconditional.—An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument. But an order or promises to pay out of a particular fund is not unconditional.

§ 23. Determinable future time; what constitutes.—An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

§ 24. Additional provisions not affecting negotiability.—An instrument which contains an order or promise to do any act in addition

to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

§ 25. Omissions; seal; particular money.—The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

§ 26. When payable on demand.—An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

§ 27. When payable to order.—The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or

2. The drawer or maker ; or
3. The drawee ; or
4. Two or more payees jointly ; or
5. One or some of several payees ; or
6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

§ 28. When payable to bearer.—The instrument is payable to bearer :

1. When it is expressed to be so payable ; or
2. When it is payable to a person named therein or bearer ; or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable ; or
4. When the name of the payee does not purport to be the name of any person ; or
5. When the only or last indorsement is an indorsement in blank.

§ 29. Terms, when sufficient.—The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

§ 30. Date, presumption as to.—Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement as the case may be.

§ 31. Ante-dated and post-dated.—The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

§ 32. When date may be inserted.—Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course ; but as to him, the date so inserted is to be regarded as the true date.

§ 33. **Blanks; when may be filled.**—When the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

§ 34. **Incomplete instrument not delivered.**—Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

§ 35. **Delivery; when effectual; when presumed.**—Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

§ 36. **Construction where instrument is ambiguous.**—Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures

and there is a discrepancy between the two, the sum donated by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount;

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

5. Where the instrument is so ambiguous that there is a doubt whether it is a bill or note, the holder may treat it as either at his election;

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

§ 37. Liability of person signing in trade or assumed name.—No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

§ 38. Signature by agent; authority; how shown.—The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

§ 39. Liability of person signing as agent, etc.—Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

§ 40. Signature by procuration; effect of.—A signature by "procuration" operates as notice that the agent has but a limited authority

to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

§ 41. Effect of indorsement by infant or corporation.—The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

§ 42. Forged signature; effect of.—Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

ARTICLE III.

CONSIDERATION OF NEGOTIABLE INSTRUMENTS.

SEC.

50. Presumption of consideration.

51. What constitutes consideration.

52. What constitutes holder for value.

SEC.

53. When lien on instrument constitutes holder for value.

54. Effect of want of consideration.

55. Liability of accommodation party.

§ 50. Presumption of consideration.—Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

§ 51. Consideration, what constitutes.—Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

§ 52. What constitutes holder for value.—Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

§ 53. **When lien on instrument constitutes holder for value.**—Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

§ 54. **Effect of want of consideration.**—Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.

§ 55. **Liability of accommodation party.**—An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

ARTICLE IV.

NEGOTIATION.

SEC.

60. What constitutes negotiation.
61. Indorsement; how made.
62. Indorsement must be of entire instrument.
63. Kinds of indorsement.
64. Special indorsement; indorsement in blank.
65. Blank indorsement; how changed to special indorsement.
66. When indorsement restrictive.
67. Effect of restrictive indorsement; rights of indorsee.
68. Qualified indorsement.
69. Conditional indorsement.
70. Indorsement of instrument payable to bearer.
71. Indorsement where payable to two or more persons.

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72. Effect of instrument drawn or indorsed to a person as cashier.
73. Indorsement where name is misspelled, et cetera.
74. Indorsement in representative capacity.
75. Time of indorsement; presumption.
76. Place of indorsement; presumption.
77. Continuation of negotiable character.
78. Striking out indorsement.
79. Transfer without indorsement; effect of.
80. When prior party may negotiate instrument.

§ 60. **What constitutes negotiation.**—An instrument is negotiated when it is transferred from one person to another in such manner as

to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

§ 61. **Indorsement; how made.**—The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

§ 62. **Indorsement must be of entire instrument.**—The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

§ 63. **Kinds of indorsement.**—An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

§ 64. **Special indorsement; indorsement in blank.**—A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

§ 65. **Blank indorsement; how changed to special indorsement.**—The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

§ 66. **When indorsement restrictive.**—An indorsement is restrictive, which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

§ 67. Effect of restrictive indorsement; rights of indorsee.—A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

§ 68. Qualified indorsement.—A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

§ 69. Conditional indorsement.—Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

§ 70. Indorsement of instrument payable to bearer.—Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

§ 71. Indorsement where payable to two or more persons.—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

§ 72. Effect of instrument drawn or indorsed to a person as cashier.—Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

§ 73. **Indorsement where name is misspelled, et cetera.**—Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

§ 74. **Indorsement in representative capacity.**—Where any person is under obligation to indorse in a representative capacity, he may indorsee in such terms as to negative personal liability.

§ 75. **Time of indorsement; presumption.**—Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

§ 76. **Place of indorsement; presumption.**—Except where the contrary appears every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

§ 77. **Continuation of negotiable character.**—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

§ 78. **Striking out indorsement.**—The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

§ 79. **Transfer without indorsement; effect of.**—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

§ 80. **When prior party may negotiate instrument.**—Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

ARTICLE V.

RIGHTS OF HOLDER.

SEC.

90. Right of holder to sue; payment.

91. What constitutes a holder in due course.

92. When person not deemed holder in due course.

93. Notice before full amount paid.

94. When title defective.

SEC.

95. What constitutes notice of defect.

96. Rights of holder in due course.

97. When subject to original defenses.

98. Who deemed holder in due course.

§ 90. **Right of holder to sue; payment.**—The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

§ 91. **What constitutes a holder in due course.**—A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

§ 92. **When person not deemed holder in due course.**—Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

§ 93. **Notice before full amount paid.**—Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

§ 94. **When title defective.**—The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration,

or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

§ 95. What constitutes notice of defect.—To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

§ 96. Rights of holder in due course.—A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

§ 97. When subject to original defenses.—In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

§ 98. Who deemed holder in due course.—Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

ARTICLE VI.

LIABILITIES OF PARTIES.

SEC.

110. Liability of maker.

111. Liability of drawer.

112. Liability of acceptor.

113. When person deemed indorser.

114. Liability of irregular indorser.

115. Warranty: where negotiation by delivery, et cetera.

SEC.

116. Liability of general indorsers.

117. Liability of indorser where paper negotiable by delivery.

118. Order in which indorsers are liable.

119. Liability of agent or broker.

§ 110. **Liability of maker.**—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse.

§ 111. **Liability of drawer.**—The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

§ 112. **Liability of acceptor.**—The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse.

§ 113. **When person deemed indorser.**—A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

§ 114. **Liability of irregular indorser.**—Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
3. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

§ 115. **Warranty where negotiation by delivery, et cetera.**—Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

§ 116. Liability of general indorser.—Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matter and things mentioned in subdivisions one, two and three of the next preceding section; and,
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

§ 117. Liability of indorser where paper negotiable by delivery.—Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

§ 118. Order in which indorsers are liable.—As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

§ 119. Liability of agent or broker.—Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section one hundred and fifteen of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

ARTICLE VII.

PRESENTMENT FOR PAYMENT.

SEC.	SEC.
130. Effect of want of demand on principal debtor.	140. When presentment not required to charge the indorser.
131. Presentment where instrument is not payable on demand.	141. When delay in making presentment is excused.
132. What constitutes a sufficient presentment.	142. When presentment may be dispensed with.
133. Place of presentment.	143. When instrument dishonored by non-payment.
134. Instrument must be exhibited.	144. Liability of person secondarily liable, when instrument dishonored.
135. Presentment where instrument payable at bank.	145. Time of maturity.
136. Presentment where principal debtor is dead.	146. Time; how computed.
137. Presentment to persons liable as partners.	147. Rule where instrument payable at bank.
138. Presentment to joint debtors.	148. What constitutes payment in due course.
139. When presentment not required to charge the drawer.	

§ 130. **Effect of want of demand on principal debtor.**—Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity and has funds there available for that purpose such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

§ 131. **Presentment where instrument is not payable on demand.**—Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in a case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

§ 132. **What constitutes a sufficient presentment.**—Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;

2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To a person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

§ 133. Place of presentment.—Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last-known place of business or residence.

§ 134. Instrument must be exhibited.—The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

§ 135. Presentment where instrument payable at bank.—Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

§ 136. Presentment where principal debtor is dead.—Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence, he can be found.

§ 137. Presentment to persons liable as partners.—Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

§ 138. **Presentment to joint debtors.**—Where there are several persons not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

§ 139. **When presentment not required to charge the drawer.**—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

§ 140. **When presentment not required to charge the indorser.**—Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

§ 141. **When delay in making presentment is excused.**—Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

§ 142. **When presentment may be dispensed with.**—Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment express or implied.

§ 143. **When instrument dishonored by non-payment.**—The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

§ 144. **Liability of person secondarily liable, when instrument dishonored.**—Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

§ 145. **Time of maturity.**—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity

falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

§ 146. **Time; how computed.**—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

§ 147. **Rule where instrument payable at bank.**—Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

§ 148. **What constitutes payment in due course.**—Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

ARTICLE VIII.

NOTICE OF DISHONOR.

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161. By whom given.

162. Notice given by agent.

163. Effect of notice given on behalf of holder.

164. Effect where notice is given by party entitled thereto.

165. When agent may give notice.

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168. To whom notice may be given.

169. Notice where party is dead.

170. Notice to partners.

171. Notice to persons jointly liable.

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173. Time within which notice must be given.

174. Where parties reside in same place.

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176. When sender deemed to have given due notice.

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178. Notice to subsequent parties, time of.

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183. When notice dispensed with.

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185. When notice need not be given to drawer.

186. When notice need not be given to indorser.

SEC.

187. Notice of non-payment where acceptance refused.

188. Effect of omission to give notice of non-acceptance.

189. When protest need not be made; when must be made.

§ 160. **To whom notice of dishonor must be given.**—Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

§ 161. **By whom given.**—The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up would have a right to reimbursement from the party to whom the notice is given.

§ 162. **Notice given by agent.**—Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

§ 163. **Effect of notice given on behalf of holder.**—Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

§ 164. **Effect where notice is given by party entitled thereto.**—Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

§ 165. **When agent may give notice.**—Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

§ 166. **When notice sufficient.**—A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

§ 167. **Form of notice.**—The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

§ 168. **To whom notice may be given.**—Notice of dishonor may be given either to the party himself or to his agent in that behalf.

§ 169. **Notice where party is dead.**—When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

§ 170. **Notice to partners.**—Where the parties to be notified are partners notice to any one partner is notice to the firm even though there has been a dissolution.

§ 171. **Notice to persons jointly liable.**—Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

§ 172. **Notice to bankrupt.**—Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

§ 173. **Time within which notice must be given.**—Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

§ 174. **Where parties reside in the same place.**—Where the person

giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;
2. If given at his residence, it must be given before the usual hours of rest on the day following;
3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

§ 175. Where parties reside in different places.—Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.
2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

§ 176. When sender deemed to have given due notice.—Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any mis-carriage in the mails.

§ 177. Deposit in post-office; what constitutes.—Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter-box under the control of the Post-office Department.

§ 178. Notice to subsequent party; time of.—Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

§ 179. Where notice must be sent.—Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is so sojourning in another place, notice may be sent to the place where he is sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

§ 180. Waiver of notice.—Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

§ 181. Whom affected by waiver.—Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

§ 182. Waiver of protest.—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

§ 183. When notice is dispensed with.—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

§ 184. Delay in giving notice; how excused.—Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

§ 185. When notice need not be given to drawer.—Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;
2. Where the drawee is a fictitious person or a person not having capacity to contract;
3. Where the drawer is the person to whom the instrument is presented for payment;
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
5. Where the drawer has countermanded payment.

§ 186. When notice need not be given to indorser.—Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;
2. Where the indorser is the person to whom the instrument is presented for payment;
3. Where the instrument was made or accepted for his accommodation.

§ 187. Notice of non-payment where acceptance refused.—Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

§ 188. Effect of omission to give notice of non-acceptance.—An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

§ 189. When protest need not be made; when must be made.—Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange.

ARTICLE IX.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

SEC.	SEC.
200. Instruments; how discharged.	204. Cancellation; unintentional; burden of proof.
201. When persons secondarily liable on, discharged.	205. Alteration of instrument; effect of.
202. Right of party who discharges instrument.	206. What constitutes a material alteration.
203. Renunciation by holder.	

§ 200. Instrument; how discharged.—A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
3. By the intentional cancellation thereof by the holder;
4. By any other act which will discharge a simple contract for the payment of money;
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

§ 201. When persons secondarily liable on, discharged.—A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party.
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved.

§ 202. Right of party who discharges instrument.—Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements and again negotiate the instrument, except

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

§ 203. Renunciation by holder.—The holder may expressly renounce his rights against any party to the instrument at, before, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor, made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

§ 204. Cancellation; unintentional; burden of proof.—A cancellation made unintentionally, or under a mistake, or without the au-

thority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

§ 205. Alteration of instrument; effect of.—Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

§ 206. What constitutes a material alteration.—Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties.
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

ARTICLE X.

BILLS OF EXCHANGE—FORM AND INTERPRETATION.

SEC.	SEC.
210. Bill of exchange defined.	213. Inland and foreign bills of exchange.
211. Bill not an assignment of funds in hands of drawee.	214. When bill may be treated as promissory note.
212. Bill addressed to more than one drawee.	215. Referee in case of need.

§ 210. Bills of exchange defined.—A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

§ 211. **Bill not an assignment of funds in hands of drawee.**—A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof and the drawee is not liable on the bill unless and until he accepts the same.

§ 212. **Bill addressed to more than one drawee.**—A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

§ 213. **Inland and foreign bills of exchange.**—An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within the state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

§ 214. **When bill may be treated as promissory note.**—Where in a bill the drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

§ 215. **Referee in case of need.**—The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

ARTICLE XI.

ACCEPTANCE OF BILLS OF EXCHANGE.

SEC.	SEC.
220. Acceptance; how made; et cetera.	225. Liability of drawee retaining or destroying bill.
221. Holder entitled to acceptance on face of bill.	226. Acceptance of incomplete bill.
222. Acceptance by separate instrument.	227. Kinds of acceptances.
223. Promise to accept; when equivalent to acceptance.	228. What constitutes a general acceptance.
224. Time allowed drawee to accept.	229. Qualified acceptance.
	230. Rights of parties as to qualified acceptance.

§ 220. **Acceptance; how made; et cetera.**—The acceptance of a bill, is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

§ 221. **Holder entitled to acceptance on face of bill.**—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill and if such request is refused, may treat the bill as dishonored.

§ 222. **Acceptance by separate instrument.**—Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it was shown and who, on the faith thereof, receives the bill for value.

§ 223. **Promise to accept; when equivalent to acceptance.**—An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

§ 224. **Time allowed drawee to accept.**—The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation.

§ 225. **Liability of drawee retaining or destroying bill.**—Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

§ 226. **Acceptance of incomplete bill.**—A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or where it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

§ 227. **Kinds of acceptances.**—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

§ 228. **What constitutes a general acceptance.**—An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.

§ 229. **Qualified acceptance.**—An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular place;
4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all.

§ 230. **Rights of parties as to qualified acceptance.**—The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

ARTICLE XII.

PRESENTMENT OF BILLS OF EXCHANGE FOR ACCEPTANCE.

SEC.	SEC.
240. When presentment for acceptance must be made.	245. When presentment is excused.
241. When failure to present releases drawer and indorser.	246. When dishonored by non-acceptance.
242. Presentment; how made.	247. Duty of holder where bill not accepted.
243. On what days presentment may be made.	248. Rights of holder where bill not accepted.
244. Presentment; where time is insufficient.	

§ 240. When presentment for acceptance must be made.—Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

§ 241. When failure to present releases drawer and indorser.—Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

§ 242. Presentment; how made.—Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on (his)* behalf; and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative;

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

§ 243. On what days presentment may be made.—A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections one hundred and thirty-two and one hundred and forty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.

* Word "his" not in original.

§ 244. Presentment where time is insufficient.—Where the holder of a bill drawn payable elsewhere than at the place of business of the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

§ 245. Where presentment is excused.—Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead or has absconded, or is a fictitious person or person not having capacity to contract by bill;
2. Where after the exercise of reasonable diligence, presentment cannot be made;
3. Where although presentment has been irregular, acceptance has been refused on some other ground.

§ 246. When dishonored by non-acceptance.—A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or
2. When presentment for acceptance is excused and the bill is not accepted.

§ 247. Duty of holder where bill not accepted.—Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

§ 248. Rights of holder where bill not accepted.—When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

ARTICLE XIII.

PROTEST OF BILLS OF EXCHANGE.

SEC.

260. In what cases protest necessary.**261. Protest; how made.****262. Protest; by whom made.****263. Protest; when to be made.****264. Protest; where made.**

SEC.

265. Protest both for non-acceptance and non-payment.**266. Protest before maturity where acceptor insolvent.****267. When protest dispensed with.****268. Protest; where bill is lost, et cetera.**

§ 260. In what cases protest necessary.—Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

§ 261.—Protest; how made.—The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

§ 262. Protest; by whom made.—Protest may be made by:

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

§ 263. Protest; when to be made.—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

§ 264. Protest; where made.—A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the

place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

§ 265. Protest both for non-acceptance and non-payment.—A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

§ 266. Protest before maturity where acceptor insolvent.—Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security, against the drawer and indorsers.

§ 267. When protest dispensed with.—Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

§ 268. Protest where bill is lost, et cetera.—Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

ARTICLE XIV.

ACCEPTANCE OF BILLS OF EXCHANGE FOR HONOR.

SEC.	SEC.
280. When bill may be accepted for honor.	285. Maturity of bill payable after sight; accepted for honor.
281. Acceptance for honor; how made.	286. Protest of bill accepted for honor, et cetera.
282. When deemed to be an acceptance for honor of the drawer.	287. Presentment for payment to acceptor for honor; how made.
283. Liability of acceptor for honor.	288. When delay in making presentment is excused.
284. Agreement of acceptor for honor.	289. Dishonor of bill by acceptor for honor.

§ 280. **When bill may be accepted for honor.**—Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security, and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

§ 281. **Acceptance for honor; how made.**—An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

§ 282. **When deemed to be an acceptance for honor of the drawer.**—Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

§ 283. **Liability of acceptor for honor.**—The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

§ 284. **Agreement of acceptor for honor.**—The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

§ 285. **Maturity of bill payable after sight; accepted for honor.**—Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

§ 286. **Protest of bill accepted for honor, et cetera.**—Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

§ 287. Presentment for payment to acceptor for honor; how made.—Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section 175.

§ 288. When delay in making presentment is excused.—The provisions of section 141 apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

§ 289. Dishonor of bill by acceptor for honor.—When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE XV.

PAYMENT OF BILLS OF EXCHANGE FOR HONOR.

SEC.	SEC.
300. Who may take payment for honor.	304. Effect on subsequent parties where bill is paid for honor.
301. Payment for honor; how made.	305. Where holder refuses to receive payment supra protest.
302. Declaration before payment for honor.	306. Rights of payer for honor.
303. Preference of parties offering to pay for honor.	

§ 300. Who may make payment for honor.—Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

§ 301. Payment for honor; how made.—The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.

§ 302. Declaration before payment for honor.—The notarial act of honor must be founded on a declaration made by the payer for

honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

§ 303. Preference of parties offering to pay for honor.—Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

§ 304. Effect on subsequent parties where bill is paid for honor.—Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payor for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

§ 305. Where holder refuses to receive payment supra protest.—Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

§ 306. Rights of payer for honor.—The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

ARTICLE XVI.

BILLS IN A SET.

SEC.	SEC.
310. Bills in sets constitute one bill.	313. Acceptance of bills drawn in sets.
311. Rights of holders where different parts are negotiated.	314. Payment by acceptor of bills drawn in sets.
312. Liability of holder who indorses two or more parts of a set to different persons.	315. Effect of discharging one of a set.

§ 310. Bills in sets constitute one bill.—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

§ 311. Rights of holders where different parts are negotiated.—Where two or more parts of a set are negotiated to different holders in

due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

§ 312. Liability of holder who indorses two or more parts of a set to different persons.—Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

§ 313. Acceptance of bills drawn in sets.—The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

§ 314. Payment by acceptor of bills drawn in sets.—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

§ 315. Effect of discharging one of a set.—Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

ARTICLE XVII.

PROMISSORY NOTES AND CHECKS.

SEC.

320. Promissory note defined.

321. Check defined.

322. Within what time a check must be presented.

323. Certification of a check; effect of.

SEC.

324. Effect where holder of check procures it to be certified.

325. When check operates as an assignment.

§ 320. Promissory note defined.—A negotiable promissory note within the meaning of this act is an unconditional promise in writing

made by one person to another signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

§ 321. Check defined.—A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

§ 322. Within what time a check must be presented.—A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

§ 323. Certification of check; effect of.—Where a check is certified by a bank on which it is drawn the certification is equivalent to an acceptance.

§ 324. Effect where the holder of check procures it to be certified.—Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

§ 325. When check operates as an assignment.—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

ARTICLE XVIII.

NOTES GIVEN FOR PATENT RIGHTS AND FOR A SPECULATIVE CONSIDERATION.

SEC.	SEC.
330. Negotiable instruments given for patent rights.	332. How negotiable bonds are made non-negotiable.
331. Negotiable instruments given for a speculative consideration.	

§ 330. Negotiable instruments given for patent rights.—A promissory note or other negotiable instrument, the consideration of which

consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words "given for a patent right" prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase-price or the use of a patented article.

§ 331. Negotiable instruments for a speculative consideration.—

If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase-price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time, in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater by four times than the market value of the same product at the time in the locality, the words, "given for a speculative consideration," or other words clearly showing the nature of the consideration must be prominently and legibly written or printed on the face of such note or instrument above the signature thereof; and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder.

§ 332. How negotiable bonds are made non-negotiable.—The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this state, but not registered in pursuance of any state law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon, that such bond, obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor's place of residence.

ARTICLE XIX.

LAWS REPEALED; WHEN TO TAKE EFFECT.

SEC.

340. Laws repealed.

SEC.

341. When to take effect.

§ 340. **Laws repealed.**—The laws or parts thereof specified in the schedule hereto annexed are hereby repealed.

§ 341. **When to take effect.**—This chapter shall take effect on the first day of October, 1897.

Revised Statutes.	Sections.	Subject-Matter.	
R. S., pt. 11, ch. 4, tit 11.	All....	Bills and Notes.	
Laws of—	Chap.	Sections.	Subject-Matter.
1835.....	141.....	All....	Notice of protest; how given.
1857.....	416.....	All....	Commercial paper.
1865.....	309.....	All....	Protest of foreign bills, etc.
1870.....	438.....	All....	Negotiability of corporate bonds, how limited.
1871.....	84.....	All....	Negotiable bonds; how made non- negotiable.
1873.....	595.....	All....	Negotiable bonds; how made nego- tiable.
1877.....	65.....	1, 3....	Negotiable instruments given for patent rights.
1887.....	461.....	All....	Effect of holidays upon payment of commercial paper.
1888.....	229.....	All....	One hundredth anniversary of the inauguration of George Washing- ton.
1891.....	262.....	1.....	Negotiable instruments given for a speculative consideration.
1894.....	607.....	All....	Days of grace abolished.

BILLS OF EXCHANGE ACT.

(45 and 46 Vict. c. 61.)

AN ACT TO CODIFY THE LAW RELATING TO BILLS OF EXCHANGE,
CHEQUES AND PROMISSORY NOTES.

PART I.

PRELIMINARY.

SEC.

1. Short title.
2. Interpretation of terms.

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BILLS OF EXCHANGE.

Form and Interpretation.

3. Bill of exchange defined.
4. Inland and foreign bills.
5. Effect where different parties to bill are the same person.
6. Address to drawee.
7. Certainty required as to payee.
8. What bills are negotiable.
9. Sum payable.
10. Bill payable on demand.
11. Bill payable at a future time.
12. Omission of date in bill payable after date.
13. Ante-dating and post-dating.
14. Computation of time of payment.
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16. Optional stipulation.
17. Definition and requisites of acceptance.
18. Time for acceptance.
19. General and qualified acceptances.
20. Inchoate instruments.
21. Delivery.

Capacity and Authority of Parties.

SEC.

22. Capacity of parties.
23. Signature essential to liability.
24. Forged or unauthorized signature.
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39. When presentment for acceptance is necessary.
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47. Dishonor by non-payment.
48. Notice of dishonor and effect of non-notice.
49. Rules as to notice of dishonor.
50. Excuses for non-notice and delay.
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55. Liability of drawer or indorser.
56. Stranger signing bill liable as indorser.
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SCHEDULES.

FIRST SCHEDULE.

SECOND SCHEDULE.

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

PRELIMINARY.

1. Short title.—This act may be cited as the Bills of Exchange Act, 1882.

2. Interpretation of terms.—In this act, unless the context otherwise requires,—

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counter-claims and set-off.

“Banker” includes a body of persons whether incorporated or not who carry on the business of banking.

“Bankrupt” includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement completed by delivery.

“Issue” means the first delivery of a bill or note, complete in form to a person who takes it as a holder.

“Person” includes a body of persons whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print.

PART II.

BILLS OF EXCHANGE.

Form and Interpretation.

3. Bill of exchange defined.—(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.

(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

(3) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional.

(4) A bill is not invalid by reason—

(a) That it is not dated;

(b) That it does not specify the value given, or that any value has been given therefor;

(c) That it does not specify the place where it is drawn or the place where it is payable.

4. Inland and foreign bills.—(1) An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

For the purposes of this act “British Islands” mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of her Majesty.

(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

5. Effect where different parties to bill are the same person.—

(1) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee.

(2) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

6. Address to drawee.—(1) The drawee must be named or otherwise indicated in a bill with reasonable certainty.

(2) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or two or more drawees in succession is not a bill of exchange.

7. Certainty required as to payee.—(1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

(2) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one of some of several payees. A bill may also be made payable to the holder of an office for the time being.

(3) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.

8. What bills are negotiable.—(1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

(2) A negotiable bill may be payable either to order or to bearer.

(3) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.

(4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

(5) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

9. Sum payable.—(1) The sum payable by a bill is a sum certain within the meaning of this act, although it is required to be paid—

(a) With interest.

(b) By stated instalments.

(c) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due.

(d) According to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill.

(2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

(3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated, from the issue thereof.

10. Bill payable on demand.—(1) A bill is payable on demand—

(a) Which is expressed to be payable on demand, or at sight, or on presentation; or

(b) In which no time for payment is expressed.

(2) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

11. Bill payable at a future time.—A bill is payable at a determinable future time within the meaning of this act which is expressed to be payable—

(1) At a fixed period after date or sight.

(2) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

12. Omission of date in bill payable after date.—Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in

due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

13. Ante-dating and post-dating.—(1) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.

(2) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.

14. Computation of time of payment.—Where a bill is not payable on demand the day on which it falls due is determined as follows:

(1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace:

Provided that—

(a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal Proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day;

(b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day.

(2) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

(3) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.

(4) The term “month” in a bill means calendar month.

15. Case of need.—The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of

need. It is in the option of the holder to resort to the referee in case of need, or not, as he may think fit.

16. Optional stipulations.—The drawer of a bill, and any indorser, may insert therein an express stipulation—

- (1) Negating or limiting his own liability to the holder:
- (2) Waiving as regards himself some or all of the holder's duties.

17. Definition and requisites of acceptance.—(1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

(2) An acceptance is invalid unless it complies with the following conditions, namely:

(a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.

(b) It must not express that the drawee will perform his promise by any other means than the payment of money.

18. Time for acceptance.—A bill may be accepted—

(1) Before it has been signed by the drawer, or while otherwise incomplete:

(2) When it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment:

(3) When a bill payable after sight is dishonored by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

19. General and qualified acceptances.—(1) An acceptance is either (a) general or (b) qualified.

(2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

In particular an acceptance is qualified which is—

(a) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated:

(b) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn:

(c) Local, that is to say, an acceptance to pay only at a particular specified place:

An acceptance to pay at a particular place is a general acceptance,

unless it expressly states that the bill is to be paid there only and not elsewhere:

(d) Qualified as to time:

(e) The acceptance of some one or more of the drawees, but not of all.

20. Inchoate instruments.—(1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit.

(2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

21. Delivery.—(1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

(2) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—

(a) In order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be:

(b) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

But if the bill be in the hands of a holder in due course a valid

delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

(3) Where a bill is no longer in the possession of a party who signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

Capacity and Authority of Parties.

22. Capacity of parties.—(1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

23. Signature essential to liability.—No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such:

Provided that

(1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name:

(2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

24. Forged or unauthorized signature.—Subject to the provisions of this act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

25. Procuration signatures.—A signature by procuration operates as notice that the agent has but a limited authority to sign, and

the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

26. Persons signing as agent or in representative capacity.—(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted.

The Consideration for a Bill.

27. Value and holder for value.—(1) Valuable consideration for a bill may be constituted by—

- (a) Any consideration sufficient to support a simple contract;
- (b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

(2) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

(3) Where the holder of a bill has a lien on it arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

28. Accommodation bill or party.—(1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

(2) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

29. Holder in due course.—(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely,

- (a) That he became the holder of it before it was overdue and

without notice that it had been previously dishonored, if such was the fact:

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

30. Presumption of value and good faith.—(1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

(2) Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is effected by fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

Negotiation of Bills.

31. Negotiation of bill.—(1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(2) A bill payable to bearer is negotiated by delivery.

(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

(4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

(5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

32. Requisites of a valid indorsement.—An indorsement in order to operate as a negotiation, must comply with the following conditions, namely,—

(1) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient.

An indorsement written on an allonge, or on a “copy” of a bill issued or negotiated in a country where “copies” are recognized, is deemed to be written on the bill itself.

(2) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.

(3) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorser has authority to indorse for the others.

(4) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelled, he may indorse the bill as therein described, adding, if he think fit, his proper signature.

(5) Where there are two or more indorsements on a bill each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.

(6) An indorsement may be made in blank or special. It may also contain terms making it restrictive.

33. Conditional indorsement.—Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.

34. Indorsement in blank and special indorsement.—(1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

(2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

(3) The provisions of this act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

(4) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

35. Restrictive indorsement.—(1) An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed “Pay D. only,” or “Pay D. for the account of X.,” or “Pay D. or order for collection.”

(2) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorize him to do so.

(3) Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

36. Negotiation of overdue or dishonored bill.—(1) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise.

(2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

(3) A bill payable on demand is deemed to be overdue within the meaning and for the purposes, of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

(4) Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue.

(5) Where a bill which is not overdue has been dishonored any person who takes it with notice of the dishonor takes it subject to any defect of title attaching thereto at the time of dishonor, but nothing in this sub-section shall affect the rights of a holder in due course.

37. Negotiation of bill to party already liable thereon.—Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this act, reissue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.

38. Rights of the holder.—The rights and powers of the holder of a bill are as follows:

(1) He may sue on the bill in his own name:

(2) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defenses available to prior parties among themselves, and may enforce payment against all parties liable on the bill:

(3) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

General Duties of the Holder.

39. When presentment for acceptance is necessary.—(1) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

(2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

(3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

(4) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

40. Time for presenting bill payable after sight.—(1) Subject to the provisions of this act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

(2) If he do not do so, the drawer and all indorsers prior to that holder are discharged.

(3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

41. Rules as to presentment for acceptance, and excuses for non-presentment.—(1) A bill is duly presented for acceptance which is presented in accordance with the following rules:

(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue:

(b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only:

(c) Where the drawee is dead presentment may be made to his personal representative:

(d) Where the drawee is bankrupt, presentment may be to him or his trustee:

(e) Where authorized by agreement or usage, a presentment through the post-office is sufficient.

(2) Presentment in accordance with these rules is excused and a bill may be treated as dishonored by non-acceptance—

(a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill:

(b) Where, after the exercise of reasonable diligence, such presentment cannot be effected:

(c) Where, although the presentment has been irregular, acceptance has been refused on some other ground.

(3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonored does not excuse presentment.

42. Non-acceptance.—(1) When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonored by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

43. Dishonor by non-acceptance and its consequences.—(1) A bill is dishonored by non-acceptance—

(a) When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

(b) When presentment for acceptance is excused and the bill is not accepted.

(2) Subject to the provisions of this act, when a bill is dishonored by non-acceptance, an immediate right of recourse against the drawer

and indorsers accrues to the holder, and no presentment for payment is necessary.

44. Duties as to qualified acceptances.—(1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonored by non-acceptance.

(2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protected as to the balance.

(3) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto.

45. Rules as to presentment for payment.—Subject to the provisions of this act a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.

A bill is duly presented for payment which is presented in accordance with the following rules:—

(1) Where the bill is not payable on demand, presentment must be made on the day it falls due.

(2) Where the bill is payable on demand, then, subject to the provisions of this act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

(3) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

(4) A bill is presented at the proper place:—

(a) Where a place of payment is specified in the bill and the bill is there presented.

(b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.

(c) Where no place of payment is specified, and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.

(d) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.

(5) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

(6) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

(7) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence can be found.

(8) Where authorized by agreement or usage a presentment through the postoffice is sufficient.

46. Excuses for delay or non-presentment for payment.—(1) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

(2) Presentment for payment is dispensed with,—

(a) Where, after the exercise of reasonable diligence, presentment, as required by this act, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonored, does not dispense with the necessity for presentment.

(b) Where the drawee is a fictitious person.

(c) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

(d) As regards an indorser, where the bill was accepted or made

for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

(e) By waiver of presentment, express or implied.

47. Dishonor by non-payment.—(1) A bill is dishonored by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to the provisions of this act, when a bill is dishonored by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

48. Notice of dishonor and effect of non-notice.—Subject to the provisions of this act, when a bill has been dishonored by non-acceptance or by non-payment, notice of dishonor must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged;

Provided that—

(1) Where a bill is dishonored by non-acceptance, and notice of dishonor is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission.

(2) Where a bill is dishonored by non-acceptance, and due notice of dishonor is given, it shall not be necessary to give notice of a subsequent dishonor by non-payment unless the bill shall in the meantime have been accepted.

49. Rules as to notice of dishonor.—Notice of dishonor in order to be valid and effectual must be given in accordance with the following rules—

(1) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(2) Notice of dishonor may be given by an agent either in his own name, or in the name of any party entitled to give notice whether that party be his principal or not.

(3) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

(5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonored by non-acceptance or non-payment.

(6) The return of a dishonored bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonor.

(7) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

(8) Where notice of dishonor is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

(9) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

(10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

(12) The notice may be given as soon as the bill is dishonored and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

(a) Where the person giving and the person to receive notice reside in the same place, and notice is given or sent off in time to reach the latter on the day after the dishonor of the bill.

(b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonor of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

13) Where a bill when dishonored is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

(14) Where a party to a bill receives due notice of dishonor, he has

after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonor.

(15) Where a notice of dishonor is duly addressed and posted, the sender is deemed to have given due notice of dishonor, notwithstanding any miscarriage by the postoffice.

50. Excuses for non-notice and delay.—(1) Delay in giving notice of dishonor is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

(2) Notice of dishonor is dispensed with—

(a) When, after the exercise of reasonable diligence, notice as required by this act cannot be given to or does not reach the drawer or indorser sought to be charged:

(b) By waiver express or implied. Notice of dishonor may be waived before the time of giving notice has arrived, or after the omission to give due notice:

(c) As regards the drawer in the following cases, namely, (1) where the drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment:

(d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

51. Noting or protest of bill.—(1) Where an inland bill has been dishonored it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

(2) Where a foreign bill, appearing on the face of it to be such, has been dishonored by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonored by non-acceptance, is dishonored by non-payment it must

be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonor is unnecessary.

(3) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

(4) Subject to the provisions of this act, when a bill is noted or protested, it must be noted on the day of its dishonor. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

(5) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

(6) A bill must be protested at the place where it is dishonored:

Provided that—

(a) When a bill is presented through the postoffice, and returned by post dishonored, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day:

(b) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

(7) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—

(a) The person at whose request the bill is protested:

(b) The place and date of protest, the cause or reason for protesting the bill, the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

(8) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

(9) Protest is dispensed with by any circumstance which would dispense with notice of dishonor. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

52. Duties of holder as regards drawee or acceptor.—(1) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

(2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonor should be given to him.

(4) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

Liabilities of Parties.

53. Bill not assignment of funds in hands of drawee.—(1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this act is not liable on the instrument. This sub-section shall not extend to Scotland.

(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favor of the holder, from the time when the bill is presented to the drawee.

54. Liability of acceptor.—The acceptor of a bill, by accepting it—

(1) Engages that he will pay it according to the tenor of his acceptance:

(2) Is precluded from denying to a holder in due course:

(a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

(b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement;

(c) In the case of a bill payable to the order of a third person the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

55. Liability of drawer or indorser.—(1) The drawer of a bill by drawing it—

(a) Engages that on due presentment it shall be accepted and

paid according to its tenor, and that if it be dishonored he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonor be duly taken;

(b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

(2) The indorser of a bill by indorsing it—

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonored he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonor be duly taken;

(b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

(c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

56. Stranger signing bill liable as indorser.—Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

57. Measure of damages against parties to dishonored bill.—Where a bill is dishonored, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:

(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

(a) The amount of the bill:

(b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case:

(c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

(2) In the case of a bill which has been dishonored abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

(3) Where by this act interest may be recovered as damages, such

interest may, if justice requires it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

58. Transferor by delivery and transferee.—(1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a “transferor by delivery.”

(2) A transferor by delivery is not liable on the instrument.

(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

Discharge of Bill.

59. Payment in due course.—(1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

“Payment in due course” means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

(2) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but

(a) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill.

(b) Where a bill is paid by an indorser, or where a bill payable to drawer’s order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

(3) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

60. Banker paying demand draft whereon indorsement is forged.—When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due

course, although such indorsement has been forged or made without authority.

61. Acceptor the holder at maturity.—When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

62. Express waiver.—(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

63. Cancellation.—(1) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

(2) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

(3) A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

64. Alteration of bill.—(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

Provided that,

Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

(2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the

place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

Acceptance and Payment for Honor.

65. Acceptance for honor supra protest.—(1) Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill supra protest, for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn.

(2) A bill may be accepted for honor for part only of the sum for which it is drawn.

(3) An acceptance for honor supra protest in order to be valid must—

(a) Be written on the bill, and indicate that it is an acceptance for honor:

(b) Be signed by the acceptor for honor.

(4) Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

(5) Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honor.

66. Liability of acceptor for honor.—(1) The acceptor for honor of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

(2) The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

67. Presentment to acceptor for honor.—(1) Where a dishonored bill has been accepted for honor supra protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor, or referee in case of need.

(2) Where the address of the acceptor for honor is in the same place where the bill is protested for non-payment, the bill must be presented

to him not later than the day following its maturity; and where the address of the acceptor for honor is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

(3) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.

(4) When a bill of exchange is dishonored by the acceptor for honor it must be protested for non-payment by him.

68. Payment for honor supra protest.—(1) Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn.

(2) Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

(3) Payment or honors supra protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honor which may be appended to the protest or form an extension of it.

(4) The notarial act of honor must be founded on a declaration made by the payer for honor, or his agent in that behalf, declaring his intention to pay the bill for honor, and for whose honor he pays.

(5) Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honor he pays, and all parties liable to that party.

(6) The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honor in damages.

(7) Where the holder of a bill refuses to receive payment supra protest he shall lose his right of recourse against any party who would have been discharged by such payment.

Lost Instruments.

69. Holder's right to duplicate of lost bill.—Where a bill has been lost before it is overdue, the person who was the holder of it may apply

to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill he may be compelled to do so.

70. Action on lost bill.—In any action or proceeding upon a bill, the court or judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

Bill in a Set.

71. Rules as to sets.—(1) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.

(2) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he himself indorsed as if the said parts were separate bills.

(3) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

(4) The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

(5) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

(6) Subject to the preceding rules, where any one part of bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

Conflict of Laws.

72. Rules where laws conflict.—Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made.

Provided that—

(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

(b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purposes of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.

(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonor, or otherwise, are determined by the law of the place where the act is done or the bill is dishonored.

(4) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

PART III.

CHEQUES ON A BANKER.

73. Cheque defined.—A cheque is a bill of exchange drawn on a banker payable on demand.

Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

74. Presentment of cheque for payment.—Subject to the provisions of this Act—

(1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

(2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

75. Revocation of banker's authority.—The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

(1) Countermand of payment:

(2) Notice of the customer's death.

Crossed Cheques.

76. General and special crossings defined.—(1) Where a cheque bears across its face an addition of—

(a) The words “and company” or any abbreviation thereof between two parallel transverse lines, either with or without the words “not negotiable;” or

(b) Two parallel transverse lines simply, either with or without the words “not negotiable;”
that addition constitutes a crossing, and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words “not negotiable,” that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

77. Crossing by drawer or after issue.—(1) A cheque may be crossed generally or specially by the drawer.

(2) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3) Where a cheque is crossed generally the holder may cross it specially.

(4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

(5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

78. Crossing a material part of cheque.—A crossing authorized by this act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this act, to add to or alter the crossing.

79. Duties of banker as to crossed cheques.—(1) Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

(2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of a crossing having been obliterated or having been added to or altered otherwise than as authorized by this act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

80. Protection to banker and drawer where cheque is crossed.—Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and

if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

81. Effect of crossing on holder.—Where a person takes a crossed cheque which bears on it the words “not negotiable,” he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

82. Protection to collecting banker.—Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability as to the true owner of the cheque by reason only of having received such payment.

Amended, 6 Edw. 7, as follows:

An Act to amend section eighty-two of the Bills of Exchange Act, 1882 [4th August, 1906].

Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. A banker receives payment of a crossed cheque for a customer within the meaning of section eighty-two of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

2. This Act may be cited as the Bills of Exchange (Crossed Cheques) Act, 1906, and this act and the Bills of Exchange Act, 1882, may be cited together as the Bills of Exchange Acts, 1882 and 1906.

PART IV.

PROMISSORY NOTES.

83. Promissory note defined.—(1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determin-

able future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

(4) A note which is, or on the face of it, purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

84. Delivery necessary.—A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

85. Joint and several notes.—(1) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor.

(2) Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note.

86. Note payable on demand.—(1) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

(3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

87. Presentment of note for payment.—(1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

(2) Presentment for payment is necessary in order to render the indorser of a note liable.

(3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an in-

dorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

88. Liability of maker.—The maker of a promissory note by making it—

- (1) Engages that he will pay it according to its tenor;
- (2) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

89. Application of Part II to notes.—(1) Subject to the provisions in this part, and except as by this section provided, the provisions of this act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

(3) The following provisions as to bills do not apply to notes; namely, provisions relating to—

- (a) Presentment for acceptance;
- (b) Acceptance;
- (c) Acceptance *supra* protest;
- (d) Bills in a set.

(4) Where a foreign note is dishonored, protest thereof is unnecessary.

PART V.

SUPPLEMENTARY.

90. Good faith.—A thing is deemed to be done in good faith, within the meaning of this act, where it is in fact done honestly, whether it is done negligently or not.

91. Signature.—(1) Where, by this act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

(2) In the case of a corporation, where, by this act, any instru-

ment or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

92. Computation of time.—Where, by this act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.

“Non-business days” for the purposes of this act mean—

(a) Sunday, Good Friday, Christmas Day:

(b) A bank holiday under the Bank Holidays Act, 1871, or acts amending it:

(c) A day appointed by royal proclamation as a public fast or thanksgiving day.

Any other day is a business day.

93. When noting equivalent to protest.—For the purpose of this act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

94. Protest when notary not accessible.—Where a dishonored bill or note is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonored, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonor of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

The form given in Schedule 1 to this act may be used with necessary modifications, and if used shall be sufficient.

95. Dividend warrants may be crossed.—The provisions of this act as to crossed cheques shall apply to a warrant for payment of dividend.

96. Repeal.—The enactments mentioned in the second schedule to this act are hereby repealed as from the commencement of this act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

97. Savings.—(1) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this act contained.

(2) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this act, shall continue to apply to bills of exchange, promissory notes, and cheques.

(3) Nothing in this act or in any repeal effected thereby shall affect—

(a) The provisions of the Stamp Act, 1870, or acts amending it or any law or enactment for the time being in force relating to the revenue:

(b) The provisions of the Companies Act, 1862, or acts amending it or any act relating to joint stock bank or companies:

(c) The provisions of any act relating to or confirming the privileges of the Bank of Ireland respectively:

(d) The validity of any usage relating to dividend warrants, or the indorsements thereof.

98. Saving of summary diligence in Scotland.—Nothing in this act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence.

99. Construction with other acts, &c.—Where an act or document refers to any enactment repealed by this act, the act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this act.

100. Parol evidence allowed in certain judicial proceedings in Scotland.—In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parol evidence: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of

any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignment, or to find such caution as the court or judge before whom the cause is depending may require.

This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription.

SCHEDULES.

FIRST SCHEDULE.

Form of protest which may be used when the services of a notary cannot be obtained.

Know all men that I, A. B. (householder), of —, in the country of —, in the United Kingdom, at the request of C. D., there being no notary public available, did on the — day of —, 188—, — at — demand payment (or acceptance) of the bill of exchange hereunder written, from E. F., to which demand he made answer (state answer, if any) Wherefore I now, in the presence of G. H. and J. K., do protest the said bill of exchange. (Signed)

A. B.

G. H.

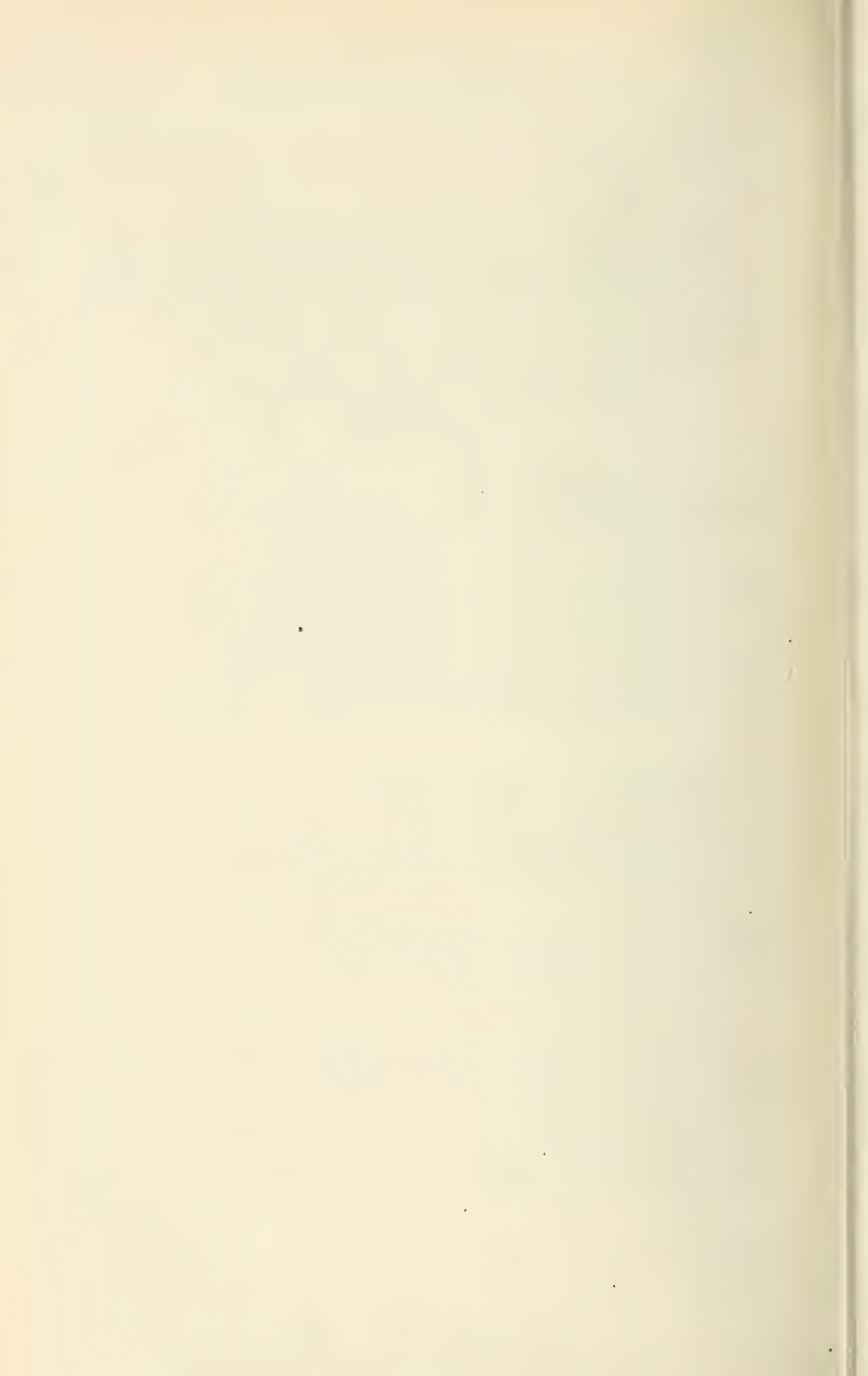
J. K.

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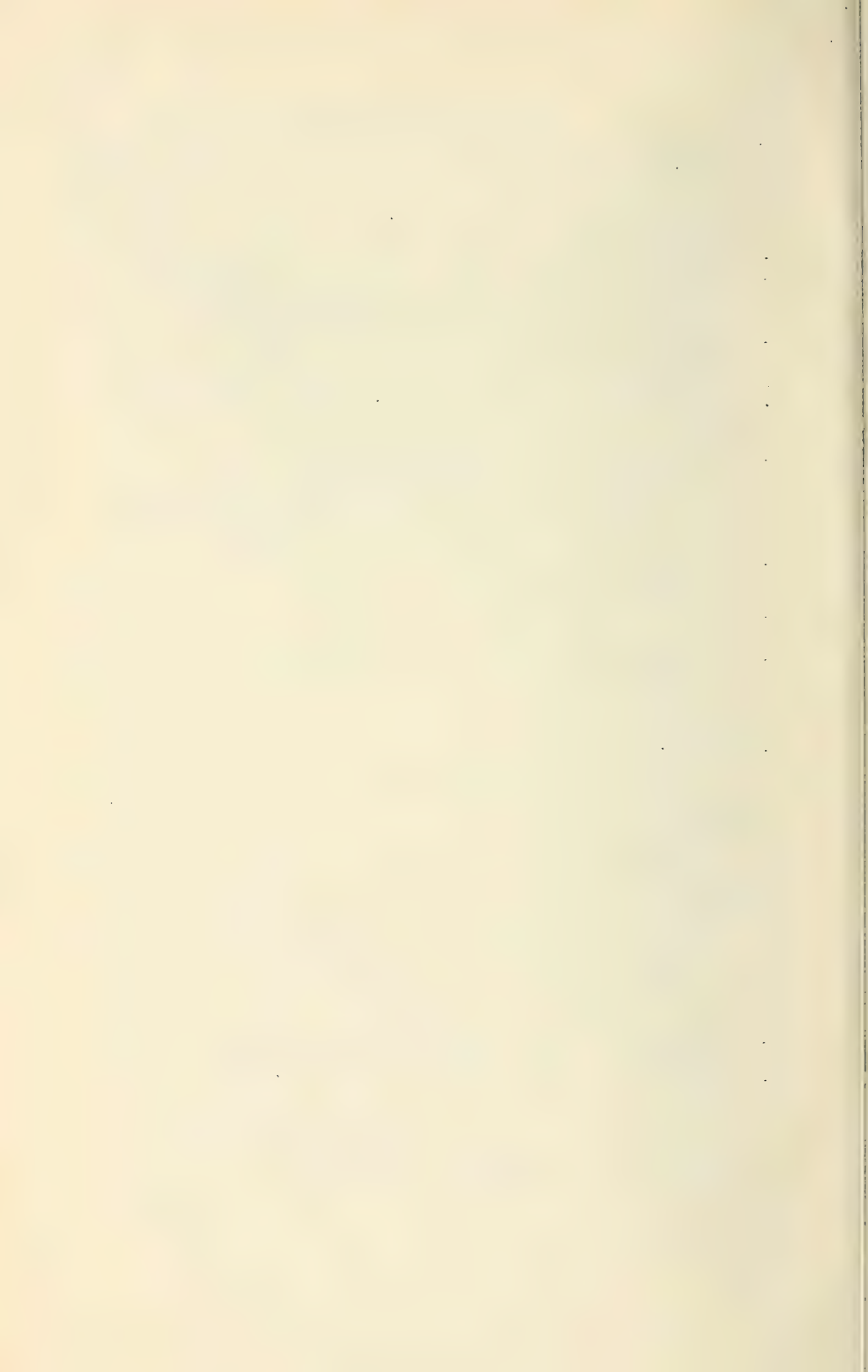
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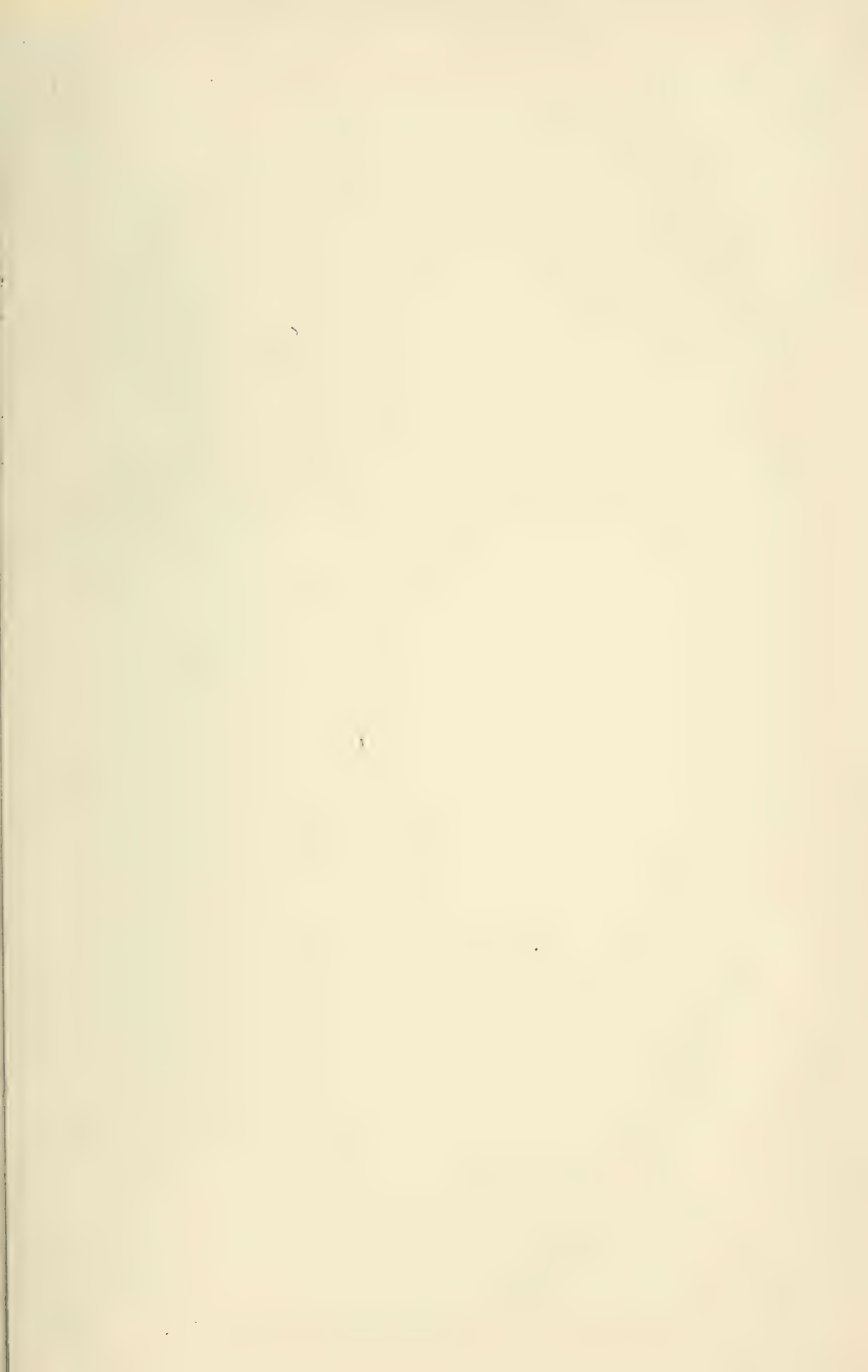
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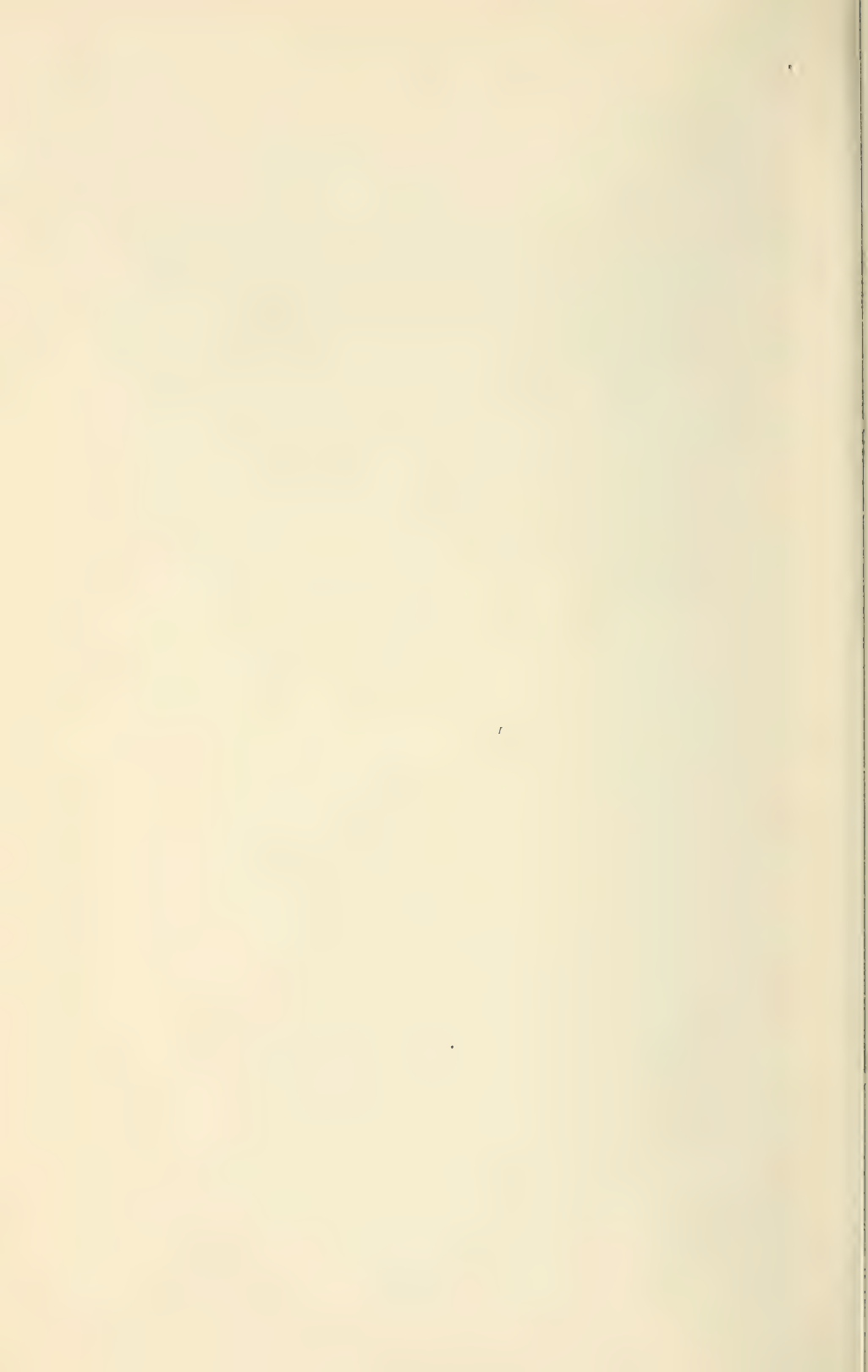
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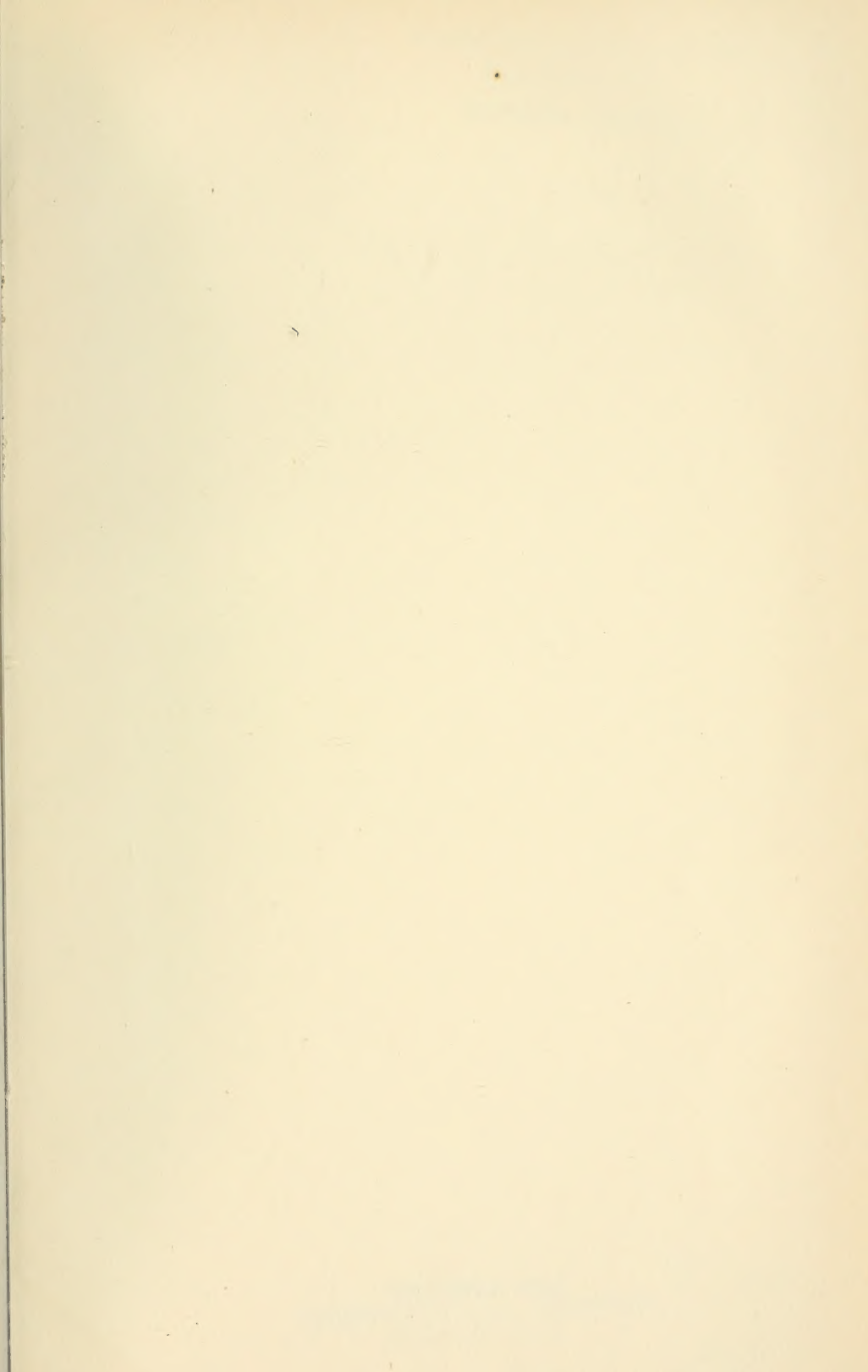
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